Neutral Citation Number: [2017] EWHC 238 (TCC)

Case No: HT-2016-000302

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 17 February 2017

Before:

THE HON MR JUSTICE COULSON

- -

Between:

Joseph Gleave & Son Limited	**Claimant**
- and -	
Secretary of State for Defence	**Defendant**

- -
- -

Jason Coppel QC and **Fiona Banks** (instructed by **Weightmans LLP**) for the **Claimant**
Sarah Hannaford QC and **Ewan West** (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing date: 3 February 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE COULSON

The Hon. Mr Justice Coulson :

1 INTRODUCTION

1. This is a dispute about the ongoing procurement of over 6,000 product lines of hand tools for essential military needs. Following various delays, the second stage of the tender process is now likely to be completed at the end of February 2017, and the award of the contract is scheduled for early May 2017. At the CMC on 3 February, when considering the procedural way forward, the parties adopted polarised positions: the claimant sought an expedited trial so that the outcome of its challenge would be known before the contract was awarded in early May, whilst the defendant sought a stay of the proceedings until after the contract award.

2. The hearing took significantly longer than the parties had estimated, in part because both sides were also using their respective applications to try and obtain tactical advantages for the future, particularly if the trial was not expedited and there was then a dispute about the contract award. In addition, both sides indicated that the outcome of this procedural dispute might have ramifications beyond the confines of these particular proceedings: towards the end of his submissions in reply, Mr Coppel expressly warned me about "the message" I would be sending to prospective claimants in procurement cases if I refused his application.

3. For these reasons, I had no real option but to reserve judgment. After the hearing, the parties provided yet further written arguments. On the next working day after the hearing (6 February), I informed leading counsel of the result and the particular order I proposed to make. I refer to that in greater detail at the end of this Judgment, at paragraphs 60-63 below.

4. This Judgment is structured as follows. In **Section 2**, I set out the factual background. In **Section 3**, I address the general principles of law concerned with speedy relief in procurement cases. In **Section 4**, I identify certain particular features of this case which I consider to be relevant to the applications before the court. Then, in **Section 5**, I deal with the principles relating to expedition and, in **Section 6**, analyse the claimant's claim for expedition. In **Section 7**, I address separately the defendant's application for a stay.

2. THE FACTUAL BACKGROUND

5. This procurement for hand tools has had a chequered history. There were at least two attempts in 2015 to procure hand tools by reference to particular manufacturers. These procurements were challenged by the claimant and subsequently abandoned. In February 2016, there was a procurement in respect of hand tools by reference to technical specifications ("the first 2016 procurement"). That procurement too was challenged by the claimant in the TCC, but proceeded to tender evaluation. I am told that it did not lead to a contract because no compliant bids were received.

6. In relation to the first 2016 procurement, following the challenge by the claimant but before the outcome of the tender process was known, the claimant's solicitors wrote to the Treasury Solicitor on 5 May 2016 to propose a stay of the proceedings pending the outcome of the tender process. The defendant agreed to that suggestion. That is

the course of action now proposed by the defendant in respect of the latest challenge, but it is opposed by the claimant.

7. The current procurement is a further attempt to procure hand tools for essential military needs. The tender documents were made available at some point between 7 and 12 October 2016 (the precise date, like everything else in this case, appears to be disputed). The relevant product lines are set out within Annex A to the Invitation to Tender ("ITT"). Many are referenced by a Manufacturers' Part Number ("MPN"). The claimant contends that this is a breach of the Public Contracts Regulations 2015 ("the Regulations"): they argue that the use of MPNs cannot be justified and that, accordingly, the use of MPNs is an unlawful obstacle to the opening up of the procurement to competition.

8. The claimant's letter of claim was dated 2 November 2016. The Claim Form was issued on 10 November 2016, and the Particulars of Claim served on 17 November 2016. The Defence was served on 15 December 2016, and included the assertion of a limitation defence. The Reply was dated 23 January 2017.

