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Mediterranean Hospital of Cyprus (MHOC) Limited v The Secretary of State for Defence [2018] EWHC 3289 (TCC)

Court

Queen's Bench Division (Technology & Construction Court)

Judgment Date

19 November 2018

High Court of Justice Business and Property Courts of England and Wales Technology and Construction Court (QBD)

Before: Mr. A. Williamson QC (Sitting as Judge of the High Court)

Monday, 19th November 2018

Representation

- Mr. Michael Bowsher QC and Ms. Fiona Banks (instructed by Sidley Austin LLP) for the Claimant.
- Mr. Philip Moser QC and Ms. Anneliese Blackwood (instructed by Government Legal Department) for the Defendant.

Mr. A. Williamson QC

1. This claim, which was issued on 8th June 2018, seeks to challenge the inclusion of a requirement for CHKS Accreditation (which I will refer to as the "CHKS requirement") in a tender process by the Ministry of Defence (the "MoD") for the award of a contract for the provision of healthcare services in Cyprus for British Forces serving there.

2. There are three applications before the court today:

(1) The MoD's application of 9th July for the claim to be struck out or for summary judgment;

(2) The claimant's application to extend time under Regulation 92(2) of the Public Contract Regulations 2015 (the "Regulations"); and

(3) The claimant's application of 17th October to amend its particulars of claim albeit that that amendment application is now largely uncontroversial.

Context

3. An OJEU Notice was issued in relation to these works on 30th November 2017. It provided inter alia that "CHKS Accreditation required".

4. That is a reference to an organisation called Caspe Healthcare Knowledge Systems, who are a European Medical Assurance Organisation which provide external assurance services similar to that provided in the UK by the Care Quality Commission. It was the desire of the

MoD that the services to be provided to their personnel in Cyprus should be subject to similar regulation to the Care Quality Commission at home, as it were.

5. On 30th November 2017 Mr. Ellis, who is the Policy Manager of the claimant company, sent an e-mail to Mr. Walker who was dealing with the procurement on behalf of the MoD in the following terms:

"Dear Peter,

Can I just confirm that you are stating that we MUST have CHKS Accreditation?"

6. The next day after that, on 1st December 2017, an internal e-mail was circulated within the MoD from Mr. Walker in relation to that e-mail in which he said:

"Re below, just had Nick Ellis on the phone. CHKS is not a pass/fail at the DPQQ Stage" – that stands for Digital Dynamic Prequalification Question – "as I understand it and what I said to him is that it will be a prerequisite for contract award. He advised he will get MHOC Solicitors to challenge it!!"

7. On 23rd January 2018 Mr. Ellis wrote referring to the CHKS requirement and indeed intimated a challenge, albeit not through solicitors. He objected to the use of the terminology of "Accreditation" being applied to CHKS and he objected further to the inclusion of the requirement at all as he said that the claimant believed that it was against both European, British and MoD Procurement Regulations.

8. These matters stood until March of this year when the MoD informed the claimant that its application to pre-qualify had been evaluated and that they would be allowed or invited to tender for the contract. The letter further stated as follows:

"At this stage I would reiterate that evidence of CHKS Accreditation is required prior to contract award date."

9. On 11th April the MoD issued the invitation to tender to the claimant and I think also to other tenderers who pre-qualified. There was reference in the tender documents to the CHKS Accreditation requirement at paragraph 3.1 of page 73 in the bundle, at paragraph 2.32 at pages 106 and 107 and then again at paragraph 8.2 on page 137.

10. On 16th April Mr. Ellis sent a confidential e-mail and letter to the MoD which was not, as he put it, to form part of the broader tender clarification question process and not to be shown to the other tenderers. In the accompanying letter Mr. Ellis said this:

"We believe that we can provide the most economically advantageous bid but to do so requires the tender to be on a level playing field which it clearly is not at this juncture. There may be a perception that we are too quick to launch in the use of lawyers and it is therefore important to us that you understand the market here in Cyprus and the prestige that comes when contracting with British Forces. In the past when we have received no reply to our questions, we were forced down this path. This is one we have tried to avoid from the very beginning of this process. We would appeal to you to 'level the playing field' by removing the CHKS requirement by way of an amendment letter which will allow for fair and open competition."

