



When is ineffectiveness not effective?

Ongoing litigation concerning the procurement by Eurostar of new rolling stock from Siemens, rather than the supplier of its existing fleet Alstom, is continuing to clarify the law on procurement remedies. In a judgment on 13 July 2011 Mann J has clarified the rules on 'ineffectiveness' under the recently amended Utilities Contracts Regulations 2006:

- when ineffectiveness may be available; and
- when claims alleging ineffectiveness must be brought to avoid limitation issues.

When ineffectiveness may be available

Amendments to the Utilities Contracts Regulations 2006 which came into force for procurements commencing on or after 20 December 2009 introduced new remedies for breaches of procurement obligations. Amongst these was the power for the court to make a contract ineffective if it is entered into before the utility has completed the proper procurement process.

The Eurostar Contract

Following an extended procurement process, Eurostar informed Alstom of its intention to award a contract to Siemens on 5 October 2010. Alstom objected and brought proceedings for breach of the process including an early application for an injunction to prevent Eurostar entering into the contract with Siemens. The court refused the injunction on 29 October 2010, the contract was signed on 3 December 2010 and Alstom was informed on that day.

Alstom then alleged that the contract was materially varied and issued a new claim in May 2011 seeking a declaration of ineffectiveness. Alstom alleged that the contract was different to the one advertised and therefore there had been no procurement process or standstill period in respect of it.

Eurostar argued that the process and standstill period were sufficient for the contract entered into and that Alstom's claim was brought too late. Alstom had received a summary of reasons in October 2010 (including in witness statements and solicitors' correspondence in the injunction proceedings) and knew on 3 December 2010 that the contract had been signed.

As this was a strike out application certain assumptions were made in Alstom's favour on points which are otherwise strongly disputed, in particular a temporary assumption that the contract had in fact been fundamentally changed and that the Regulations actually apply to it, both of which Eurostar reject.

When claims alleging ineffectiveness must be brought to avoid limitation issues

The Court considered the notice that Eurostar published to start the procurement process and determined that it was wide enough to cover the Siemens contract even if there had been a fundamental change.

In order to claim ineffectiveness under the Regulations, Alstom would also have had to show that it had been unable to claim ineffectiveness before expiry of the Standstill Period. As Alstom had made similar allegations during this period and had actually commenced proceedings (for damages) the Court concluded that Alstom could have brought ineffectiveness proceedings at this time and had lost the chance to do so when the Standstill Period expired.

Time limit for ineffectiveness

The Court confirmed that communication of the reasons for selecting the successful bidder under regulation 45E(5)(b) need not be a detailed exercise. Reasons should be "clear and relatively short."

Reasons can also be communicated formally or informally, do not have to be in writing and can be provided on different occasions and in different documents (Eurostar provided "more than a summary of reasons" by a combination including witness statements, oral feedback and solicitors' correspondence).

Alstom had received a summary of the reasons for awarding the contract during the Standstill Period and during the injunction process. By the time it was informed that the contract was signed on 3 December 2010 it therefore had sufficient information to bring an ineffectiveness claim and had 30 days in which to do so.

Alstom failed to bring its claim within those 30 days and consequently lost its chance to claim ineffectiveness in any event.

In Practice

This case reinforces the messages in procurement that Utilities should be clear in their communication with unsuccessful bidders but the ineffectiveness rules do not impose rigid requirements as to the form in which the reasons must be communicated, neither do they need to provide more than a summary of those reasons.

It also reinforced the importance of unsuccessful bidders acting quickly once they are aware of an intention to contract with another bidder.

Burges Salmon LLP represents Eurostar in the *Alstom v Eurostar* proceedings. (*Alstom Transport v Eurostar International Limited and Siemens Plc* [2011] EWHC 1828 (Ch)).

Our specialist procurement lawyers advise clients on all aspects of utilities and public procurement law and practice from practical delivery of compliant projects to defending or making legal challenges.

For further information please contact:



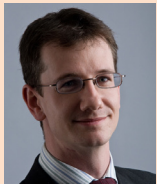
John Houlden
Partner

+44(0)117 902 2796
john.houlden@burges-salmon.com



Chris Jackson
Partner

+44(0)117 939 2238
chris.jackson@burges-salmon.com



Ian Tucker
Senior Associate

+44(0)117 902 6332
ian.tucker@burges-salmon.com