9. It was not until 23 January 2017 that the claimant suggested, for the first time, that the trial in these proceedings should be expedited. A trial date of 13 March was suggested. Subsequently, in the days leading up to the CMC on 3 February, the claimant produced a flurry of proposals dealing with the detail of how the trial might be expedited. As previously noted, however, the parties' positions remained polarised.

3. SPEED IN PROCUREMENT CASES

10. The importance of speed in procurement cases was first identified in the Council Directive (89/665/EEC) (as amended), commonly known as the "Remedies Directive". The preamble to the Remedies Directive stated:

> "Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law…
>
> Whereas, since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorized to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority; whereas the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently…"

11. The relevant parts of the Articles (as amended) state:

> "**Article 1**

> Member States shall take the measures necessary to ensure that, as regards contracts…decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles 2-2F of this Directive…
>
> **Article 2**
>
> 1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:
>
> …
>
> (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure…"

12. The United Kingdom complied with the Remedies Directive through the Public Contracts Regulations, which have been amended on a number of occasions and are now in the 2015 version. The Regulations concerned with time limits are Regulations 92 and 94-96 as follows:

> "**General time limits for starting proceedings**
>
> 92. (1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.
>
> (2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
>
> (3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods:—
>
> (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—
>
> (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
>
> (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first:—

(i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;

(ii) 10 days beginning with—

(aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or

(bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.

(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.

(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued…

Starting proceedings

94. (1) Where proceedings are started, the economic operator must serve the claim form on the contracting authority within 7 days after the date of issue.

(2) Paragraph (3) applies where proceedings are started—

(a) seeking a declaration of ineffectiveness; or

(b) alleging a breach of regulation 87, 95 or 96(1)(b) where the contract has not been fully performed.

(3) In those circumstances, the economic operator must, as soon as practicable, send a copy of the claim form to each

person, other than the contracting authority, who is a party to the contract in question.

(4) The contracting authority must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with paragraph (3).

(5) In this regulation, "serve" means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.

Contract-making suspended by challenge to award decision

95. (1) Where—

(a) a claim form has been issued in respect of a contracting authority's decision to award the contract,

(b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision, and

(c) the contract has not been entered into,

the contracting authority is required to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs—

(a) the Court brings the requirement to an end by interim order under regulation 96(1)(a);

(b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) This regulation does not affect the obligations imposed by regulation 87.

Interim orders

96. (1) In proceedings, the Court may, where relevant, make an interim order—

(a) bringing to an end the requirement imposed by regulation 95(1);

(b) restoring or modifying that requirement;

(c) suspending the procedure leading to—

(i) the award of the contract, or

(ii) the determination of the design contest,

in relation to which the breach of the duty owed in accordance with regulation 89 or 90 is alleged;

(d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.

(2) When deciding whether to make an order under paragraph (1)(a)—

(a) the Court must consider whether, if regulation 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and

(b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 95(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court."

13. The vast majority of procurement disputes arise either from a challenge to the legality of the tender documents, or a challenge to the award of a contract following the tender process. If there is a challenge to the legality of the tender documents, then the challenger must commence proceedings within 30 days. Indeed, it is vital that such a challenge is made in that time because the challenger's cause of action accrues when the defective tender documentation is published, not when a contract is awarded on the basis of that unlawful documentation: see ***Jobsin Co UK PLC v Department of Health*** [2001] EWCA Civ. 1241. In that case, Dyson LJ said:

> "27. Mr Lewis submits that neither the loss nor the risk of loss was caused by the breach of regulation 21(3) until Jobsin was excluded from the tender process on 17th November. I reject that submission for the following reasons. First, it gives no

