

PUBLIC PROCUREMENT: PUBLIC INTEREST PREVAILS AS HIGH COURT LIFTS SUSPENSION OF NETWORK RAIL CONTRACT

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Legal Briefings

In a judgment handed down on 20 December 2019, the High Court in [Alstom Transport UK Ltd v Network Rail Infrastructure Ltd \[2019\] EWHC 3585 \(TCC\)](#) allowed Network Rail Infrastructure Ltd (“**Network Rail**”) to enter into a major signalling contract with Siemens. The court lifted the automatic suspension which had been in place after an unsuccessful bidder in the procurement process, Alstom Transport UK Ltd (“**Alstom**”), issued a claim challenging Network Rail’s decision to award the contract to Siemens.

In reaching its decision, the court applied the *American Cyanamid* test. The court found that damages would be an adequate remedy for Alstom but not for Network Rail, and that the balance of convenience lay in favour of lifting the suspension.

Background

Network Rail had sought to procure a partner operator for the new digital train control system on the East Coast Main Line. The system was being introduced to improve safety and reduce delays and the contract had an estimated value of £1.8 billion.

After a year-long procurement process, on 10 July 2019, Siemens narrowly won, with a score of 77.71% against Alstom’s 76.39%.

Alstom challenged Network Rail's decision by issuing a claim under the Utilities Contracts Regulations 2016 ("**Utilities Contracts Regulations**"). Alstom sought an order setting aside Network Rail's decision to award the contract to Siemens, a declaration that Alstom should have been awarded the contract, and damages for lost profits and wasted tender costs.

Under the Utilities Contracts Regulations, when a claim form in respect of a contracting authority's decision to award the contract is issued, the contract award is automatically suspended. On 19 August 2019, Network Rail applied to Court to lift the automatic suspension and allow it to enter into the contract with Siemens.

Decision

O'Farrell J held that it is "*settled law*" that the *American Cyanamid* test should be applied when deciding whether to lift the suspension.

1. *Is there a serious issue to be tried?*

Network Rail conceded that there was a serious issue to be tried.

2. *Would damages be an adequate remedy for Alstom?*

The judgment explains that Network Rail found itself on the horns of interesting dilemma. It had initially argued that the alleged breaches were not "*sufficiently serious*" to justify the award of damages (as required by the Supreme Court in [Energy Solutions EU Ltd v Nuclear Decommissioning Authority \[2017\] UKSC 34](#)). If that was correct, however, Alstom would have no remedy in damages at all – a factor pointing in favour of maintaining the suspension. Network Rail therefore conceded that the breaches were "*sufficiently serious*".

This illustrates how defendant authorities in Network Rail's position are likely to be forced to run or drop the "*sufficiently serious*" defence early on in the process. If the authority runs the point, this increases the chance the automatic suspension will be maintained (because damages might not be an adequate remedy), but allows the authority to rely on the defence in a subsequent damages claim. On the other hand, if the authority concedes this point, it should increase the likelihood that the suspension will be lifted, but such an admission may impede its defence in a subsequent damages claim.

Alstom raised a number of arguments as to why damages would not be an adequate remedy. These were rejected by the court, which held that:

- Any losses incurred in the tendering process could be quantified.
- Alstom would not be at a disadvantage in future tenders, as it had comparable opportunities to tender and had gained experience on other European projects.
- Any negative impact on Alstom's employees, such as redundancies/HR costs, could be quantified.
- There was no negative impact on Alstom's ability to develop resources, as this could be gained through Danish and Spanish projects and subsequently applied in the UK.
- The loss of the contract did not threaten Alstom's solvency.
- There is no obligation, and it would be contrary to procurement rules, to ensure equitable apportionment of Network Rail projects (an argument Alstom raised because Siemens has a greater share of Network Rail's existing signalling work).

3. *Would damages be an adequate remedy for Network Rail?*

Network Rail argued that damages would not be an adequate remedy for three reasons.

One of those reasons was accepted. The court agreed that "*the delayed improvements to safety, and the wider impact on businesses and the travelling public caused by delays and disruption to rail services*" were matters that could not be quantified or fairly compensated by way of damages.

4. *Where does the balance of convenience lie?*

For completeness, the court went on to consider the balance of convenience and decided that it lay in favour of lifting the suspension.

The court had regard, in particular, to Network Rail's argument that it could not delay progress on vital signalling upgrades. This included work on the East Coast Main Line (from Kings Cross to Peterborough) worth £10m and on the Northern City Line (from Finsbury Park to Moorgate) worth £46m. There was an urgent need to replace degraded signalling works which required a decision in early 2020 to either proceed with the new contract or implement a conventional replacement system. The court held that there was a "*strong public interest*" in proceeding with the new contract as soon as possible as maintaining the suspension would likely "*cause abortive costs of urgent replacement*", "*years of delay*" and put the funding of the project at risk.

The court also considered the position of Siemens, for whom the continuation of the suspension would cause problems in retaining the specialised workforce assembled for the project and loss of a commercial advantage.

Finally, the court rejected Alstom's alternative case that the suspension should only be lifted for part of the contract. It held that this would still affect the urgent replacement works; there was a strong public interest in lifting the suspension in its entirety; and the commercial basis of Siemens' tender was reliant on it being awarded the full contract.

Network Rail's application to lift the suspension was granted. An expedited trial is scheduled to be heard in June 2020.

Comment

In line with the recent trend in cases of this nature, the court placed considerable emphasis on the public interest in lifting the suspension, including the delay it would cause in bringing about improvements to safety, and the wider impact on businesses and the travelling public caused by delays and disruption to rail services, if the suspension continued. The court found these were not matters which could be fairly compensated for by damages. It also found that the balance of convenience lay in favour of lifting the suspension, particularly so as not to delay progress on vital signalling upgrades.

The decision is also notable in illuminating that it may well be necessary for defendants to concede that alleged breaches are sufficiently serious to justify the award of damages, to avoid strengthening the claimants' argument that damages would not be an adequate remedy.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



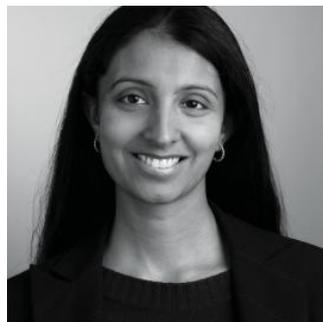
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