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UK Public Procurement Law Digest:

The perils of high-speed trains and the elusiveness of the remedy of ineffectiveness

The UK High Court has struck out an application for “ineffectiveness” made by an aggrieved bidder under the UK procurement rules, clarifying the way in which the new contract set-aside remedy operates and reinforcing the importance of acting with promptness in seeking remedies under European public procurement law.

By Alistair Maughan and Masayuki Negishi

The remedy of “set-aside” or “ineffectiveness” was introduced in 2009 in order to allow courts to overturn contract awards in certain circumstances. Until now, there have been no reported cases to illustrate how the courts would approach the remedy. When first enacted, the remedy was considered potentially draconian, but decisions in cases such as the one described below show how hard it may be to make a sufficiently strong case to persuade a court to apply the set-aside remedy.

WHAT IS THE CASE?

The case is *Alstom Transport v. (1) Eurostar International Limited and (2) Siemens PLC* [2011] EWHC 1828, a decision made by the English High Court in an application made by the cross-channel train operator, Eurostar, and the successful bidder, Siemens, to strike out parts of a claim brought by Alstom, an aggrieved bidder who lost out in a tender for a contract to supply the new generation of trains as part of Eurostar’s £700 million investment in its fleet.

WHY IS THIS CASE IMPORTANT?

This case involves an interim application, made by a private company which is alleged to be a “utility”, to strike out parts of a claim made by an aggrieved bidder. As such, much of the substance of the aggrieved bidder’s complaints remains to be determined at a subsequent trial. Nevertheless, this case clarifies the way in which the “ineffectiveness” remedy operates under the current procurement remedies regime, and it conveys a number of important messages for both bidders and utilities alike.

It is easy to forget that the procurement remedies regime applies equally to utilities, as well as to more traditional public sector bodies. So, whilst this case centres on the interpretation of the public procurement rules that apply to the utilities sector, due the similarity between the legal regimes that underpin the utilities sector and the non-utility public sector, the messages that emerge from this case would be equally relevant to those bidders and contracting authorities that engage in procurement outside the utilities sector.

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The key messages that emerge from this case are as follows:

- Awarding authorities/utilities and winning bidders should welcome this ruling, as it provides clarification that allegations as to subsequent alteration to an awarded contract will effectively not be covered by the ineffectiveness remedy, insofar as the allegation is that the contract finally awarded at the conclusion of a given procurement process was materially different from that which was initially advertised.
- This ruling also clarifies that the information which an awarding authority/utility is required to provide to unsuccessful bidders in order to benefit from the shorter 30-day limitation period for the ineffectiveness remedy does not have to be in writing or in any particular form.
- Awarding utilities should take heed of the unsuccessful attempt of the utility in this case to interpret the requirement for advertisement narrowly. It is now clear that the fact that the negotiated procedure was used and no “contract notice” in the conventional sense was issued does not mean that there was no requirement for advertisement for the purposes of the ineffectiveness remedy.
- A losing bidder will need to be mindful of the fact that, if it wishes to pursue ineffectiveness as a remedy, it must act promptly. Whilst the general limitation period for public procurement challenges is 3 months, and a claim for ineffectiveness has a 6-month limitation period, in most circumstances, it is likely that losing bidders will need to act within 30 days of the debriefing.
- If a bidder wishes to challenge formally an awarding authority/utility’s decision, it could potentially weaken its case if it has failed to listen to what the awarding authority/utility asks the participating bidders to do in the ITT/ITN, BAFO, and other documentation released by the awarding authority/utility. An unwilling and reluctant bidder could potentially fall foul of an argument that any shortfall or non-compliance on the part of the authority would not have made any difference to the outcome of the procurement.

WHAT HAPPENED IN THIS CASE?

The Background

Having decided that it was time to upgrade its fleet of trains, Eurostar embarked on a procurement exercise based on the negotiated procedure, issuing a pre-qualification questionnaire (“**PQQ**”) to six potential bidders in January 2009. Alstom, along with Siemens and another bidder, passed the PQQ stage in February 2009 and, in May 2009, Eurostar issued an Invitation to Negotiate (“**ITN**”).