> meaning to the words "risks of suffering loss or damage" in regulation 32(2). It seems to me that those words are of crucial significance. They make it clear that it is sufficient to found a claim for breach of the regulations that there has been a breach and that the service provider may suffer damage as a result of the breach. It is implicit in this that the right of action may and usually will arise before the tender process has been completed.
>
> 28. That brings me to the second reason. It would be strange if a complaint could not be brought until the process has been completed. It may be too late to challenge the process by then. A contract may have been concluded with the successful bidder. Even if that has not occurred, the longer the delay, the greater the cost of re-running the process and the greater the overall cost. There is every good reason why Parliament should have intended that challenges to the lawfulness of the process should be made as soon as possible. They can be made as soon as there has occurred a breach which may cause one of the bidders to suffer loss. There was no good reason for postponing the earliest date when proceedings can begin beyond that date. Mr. Lewis suggests that there is such a reason. He points out that if, in a case such as this, the limitation period runs from the date of publication of the tender documents, it will be possible for the contracting authority to rule out any real possibility of a challenge by issuing an invitation in breach of the regulations and then not taking any further steps in relation to tenders until after the three months period has expired. I confess that I find this an unlikely state of affairs, but I can see that it might conceivably happen. If it did, a service provider who wished to bring proceedings might have a good case for an extension of time: it would all depend on the facts. In my view, this cannot affect the plain meaning of regulation 32(2). I would therefore hold that the right of action which Jobsin asserts in the present case first arose on or about 14th August 2000. The essential complaint which lies at the heart of the proceedings is that there was a breach of regulation 21(3), in that the Briefing Document did not identify the criteria by which the DOH would assess the most economically advantageous bid."

14. The need for speed where the challenge is to the tender documents was also explained by Cooke J in ***M Holleran Limited v Severn Trent Water Limited*** [2004] EWHC 2508 (Comm) when he said:

> "41. In the case of the Regulations, there is undoubtedly a public interest purpose in the requirement for promptness as is shown by the European Directives, pursuant to which the Regulations were made. It is self-evident and also appears from other decisions on comparable regulations that, in the procurement context, the need for speed in raising complaints and dealing with them is vital, since the whole process of

> procurement is otherwise rendered uncertain and hopelessly disrupted. The need for a rapid and effective review and enforcement is predicated on the need for prompt complaint. Without prompt complaint and review, lists of contractors may be drawn up and the tendering process progressed or even completed, with alteration of position by other contractors, as well as the utility company…
>
> 53. As to prejudice to STW, the Court of Appeal decisions in ***Jobsin*** (ibid) at paragraph 40 and ***Matra v Home Office*** [1999] 3 AER 562 (per Buxton LJ at page 1663) make it plain that it is not necessary to adduce particular evidence of prejudice to third parties. As Dyson LJ says, it is inherent in the process itself that delay may well cause prejudice to third parties as well as detriment to good administration. One of the major purposes of proceedings is to enable procurement procedures to be corrected and for the Court to review and enforce any remedy required. Although Holleran's claim is now limited to damages and the claim for any other relief has been abandoned, the effect of a damages claim on a complex contracts process and its unsettling disruption of it is prejudice enough."

15. Of course, from a procedural point of view, a party seeking to challenge the lawfulness of the tender documentation may have a difficult decision to make. Assuming its court proceedings challenging the tender documents are up and running within the 30 days, the challenger then has to decide whether or not to seek an injunction to prevent the process from continuing on the basis of documents which it contends are unlawful. In my experience, applications for interlocutory injunctions at that early stage are relatively rare. That may be because the challenger will often remain involved in the tender process and is content to await the outcome of that process before seeking urgent relief from the court, or it may be because the challenger has accepted that the alleged illegality has excluded him from the contract award process and is content to seek damages as a remedy.

16. The infrequency of applications for interim injunctions at the tender stage may also be explained by a more pragmatic factor. It is only in the more straightforward cases that a challenger will be able to demonstrate, on an interlocutory basis, the unlawfulness of the tender documentation and that very often, an interim challenge may face something of an uphill struggle.

17. If the challenge is to the proposed award of the contract, following what is alleged to have been a flawed bidding or evaluation process, the position is more straightforward. A challenge to the proposed award of the contract in such circumstances automatically suspends that award. It is then for the contracting authority to apply to the court to have the suspension lifted. The principles then in play are derived from the well-known decision in ***American Cyanamid v Ethicon*** [1975] AC 396. One of the relevant considerations is whether or not it is possible to have an expedited trial before lifting the suspension: see ***Covanta Energy Ltd v Merseyside Waste Disposal Authority*** [2013] EWHC 2922 (TCC), an example of a case where the detriment to the contracting authority as a result of the delay caused by

an expedited trial was less than the detriment caused to the challenger if the suspension was lifted and the contract awarded to another party.