11. The MoD on 18th April sent what was described as a "holding response" on the basis that there would be a full response in due course.

12. On 11th May the MoD issued its formal response to that letter and, in effect, the MoD gave various reasons why it said that it wished to have this requirement and therefore that it was not going to issue a tender amendment removing the CHKS requirement.

13. On 30th May a document was issued to all of the tenderers containing answers to matters which had been requested for clarification. Item 31 of that document dealt with the CHKS Accreditation issue.

14. The claim form was issued on 8th June and the particulars of claim a week later. The particulars of claim essentially put forward two complaints about what had happened as I have described it:

- (1) By paragraph 19(i) as particularised at paragraphs 21 to 28 and 33 to 35, there was complaint essentially of the fact that the CHKS requirement had been imposed.
- (2) By paragraph 19 (ii) as particularised at paragraphs 29 to 32 and 36 and 37 complaint was made of the MoD's rejection of the tender amendment request asked for on 16th April which I have referred to.

The strike out and summary judgment application

15. The Civil Procedure Rules at paragraph 3.4(2) allow a court to

"... strike out a statement of case if it appears to the court –

(a) that the statement of case disclosed no reasonable grounds for bringing or defending the claim".

16. Likewise, the court has power to give summary judgment against a claimant under CPR Part 24.2 where the claimant has no real prospects of succeeding on a claim and there is no other compelling reason why the case should proceed to trial.

17. The proper approach to applications of this kind has been identified by the Court of Appeal in the case of SITA UK Limited v. Greater Manchester Waste Disposal Authority [2012] PTSR 645 at paragraph 40 where Elias LJ approved the approach which Mann J had taken in that case to the effect that (paraphrasing it) a case should only be struck out where it was clearly bound to fail as a matter of law or fact and where that could be determined without oral evidence or full trial.

18. The context for the present proceedings, as I have already said, is the 2015 Regulations. Regulation 92(2) provides that:

"Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator [that is, in this case, the claimant] first knew or ought to have known that grounds for starting the proceedings had arisen."

That is all, of course, subject to provisions for extension of time at subparagraphs (3) to (5) which I shall return to in due course.

19. This time limit is a very short one, but that is intentional as Fraser J explained in the recent case of SRCL Limited v. The National Health Service Commissioning Board [2018] EWHC 1985 (TCC) . He said at paragraph 153:

"The time limits are strict, and intentionally so. They are there to be observed, and rapidity is important in procurement cases."

20. The approach to the Regulation 92(2) question has been recently analysed by Stuart-Smith J in Amey Highways Ltd. v. West Sussex County Council [2018] EWHC 1976 (TCC) as follows:

"31. Regulation 92(2) may involve a two-part enquiry in order to determine the date from which time runs. The first part is to establish when grounds for starting proceedings have arisen: in other words 'when did the right of action, if any, first arise?': see *Jobsin.co.uk v Department of Health* [2002] 1 CMLR 44 at [8]. In *Amarylis Limited v HM Treasury* [2009] EWHC 962 (TCC) at [52] Coulson J concluded that the grounds for bringing proceedings arise 'when a specific and irrevocable act occurs', though this formulation has not been consistently accepted.

32. The second part of the enquiry is to establish 'when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen'. In many cases this may be the same date as when grounds for starting proceedings first arose; but in some cases it may be a later date. For this reason Regulation 92(2) is often said to provide a knowledge-based test.

33. Two points are now established:

(i) The degree of knowledge or constructive knowledge that is required to start time running is 'knowledge of the facts which apparently clearly indicate, though they may not absolutely prove, an infringement': see *SITA v GMWDA* [2011] 2 CMLR 32 at [26] and [31];

(ii) It is not open to a bidder that detects an illegality during the course of the tender process to wait until the outcome of the process is announced before bringing a challenge: see *Jobsin* at [28], [38]. The policy that underlies this approach is of general importance in procurement cases and is that complaints should be brought promptly both in the interests of those directly concerned in the procurement in question and also in the wider public interest that tenders for public projects should be processed as quickly as possible: see *Jobsin* at [33]."