Due to the conflict between the then-prevailing regulatory requirement mandating the use of concentrated power systems (“**CPS**”) and Eurostar’s willingness to accept a train design that utilised distributed power systems (“**DPS**”), Alstom ceased its work on the tender. However, when the Channel Tunnel Intergovernmental Commission (the “**IGC**”) began a consultation in July 2009 to amend the regulatory requirements to allow, amongst other things, train designs based on DPS, Eurostar told Alstom that bids using DPS-based designs were acceptable because the IGC was likely to change the safety rules. Accordingly, Alstom resumed its work on the tender, and eventually submitted its bid in October 2009.

There were further communications between Eurostar and Alstom regarding the Best and Final Offer (the “**BAFO**”), and Alstom eventually submitted its BAFO in January 2010, on the assumption that the IGC would change its safety rules to allow DPS-based train designs. However, Alstom was not happy with its BAFO and later submitted a revised bid in April 2010. This, however, was rejected and, by June 2010, Siemens was the preferred bidder whilst Alstom was the reserve bidder. Eurostar and Siemens entered into a preliminary agreement on 18 August 2010, and ultimately, on 5 October 2010, Eurostar formally notified Alstom that the contract would be awarded to Siemens.

Client Alert.

Eurostar's decision to award the contract to Siemens was made despite the fact that the regulatory uncertainty surrounding the permissibility of DPS-based train designs was still persisting and, at the point of contract award, it was by no means 100% certain that IGC's safety rules would be formally amended to allow DPS-based train designs to operate in the Channel Tunnel¹.

Alstom was not happy with the outcome. On 11 October 2010, on the same day that the debriefing meeting between Eurostar and Alstom was held, Alstom notified Eurostar that it intended to bring proceedings against Eurostar under the **Utilities Contracts Regulations 2006** (the "UCR")². Eurostar subsequently notified Alstom on 13 October 2010 that Eurostar and Siemens had already entered into the preliminary agreement back in August 2010; then, on 19 October 2010, Alstom issued its claim form and application notice seeking an injunction to prevent Eurostar from contracting with Siemens³.

Alstom, amongst other things, argued that:

- the fact that Eurostar had encouraged bids for trains using DPS as opposed to CPS (despite the fact that the applicable safety regulations had not been formally amended to allow for DPS-based train designs) meant that the entire procurement process was affected by a fundamental uncertainty which, in turn, meant that it was not possible to make any fair tender or to evaluate the tenders fairly; and
- Eurostar failed to inform Alstom properly and fully in advance of the evaluation criteria, weightings, and methodology used.

The application for injunction was determined in accordance with the longstanding test based on ***American Cyanamid v. Ethicon [1975] AC 396***. The court dismissed the claim on the basis that, whilst Alstom's allegations raised serious issues to be tried, the test of the balance of convenience did not favour the granting of an injunction which would, amongst other things, deprive Eurostar of its ability to complete the procurement in a timely manner so as to enable it to prepare properly for the impending competition which is set to result from the opening up of the Channel Tunnel to other train operators such as Deutsche Bahn and which would be against the public interest (the Court noted that "*the public interest will be served by the introduction of timely and effective competition for Tunnel train services*")⁴.

There was also evidence indicating that Alstom was not as keen and eager as Siemens in its preparations and participation in the tender process, and this resulted not only in a significant gap in the final assessment scores awarded to Siemens and Alstom, respectively, but also clearly negatively affected Alstom's odds of obtaining the injunction it sought. The judge who presided over the application for injunction commented on this, amongst other things, as follows:

"...looking at the matter generally, the evidence leaves me with the impression that Siemens took the bidding process far more seriously than Alstom, placed it at the front of its list of priorities, and perhaps most importantly, paid greater attention to what Eurostar was telling bidders and to what was contained in the ITN and BAFO documents. If, as I

¹ It wasn't until June 2011 that the IGC officially announced a change to its safety rules, allowing for DPS-based train designs provided that certain specific safety conditions were met.

² Note that whilst Eurostar refuted the suggestion that the UCR applied to it on the basis that it was a private company, it nevertheless accepted, for the purposes of the application of the injunction (and the subsequent application to strike out the claim for ineffectiveness separately brought by Alstom at a much later date), that the UCR could be assumed to be applicable to Eurostar.

³ Note that Siemens was never sued directly by Alstom; rather, the Court ordered that Siemens be joined as a defendant in these proceedings.

⁴ For the judgment of the Court with respect to the initial application for injunction, see *Alstom Transport v. (1) Eurostar International Limited and (2) Siemens PLC* [2010] EWHC 2747 (Ch).