4. PARTICULAR FEATURES OF THIS CASE

18. There are particular features of this case which are important to any determination of the issue as to whether there should be an expedited trial before there has been a contract award.

19. The first point to note is that, although this is a challenge to the tender documents, the claimant has not sought an injunction to prevent the continuation of the tender process. Indeed, it might have been contrary to the claimant's commercial interests to have sought such an injunction, because the claimant is still involved in the process, having passed the PQQ stage. In other words, notwithstanding its challenge to the tender documents, the claimant might still be awarded this significant contract.

20. Thus, this application to expedite the trial before the contract award (rather than to injunct the tender process) might be said to allow the claimant the best of both worlds. It gives it the opportunity to make its challenge to the legality of the tender documents, but a trial, whatever the outcome, would not necessarily harm its commercial prospects if, following the evaluation, its own tender was successful. It is, on any view, very different to an application for an expedited trial by a challenger who has not been awarded the contract and therefore knows that, but for a successful decision in the court proceedings, it will never be the successful contractor.

21. Mr Coppel said that, even if the claimant was the successful bidder here, it would still continue with its challenge to the unlawful tender documents. He said that there were two elements of the claim that would survive even a successful tender: namely a) a claim for damages based on the profits that would have been made by the claimant if the tender documents had been lawful, as compared to the (presumably lesser) profits that it will make on the basis of the successful bid; and b) the continuing claim for a declaration that the tender documents were themselves unlawful.

22. I confess to finding an element of unreality about both of these claims. Whilst I can see that, as a matter of principle, they might be capable of being advanced following the claimant's successful tender, I am sceptical as to whether in practice that would happen. The damages claim would be a claim that the claimant did not make as much profit from the contract as it hoped to. That might not be regarded as the principal purpose of the Regulations and, even though such a claim could be made thereunder, no urgency could possibly attach to such a claim. As for the claim for a declaration, it seems to me that, if it were pursued after a successful tender, the claimant would be put in the extraordinary position of agreeing to and accepting a contract award on the basis of documents which it was alleging in court proceedings were unlawful. On the face of it, such a claim would run into obvious approbation/reprobation difficulties. Thus, the argument that this claim would subsist even if the claimant was successful in the tender process seems to me to be more theoretical than real.

23. Having set out the factual background, the relevant parts of the Remedies Directive and the Regulations, together with some of the particular features of this case, I turn to the claimant's application for an expedited trial.

5. EXPEDITION: PRINCIPLES

24. I summarise the principles relating to whether or not there should be an expedited trial as follows:

    (a) The issue as to whether to grant expedition, and if so how much and on what terms, is a matter essentially for the discretion of the judge: see ***Wembley National Stadium v Wembley*** (unreported, Court of Appeal, 28 November 2000). It is partly a matter of principle and partly a matter of practice: see ***Daltel v Makki*** [2004] EWHC 1631 (Ch).

    (b) All cases should be brought to court as soon as reasonably possible, consistently with the overriding objective: see ***Daltel***.

    (c) In exercising its discretion, the court has to take into account the requirements of other litigants: see ***Law Debenture Trust Corp PLC v Elektrim SA*** [2008] EWHC 2187 (Ch).

    (d) The applicant must satisfy the court that there is an objective urgency to deciding the claim: see ***Daltel***.

    (e) The procedural history in any case is a relevant factor to take into account: see ***CPC Group Limited v Qatari Diar Real Estate Investment Company*** [2009] EWHC 3204 (Ch).