21. Essentially the judge in that case identified a potential two-part enquiry: when did the right of action first arise; and then when did the economic operator first know or to have known of the grounds for starting proceedings.

22. In many cases the Regulation 92(2) question, as explained by Stuart-Smith J, may not be appropriate for striking out or for summary judgment. That is because deciding when the right of action arose or when the claimant knew or ought to have known that grounds existed to start proceedings will involve in many cases questions of fact which can only be resolved with the benefit of oral evidence or questions of law which require prolonged argument.

23. However, and taking all necessary account of the appropriate caution with which a court should approach striking out and summary judgment applications, it seems to me clear that

the claimant in this case knew or ought to have known of the CHKS requirement not later than 23rd January 2018.

24. In that context I would refer to the following matters:

- (1) The OJEU Notice of 30th November 2017, page 38 of the bundle;
- (2) Mr. Ellis's e-mail of that date (which I have already referred to);
- (3) The conversation between Mr. Ellis and Mr. Walker on 1st December. Although that is referred to in an e-mail there is no controversy as to what was said on that occasion as is apparent in the evidence served on behalf of the claimant;
- (4) The letter from the claimant of 23rd January 2018 which, as I have already mentioned, contains an express challenge to the CHKS requirement.

25. I accept that, as Mr. Bowsher submits on behalf of the claimant, the invitation to tender issued on 11th April expressed the CHKS requirement in a somewhat opaque fashion but that seems to me irrelevant in circumstances where Regulation 92(2) had already been satisfied.

26. I do not think that the claimant can escape that conclusion by pointing to the MoD's refusal in May to amend the tender documents. That is the case advanced at paragraph 19(ii) of the particulars of claim. It seems to me that, for the reasons already explained, the claimant had grounds to proceed by not later than January 2018. The claimant cannot, so to speak, evade the requirements of Regulation 92(2) by inviting the MoD subsequently to amend the tender documents. By that time, that is to say the date of the request for amendment to the tender documents, time was running if it had not already expired. I have considerable doubt as to whether a complaint that a contracting authority will not amend tender documents comes within the Regulations in any event, but it is not necessary for me to decide that point.

Extension of time

27. Regulation 92 further provides that:

"(4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 93) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen."

28. Given my conclusion that the claimant's right of action had arisen not later than 23rd January 2018, I have no power to extend time to 8th June 2018 in any event because that is more than three months after 23rd January.

29. In those circumstances it is not necessary for me to say very much about the extension application. However, I note that in SRCL (which I have already referred to) Fraser J gave guidance at paragraphs 149, 153 and 154 as to how one might approach an extension of time under Regulation 92(4) . I note in particular that he observed at paragraph 149:

"'Good reason' should, ordinarily, relate to some factor that has an effect upon the ability of a claimant to issue."

30. It does not seem to me that, applying that approach, there would be a good reason here for an extension of time. It has not been suggested – and I have seen no evidence to show – that the claimant was in any way disabled from issuing proceedings at any particular time. The claimant may have either decided not to pursue proceedings or may have misunderstood the position or thought that it could persuade the MoD to take a different line. Those are all possible scenarios, but none of those, as it seems to me, would come close to constituting a good reason as envisaged by the Regulation.

31. The claimant has also sought to rely on Regulation 92(3) which provides that the 30-day time limit does not apply where the proceedings relate to a decision which is sent to the economic operator by fax or, presumably, e-mail.

32. I do not think that that assists the claimant on the facts of the present case because it does not seem to me that there was any relevant decision here as envisaged by Regulation 92(3) .

33. For those reasons I would:

- (1) Grant the defendant's application dated 9th July 2018;
- (2) Dismiss the claimant's application of 3rd August 2018;
- (3) Make no order on the claimant's application of 17th October 2018 which now appears academic, unless there is some benefit to be derived from dealing with that application.

34. I will hear counsel in relation to consequential matters and as to the form of order.