Client Alert.

think, Alstom stands only a quite small chance of demonstrating that all its alleged arguable breaches, taken together, would have made any difference to the outcome, Alstom will be unlikely to obtain an order setting aside Eurostar's decision at trial'.

Having managed to avoid the imposition of an injunction, Eurostar and Siemens proceeded to sign their contract on 3 December 2010, and Eurostar informed Alstom of this fact on the same day. However, Alstom did not give up.

It continued to pursue its claims and, on 4 May 2011, Alstom sought to amend its claim by introducing a request for a declaration of ineffectiveness in respect of the final contract entered into by Eurostar and Siemens. Eurostar and Siemens in turn sought to strike-out this request.

The Remedy of Ineffectiveness (Set-Aside)

A declaration of ineffectiveness is a new remedy made available to aggrieved bidders under the amendments to the UCR and its non-utilities counterpart, the Public Contracts Regulations 2006 ("**PCR**"), introduced by Utilities Contracts (Amendment) Regulations 2009 and Public Contracts (Amendment) Regulations 2009, which together implement the changes to the remedies regime introduced by Directive 2007/66/EC of 11 December 2007 (the "**New Remedies Directive**"⁵).

The most significant feature of the amendments to the UCR and PCR introduced by the New Remedies Directive is the availability of a declaration of ineffectiveness or set-aside of a contract entered into by the utility/contracting authority and the successful bidder. Both in the context of the UCR and PCR, the New Remedies Directive has introduced a presumption that a contract entered into by a utility/contracting authority is illegal and must be set aside, if it is entered into under certain conditions. Briefly, these conditions – the "grounds for ineffectiveness" – are that the contract award was:

- made without prior advertisement, despite the requirement for that to happen; or
- made in breach of one of the primary provisions of the procurement rules (*i.e.*, a traditional breach, such as failure to treat all bidders equally and in a non-discriminatory fashion) *as well as* certain ancillary requirements (such as the requirement to comply with standstill period⁶), and the failure to comply with the ancillary requirements deprives the aggrieved bidder of "*the possibility of starting proceedings [in respect of the primary breach], or pursuing them to a proper conclusion, before contract was entered into*"; or
- for a specific contract under a dynamic purchasing system (or a framework agreement), and such award was made in breach of the rules governing the award of specific contract *and* the estimated value of such specific contract in question exceeds the relevant threshold⁷.

Where an aggrieved bidder seeks a declaration of ineffectiveness, a special limitation period applies and generally speaking, the aggrieved bidder must bring the claim for ineffectiveness within 6 months, but this 6-month limitation period can be cut down to 30 days where:

⁵ For an overview of the regime introduced by the New Remedies Directive and its UK-implementation measures, namely the amendments to the Utilities Contracts Regulations 2006 and the Public Contracts Regulations 2006, see our [January 2010 Update: New Public Procurement Remedies in the UK](#).

⁶ As to the requirement for standstill period, see Regulation 33A of the UCR (also see Regulation 32A of the PCR).

⁷ Note that the third ground for ineffectiveness under the UCR only applies to award of specific contracts under a dynamic purchasing system, whilst the third ground for ineffectiveness under the PCR covers award of specific contracts under a framework agreement as well as award of specific contracts under a dynamic purchasing system.

Client Alert.

- a contract award notice was published in the Official Journal of the European Union in accordance with the relevant provisions of the UCR or PCR; or
- the aggrieved bidder was informed of “*the conclusion of the contract*” and “*a summary of the relevant reasons*” in accordance with the relevant provisions of the UCR or PCR.

Thus, utilities/contracting authorities and successful bidders can reduce the risk of legal challenge which threatens to nullify their contract after they commence performing their obligations, so long as utilities/contracting authorities provide as much information as possible up-front in publishing their contract award notice or otherwise notifying the unsuccessful bidders in accordance with the relevant provisions of the UCR or PCR.

The Court’s approach to Alstom’s argument for a declaration of ineffectiveness and Eurostar/Siemens’ counter-argument

In arguing that the final contract awarded to Siemens ought to be declared ineffective, Alstom relied on the first two grounds of ineffectiveness outlined above, whilst Eurostar and Siemens argue that neither of those two grounds applied (and, even if either of them applied, Alstom was time-barred).