25. Mr Coppel argued that, as a result of the Remedies Directive, in any case where there was a challenge to the legality of the tender documents, there was a presumption in favour of expedition before the tender process was concluded, which he said overlaid (and in cases of conflict, trumped) the common law principles set out above. I do not agree with that. That is not what the Directive says. Moreover, there is no authority to that effect: neither ***Marina del Mediterráneo*** (Case C-391/15) nor ***Grossmann Air Service v Republik Osterreich*** (Case C-230/02), both European cases to which I was referred by the parties after the oral hearing, say any such thing. Furthermore, it seems to me that what matters most are the Regulations, not the Remedies Directive, and there is nothing in the Regulations which cuts across the principles summarised in paragraph 24 above. Thirdly and perhaps most important of all, it is settled law that there is no presumption either way when the court has to address the issue of expedition following the completion of the tender process: see ***Covanta***, paragraph 17 above. If there is no presumption at that later stage, when any loss will have crystallised, then there can be no such presumption at an earlier stage, before the tender process has even been completed.

26. Of course, it is quite possible to see circumstances in which, as a result of a challenge in an ongoing tender process, a clear need for an expedited trial has been made out. An example would be a straightforward challenge to one important element of the tender documentation which, if the challenge was successful, would lead to a significant correction of the tender documents at a relatively early stage. The question for me is whether, applying the principles set out in paragraph 24 above, when considered against the background of the Directive and the Regulations set out in **Section 3** above, the claimant has made out its case for an expedited trial on the particular facts of this case.

6. EXPEDITION: ANALYSIS

6.1 Overview

27. For a number of separate reasons, I have concluded that the claimant's application for an expedited trial – to start on 13 March 2017 – has not been made out. I set out those reasons under individual headings below.

6.2 Procedural Delays

28. I have already noted in paragraph 24e) above, that the procedural history is one factor which the court must take into account in exercising its discretion in deciding whether or not to order an expedited trial.

29. On the facts here, it will be seen that, between 17 November 2016 and 23 January 2017 (a period of 9 weeks), the parties exchanged pleadings (two from the claimant and one from the defendant). At no time during that rather leisurely process did the claimant ever suggest that this was an appropriate case for an expedited trial. That proposal was not made until 23 January 2017.

30. Thus the effect of the claimant's proposal is that, whilst the pleading stage took 9 weeks, there would be a period of just 7 weeks (from 23 January 2017 to the proposed date of 13 March 2017) for the parties to deal with disclosure, witness statements and the preparations for trial. In my view, the leisurely procedural history adopted prior to 23 January 2017 is relevant to the application for expedition because it demonstrates that, with the best will in the world, this belated request for urgency is inconsistent with what has gone before.

6.3 Impossible Timetable

31. In my view, it would be impossible for the parties to be able to be ready for an expedited trial on 13 March 2017. This is a reflection of the very short time remaining and the complex nature of the claimant's case.

32. First, the claimant's claim involves, not only the ongoing procurement exercise in which they are still involved, but also the three previous procurement exercises noted above. It appears from the pleadings that the court is being asked to give rulings on the legality of those previous procurement exercises, before turning its attention to the ongoing process. Although the claimant has subsequently said that no relief is being sought in relation to the previous exercises, it has said that they are relevant for comparison purposes. Either way, therefore, this is a significant task.

33. Secondly, it is important to understand the nature of the challenge to the current procurement. Regulation 42 deals with technical specifications. Regulations 42(12) and (13) provide as follows:

> "(12) Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents,

> types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.
>
> (13) But such reference is permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract in accordance with paragraph (11) is not possible, in which case the reference shall be accompanied by the words "or equivalent"."

34. Accordingly, in respect of over 6,000 tool types, there is an argument as to whether or not the defendant's use of MPNs was justified. That is an extensive exercise, which might involve a Scott Schedule with over 6,000 entries. There is also a separate dispute as to whether or not the defendant has failed to comply with its obligations to permit tenderers to provide products which are "equivalent to" the MPNs specified. That too is a major task.

