



LEGAL BRIEFING

European Dynamics SA v HM Treasury (sued as Buying Solutions)

[2009] EWHC 3419 (TCC), Mr Justice Akenhead

The Facts

In May 2009 HM Treasury invited tenders for the establishment of several framework agreements to deliver software application solutions to a number of different UK public sector bodies. European Dynamics, a company based in Greece with a track record for delivering the design, development and maintenance of IT applications and software products, pre-qualified for three of the framework agreements. However, in November 2009 HM Treasury informed European Dynamics that it had been unsuccessful.

European Dynamics wrote to HM Treasury stating that the whole process had been totally unfair and had infringed free and fair competition. Though HM Treasury responded to this allegation and provided a table setting out the scores of each successful bidder, European Dynamics still requested further information and reasons regarding their failed tenders.

As HM Treasury was due to enter into the framework agreements with the successful bidders on 11 December 2009, European Dynamics applied to the court on 10 December on a without notice basis for an injunction to prohibit the contracts from being signed the next day. Mr Justice Akenhead granted the injunction as it appeared that the Public Contracts Regulations 2006 had been breached and there was reason to believe that there was a serious issue to be tried.

Mr Justice Akenhead heard submissions from both sides on 16 December in order to determine whether or not the injunction to restrain the framework agreement should continue until a trial is held to determine the dispute.

The Issue

In order for the injunction to continue, European Dynamics had to establish:

- (i) that there was a serious issue to be tried;
- (ii) that damages were an inadequate remedy; and
- (iii) that the balance of convenience favoured the grant of the injunction

The Decision

Mr Justice Akenhead discharged the injunction on the basis that:

"although there were serious issues to be tried, some of the complaints were weak, that damages would be an adequate remedy and that the balance of convenience favoured no injunction being continued."

European Dynamics had alleged that the scoring system was not disclosed to the tenderers, lacked transparency and did not result in fair and equal treatment. As an example, it pointed out one discrepancy in the system in that one tenderer would receive a score of "4" for a "reasonable response" to a particular question, while another tenderer would be given a score of "3" for a "reasonable response" with respect to the same question. Mr Justice Akenhead held that though there may be innocent explanations and justifications for the scoring method, there was no live evidence put before the court and he was unable to resolve those issues on an application such as this.

Though this was a serious issue to be tried, Mr Justice Akenhead stated that he was bound by the principles laid down by Lord Diplock in *American Cyanamid Co (No1) v Ethicon Ltd*. This meant that first, the court should consider whether damages would be an adequate remedy in the situation. If this was the case, then no injunction should normally be granted. If there was doubt as to the adequacy of a remedy in damages, the question of a balance of convenience then arises.

Here, Mr Justice Akenhead found that damages would clearly be an adequate remedy and should not be difficult to assess. Furthermore, the balance of convenience favoured a discharge of the injunction as there would be a substantial prejudice to HM Treasury should it be allowed to continue. Lifting the injunction only after resolution of the dispute by the court would happen at the earliest some 6 months down the track, resulting in delay to customers and irreparable harm to HM Treasury's reputation. In addition, damage to the general public interest would be at risk should the framework agreements be suspended pending the outcome of a trial.

Comment

As set out by Lord Hoffmann in the recent case of *National Commercial Bank Jamaica Ltd v Olint Corp Ltd*, the purpose of an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial: "...What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be."

Here, it was found that substantial injustices would occur if the framework agreements were suspended. Accordingly, a party needs to carefully consider its individual circumstance and whether or not damages would be an adequate remedy prior to attempting an injunction. Should an injunction not be awarded, the claimant must also keep in mind that it will be liable for the defendant's costs incurred as a result of the applications.

Stacy Sinclair
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