Having dealt with the parties’ arguments, the court determined that:

- **For the purposes of the first ground of ineffectiveness under the UCR, the need for a prior advertisement required by the UCR should not be narrowly construed as meaning only a “contract notice” in its conventional sense.**

Where no contract notice was issued but other similar notices were issued, *e.g.*, notices for qualification procedure were issued as part of the negotiated procedure, such notices were capable of being brought within the ambit of the prior notice that had to be given to fulfil the advertisement requirement under the UCR. Thus, in this case (where the negotiated procedure was used), it was not open to Eurostar to argue that the first ground was unavailable to Alstom (which Eurostar had tried to do, on the basis that Eurostar was not subject to a requirement to advertise by virtue of the absence of the need to publish a “contract notice” in its conventional sense⁸).

- **The first ground of ineffectiveness under the UCR involves a simple, mechanistic test of whether or not an appropriate notice which calls for competition was given.**

Therefore, as long as a relevant notice satisfying the requirement for the publication of prior notice calling for competition for the award of the contract was given (be it by way of contract notice or some other notice permissible under the UCR), that was sufficient to satisfy this test and it was not open to Alstom to argue that because the contract which was finally awarded to Siemens was materially different from what was anticipated to be awarded, there was need for a fresh competition and Eurostar had to issue a fresh notice in respect of a new competition (which Eurostar had not done).

- **The second ground of ineffectiveness can only be relied upon if there is a breach of standstill requirement (or some other relevant ancillary requirement) and that breach prevents the aggrieved bidder from either: (a) starting proceedings before the signing of the contract; or (b) bringing such proceedings to a conclusion.**

Therefore, where (as here) Alstom as the aggrieved bidder was able to formulate and commence proceedings within the standstill period in an attempt to prevent the contract with the successful bidder from being concluded, it was not

⁸ In reaching this view, the Court, amongst other things, took notice of the fact that whilst the UCR merely referred to prior publication of a “notice”, the PCR specifically referred to the prior publication of a “contract notice”.

Client Alert.

also open to Alstom to argue that a breach of the standstill requirement prevented it from bringing proceedings against Eurostar⁹; nor was it open to Alstom to argue that because the contract which was finally awarded to Siemens materially differed from what was anticipated to be awarded, Eurostar was required to issue not just a fresh notice but was also subject to a fresh standstill period.

- **For the purposes of determining the special limitation period which applies to a claim for ineffectiveness under the UCR, the information which the aggrieved bidder must be given by the utility in order to trigger the shorter 30-day limitation period does not have to be in any particular form (it does not even have to be in writing), and it only has to relate to the contract in respect of which the advertisement was initially published.**

The Court took the view that there was no need for the requisite information to be given in any formal way, or indeed, to be in writing at all, noting that in practice, most of the information that must be provided to an unsuccessful bidder is given by way of debriefing, which takes the form of meetings. The Judge's view was that "*I can see no reason why the 'informing' should be done in writing; certainly, the Regulations do not say so... The process required is the passing of information (and summary information at that). Provided it is passed then the manner of passing does not matter, provided, of course, that the summary is sufficiently clear.*"

The Court also took the view that, as a matter of strict interpretation of the relevant provisions of the UCR, the information which had to be given to the unsuccessful bidders in order to trigger the shorter 30-day limitation period for the ineffectiveness remedy could only be that which related to the contract which was originally anticipated to be awarded (*i.e.*, such information obligation could only relate to "*the contract which has apparently resulted from the previously announced procedures and therefore, ostensibly at least, which the unsuccessful candidates and tenders thought they were competing for*").

Therefore, neither was it open to Alstom to argue that Eurostar failed to give the requisite debriefing information in any particular legally compliant fashion, nor was it open to Alstom to argue that Eurostar failed to give the requisite information in respect of the contract with Siemens which was alleged to have been materially amended.

In any event, the evidence of this case was such that the Court concluded that Alstom was given more than the requisite "*summary of the relevant reason*" (which, in the Court's opinion, only had to be "*reasons for lack of success and the comparative merits of the winning bid*" and nothing more) and therefore, the 30-day limitation period started on 4 December 2010 and had expired long before Alstom sought to introduce its new claim for ineffectiveness in May 2011.

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⁹ In any event, based on the facts of this case, the Court did not feel that there was any breach of the standstill requirement on Eurostar's part.

Client Alert.

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