35. The claimant has recognised these difficulties because, on 1 February 2017 (two days before the CMC) it suggested, for the first time, a proposal for sampling. The defendant has not yet had an opportunity to comment on that proposal. I should say that I have never before come across a challenge to technical tender documents which has been resolved, or been thought capable of being resolved, by way of sampling. Even assuming that such a mechanism was possible here, my experience of sampling in other commercial litigation is that it needs to be agreed, and accepted by the parties as fully representative, so that the result based on samples will still be binding. Not unreasonably, it can often take a long time for such matters to be agreed or, in the case of dispute, resolved by the court, before a trial on the basis of sampling can be ordered.

36. In addition to the logistical problems with the subject matter of the trial, there are also likely to be significant hurdles created by the disclosure process in this case. Mr Coppel's Note for the CMC devoted no less than five closely typed pages to the categories of disclosure which will be sought by the claimant from the defendant, another two pages dealing with the defendant's electronic disclosure questionnaire. It is only necessary to glance at the scope and scale of the proposed disclosure to see that there is no realistic way in which such an exercise could be completed in time for a trial on 13 March 2017. In one of the authorities to which I was referred where expedition was ordered (***Warner-Lambert Co Inc v Teva UK Ltd*** [2011] EWHC 2018 (Ch), I note that disclosure was entirely dispensed with.

37. During the course of her submissions, Ms Hannaford referred to some of the documents which were sought and the breadth and scale of the likely disclosure. Thus, she noted that in respect of MPNs, the claimant wanted, amongst other things:

> "(1) All documents, including all internal communications, relating to:
>
> (i) The effectiveness historically of the MoD procuring hand tools by reference to ISIS and/or generic descriptors…

(iv) The drawing up of the technical specifications for the tools which were the subject of the Invitation to Tender dated 17 February 2016;

(v) The decisions taken to withdraw and/or abandon the mini-competitions initiated under the Framework;

(vi) The drawing up of the technical specifications for the tolls listed in Annex A, including documents relating to (a) the MoD's requirement; and (b) any assessment of those tools by reference to the MoD's requirements…

(2) All documents and/or information held by the MoD, the UK National Codification Bureau and/or any body under the control of the MoD relating to the tools in Annex A."

In respect of the equivalents, she noted that the documents sought related to similarly wide categories of documents.

38. In response, Mr Coppel complained that, since the defendant was resisting the application for an expedited trial, it was an obvious forensic tactic on the part of Ms Hannaford to point to these potentially wide categories of documents and say that, in consequence, an expedited trial was impossible. The court is, I hope, astute enough to have worked out that tactic for itself. But even making every possible allowance for forensic exaggeration, it seems to me that the sheer scale of these categories of documents speaks for itself. The claimant's technical challenges carry with them an extensive investigation both into the history and the preparation of the relevant tender documents. It is impossible to see how the disclosure process alone will not take well beyond 13 March to be completed.

39. I have focused on the subject matter of the trial and the likely scale of disclosure because those were two elements of the application which were the focus of leading counsels' submissions. But of course, in order to be ready for an expedited trial on 13 March 2017, there would also need to be the preparation of witness statements dealing with four different procurement exercises, witness statements in reply, the preparation of trial bundles, the preparation of openings and reading time for the court. In my view, it is simply impossible for a trial to be ready by the suggested date, or even in the weeks thereafter.

6.4 The Claimant's Alternative Positions

40. Doubtless because he realised the scale of the problem, Mr Coppel made a number of submissions to the effect that, in order to achieve the expedited trial, the claimant would be prepared to "cut its cloth accordingly", so that, in some unspecified way, the claimant would accept that the trial might be less extensive in its investigations or in the material which was covered. In addition, he said that there was nothing magical about the date of 13 March 2017, and that a later (but still expedited) date was acceptable to the claimant. However, on analysis, there are difficulties with both these submissions.

41. As to the unspecified reduction in the scope and nature of the court's investigation, this immediately raised a question mark as to the efficacy of any such process. It was rather as if Mr Coppel was saying that, as with construction adjudication, the claimant accepted that "the need for the 'right' answer has been subordinated to the need to have an answer quickly": see Chadwick LJ in ***Carillion Construction Ltd v Royal Devonport Dockyard Limited*** [2005] EWCA Civ. 1358. But Chadwick LJ's description of the adjudication process is based on the relevant statutory regime, which gives the losing party the right to go to court to challenge the adjudicator's decision. There is no statutory equivalent in procurement cases, whereby the court could provide a quick answer to a challenge to tender documents on the basis that a final determination could await another day.

42. One of the purposes of having an expedited trial would be in order to allow the court to "correct" any unlawful tender documents before it was too late. Such a "correction" could only have legal effect if it was based on a proper investigation. Whilst the claimant might be prepared to "cut its cloth" and limit the investigation so as to have an immediate trial, what about the other bidders? What if the court went ahead on the basis of a truncated investigation and reached the answer X, which had an adverse effect on some other bidder, only for that other bidder to challenge the process anew and, on a full investigation, persuade a different court that the answer was Y?

43. For these reasons, it seems to me that, as things stand, the court cannot contemplate anything other than a full investigation into the matters raised in the challenge and that it is not a viable alternative for the claimant to propose some form of lesser investigation. I deal separately below with the suggestion of sampling.

44. As to the question of the trial date, the claimant's application expressly sought a trial date of 13 March 2017. I thought that was deliberate because, allowing for judgment-writing time, that was the last possible date for a hearing into these potentially complex matters, to be followed by a detailed and reasoned judgment, yet prior to the award of the contract in early May. Even if (contrary to my primary view) the trial could take place a few weeks later (say mid-April), it would then be unrealistic to expect the court to produce a reasoned judgment on the issues before the proposed contract award in early May, and the principal reason for expedition would have been lost.

45. I should add, as to the timing of the trial, that I consider this debate to be slightly academic. For the reasons set out under the previous sub-heading, absent limited disclosure and agreed sampling, this trial would not be ready for many months. If I had been asked in the ordinary way to fix a trial date at the CMC, I would have indicated a trial date in November/December 2017.

6.5 Practical Considerations

46. There are a number of practical considerations which, on analysis, also support the conclusion that an expedited trial should not be ordered.

47. First, as set out in **Section 4** above, the claimant may still be awarded this contract. Accordingly, until the outcome of the tender process is known, the precise nature of the claimant's claim will not be known. I have already pointed out the difficulties the

claimant may face if it was awarded the contract but still wished to maintain its challenge to the tender documents. Moreover, on that scenario, any claim for damages, which has not been separately pleaded, would be in a lesser sum and would not, on any view, be urgent.

48. In addition, it would be very unsatisfactory for there to be an expedited trial at the same time as the tender evaluation/contract award process. I consider that that would create real difficulty and prejudice for the defendant, who would have to deal simultaneously with both the award process itself, and a trial challenging the basis of that process. Although Mr Coppel said that there was no specific evidence about the prejudice that would be caused, it is I think obvious enough to be readily inferred. Of course I accept that, because of the need for speedy relief in procurement disputes, there will be times when such an unattractive proposition for a defendant represents the only sensible (or the least-worst) solution to the problem. But for the reasons I have given, that is not this case.

6.6 Other Court Users

49. There is no doubt that any trial before the end of this term in the TCC would have an adverse effect on other court users. The diary is full. Of course, the TCC recognises that there will be times in procurement cases where other court users will be disadvantaged. The expedited trials ordered in both ***Covanta*** and ***Bristol Missing Link v Bristol City Council*** [2015] EWHC 876 (TCC) would both have caused disadvantages to other court users had they gone ahead but, in the circumstances of those cases, the court's discretion was still exercised in favour of expedition.

50. In the present case, there is nothing which leads me to conclude that other users should be disadvantaged in the way proposed. Indeed, one could imagine other users of the TCC being surprised to find that the court had given priority to a challenge to a tender process in which the claimant might still turn out to be successful. Whilst there may be some cases in which it would be appropriate to order an expedited trial for a claimant who is still involved in the tender process, and thus disadvantage other court users, this is again not that case.

6.7 Summary

51. For the reasons set out above, I have concluded that it would not be appropriate to order the expedited trial which the claimant sought at the hearing.

7. APPLICATION FOR A STAY

7.1 Principles

52. No authorities were drawn to my attention setting out the appropriate principles applicable to a stay of court proceedings. In my view, some of those principles applicable to expedition apply again, particularly in relation to procedural history and the like. In addition, it seems to me that the more fundamental questions are these:

    (a) Is a stay in accordance with the overriding objective?

(b) Is the potential detriment to the claimant caused by delay outweighed by the benefits of a stay to one or both parties and/or to the other users of the court?

7.2 Analysis

53. The defendant seeks a stay until early May 2017, which is when it is thought that the contract will be awarded. In my view, it is appropriate to stay these proceedings until 10 May 2017. There are a number of reasons for that.

54. First, even where the challenge is to the tender documents rather than to the contract award, both sides know that if, as here, the claimant is still involved in the procurement exercise, the loss will not crystallise until the award. As set out in paragraph 6 above, the claimant's solicitors made that very point in relation to the previous procurement exercise in their letter of 5 May 2016 when they suggested a stay of the previous proceedings. That is not to say that, in all such cases, a stay is appropriate. But it is a relevant factor.

55. Second the stay sought is, on any view, a short one: two months in duration. I consider that that is also a relevant factor.

56. Third, it is difficult to see what real detriment a delay of two months is going to cause the claimant, whilst the benefits to the defendant and to the other users of the TCC are plain and obvious. Moreover, because the proceedings may not continue if the claimant is awarded the contract, it is not possible to say that the delay, and the concomitant saving of cost, may not benefit the claimant as well.

57. I therefore order the stay of these proceedings until 10 May 2017. That is subject to **Section 7.3** below. It goes without saying that, if there are any further delays in the award of the contract, the claimant is entitled to come back to court and seek a timetable for trial in any event.

7.3 Suspension Arguments

58. At various times during the oral submissions, both parties sought to argue their case, not by reference to their respective applications for an expedited trial or a stay, but by reference to what might happen in the future if the claimant was not awarded the contract; if the defendant sought to lift the automatic suspension on awarding the contract to a third party; and if the claimant sought to oppose that application.

59. It is generally inappropriate for parties to seek to put down markers in this way in the hope of binding either me or another judge in the TCC as to the likely outcome of such an application. It is entirely speculative. The principles relating to such disputes are set out in ***Covanta***: with one exception, I am not prepared to go beyond that statement of the relevant principles in this case.

60. The exception is this. I have said at paragraph 45 above that it seems to me that a full trial in this case could not take place until November/December 2017. If a full trial could not take place until the end of the year, then in any future argument about suspension of a contract award, that might be a factor which told against a suspension. However, an alternative to a full trial would be a trial based on some form of sampling exercise. Of course, that proposal has only just been made and I am unable

to say, until it has been fully proposed, considered and debated, whether or not it would even be possible to have a trial of this sort on the basis of representative samples. I have also warned of the difficulties surrounding any truncated investigation at paragraphs 41-42 above.

61. But I can see that, potentially, sampling in this case could be an appropriate and cost-effective way forward. It is unrealistic to imagine that the court would solemnly work its way through over 6,000 tool types, putting a cross or a tick against each. Sampling in some form may well be critical to any trial: the issues may be the number of samples and their representative nature.

62. In addition, the advantages of a trial based on an agreed or ordered sampling exercise are considerable. For one thing, it would mean that the disclosure exercise could be cut down significantly, because it would relate only to the agreed sample items. For another, it would reduce the scope of the witness statements, and therefore the preparations for trial. All of this would be relevant to any future debate about the automatic suspension.

63. Accordingly, on 6 February 2017 I notified leading counsel of this conclusion and gave directions for the provision by the claimant of formal proposals in respect of sampling; a detailed response from the defendant; and a meeting between leading counsel to endeavour to agree a sampling exercise. That is the only exception to the orders that I make refusing to expedite the trial and staying the proceedings until 10 May 2017.