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Case No: HT-13-173

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 26 September 2013

Before :

THE HONOURABLE MR. JUSTICE COULSON

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Between:

Covanta Energy Ltd **Cla**

- and -

Merseyside Waste Disposal Authority **Defe**

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- -

Nigel Giffin QC and Joseph Barrett (instructed by **Pinsent Masons**) for the **Claimant**

Sarah Hannaford QC and Simon Taylor (instructed by **Eversheds**) for the **Defendant**

Hearing dates: 23 and 24 September 2013

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Judgment

The Hon. Mr. Justice Coulson:

1. INTRODUCTION

1.
The defendant, Merseyside Waste Disposal Authority ("MWDA") is a statutory waste disposal authority responsible for managing the municipal waste collected and delivered within its area. The claimant ("Covanta") is a company specialising in the development, construction and operation of Energy from Waste ("EfW") facilities. Between July 2006 and April 2013, MWDA carried out a lengthy procurement process for a proposed Resource Recovery Contract ("RRC") in respect of the processing of millions of tonnes of waste delivered to it by the district councils and residents of Merseyside.

2.
The principal purpose of the RRC is to reduce the amount of waste going to landfill and instead to use the waste to generate heat and power. The value of the RRC is in excess of £1 billion and its intended duration has been put at 30-35 years.

3.

Between October 2007 and April 2013 Covanta, one of the tenderers for the RRC, were closely involved in the competitive dialogue tender procedure required by MWDA. Such a procedure can only be used in relation to the award of a particularly complex contract where the contracting authority is not able to define the technical means capable of satisfying its needs or objectives and/or cannot specify the legal or financial make-up of a project. The nature of the competitive dialogue procedure, as set out in Regulation 18(20) of the Public Contracts Regulations 2006 (as amended), is that the contracting authority must engage in a dialogue with the economic operators selected to participate. It usually proceeds by way of the progressive development of the solutions proposed by the tenderers, and in the light of the views expressed about those solutions by the authority. That is what happened in this case.

4.
Between December 2009 and June 2012, Covanta and a consortium headed by SITA were the only two tenderers involved in the detailed discussions with MWDA. The deadline for the final tenders was 22 June 2012. Ten months later, in April 2013, MWDA announced that they intended to award the RRC to SITA.

5.
When Covanta received details of the tender evaluation process, they raised a series of concerns, alleging that there were manifest errors in that evaluation. In addition, they were surprised to discover that, despite their detailed involvement in the competitive dialogue procedure, two of the key elements of their tender received no marks at all, and were described as “fundamentally unacceptable”, although that was a term used in the tender evaluation criteria which Covanta had been given. In consequence of their concerns, on 15 May 2013, Covanta commenced these proceedings in which they seek orders setting aside MWDA’s decision not to award them the contract and to restrain MWDA from entering into the contract with SITA. They also seek an order requiring MWDA lawfully to re-evaluate the respective bids.

6.
At a hearing before Akenhead J on 30 August 2013, a two day hearing was fixed for 23 and 24 September 2013 for the hearing of Covanta’s claim for an interim injunction to restrain MWDA from entering into the RRC with SITA until the conclusion of the trial. This judgment arises therefore, from that hearing, and I should emphasise at the outset the enormous assistance that I derived from the written and oral submissions of both leading counsel. Without them, this hearing would have taken much longer than it did.

7.
Covanta’s primary case is that Regulation 47G of the Public Contracts Regulations 2006 (as amended) applies to this procurement process and thus there is an automatic suspension requiring MWDA to refrain from entering into the proposed contract with SITA. However, MWDA say that this amended Regulation does not apply because the procurement process began before it came into force.

8.
If the amended Regulations, including Regulation 47G, apply to this case, then MWDA seek to discharge the automatic suspension pursuant to Regulation 47H. The authorities make plain that any application under Rule 47H has to be treated in the same way as an application for an interim injunction. And if MWDA are right and the amended Regulations do not apply, so that there is no automatic suspension, then Covanta’s fall back position is to seek an interim injunction in accordance with the well known principles in **American Cyanamid**. Accordingly, the real issue between the

parties is whether or not there should be an interim injunction restraining MWDA from entering into the RRC with SITA until the end of the trial on the substantive issues.

2. BRIEF CHRONOLOGY

9.
On 26 July 2006, MWDA published a Prior Information Notice in the Official Journal of European Union in respect of the proposed RRC. The notice said that service provision under the RRC (and two related contracts) would commence in 2008.

10.
On 9 July 2007, MWDA published a contract notice in the Official Journal in respect of the RRC. This stated that the tender process would be conducted using the competitive dialogue procedure. At the same time, MWDA issued a descriptive document in respect of the RRC stating that final tenders would be submitted by 2 February 2010 and a preferred bidder would be appointed by 7 July 2010.

11.
On 13 August 2007, Covanta submitted a Pre-Qualification Questionnaire ("PQQ") and, on 9 October 2007, were notified that it had been successful at that stage. Covanta were therefore invited to participate in the competitive dialogue procedure with, at that time, fifteen other participants. The procedure had three stages: stage one, which was an invitation to submit outline solutions; stage two, which was an invitation to submit detailed solutions; and stage three, which was a call for final tenders.

12.
On 6 November 2007, Covanta received the stage one invitation to submit an outline solution. It submitted its response on 11 January 2008. On 30 June 2008, Covanta was notified that it has been successful at stage one. By that time, there were four remaining participants, including both Covanta and SITA.

13.
On 20 March 2009, Covanta submitted its stage two detailed solutions response. On 15 December 2009 Covanta was notified that it had also been successful at stage two and would, along with SITA, be asked to proceed to the final stage of the competitive dialogue process. At that point, the other two prospective tenderers were eliminated.

14.
Between 17 December 2009 and 15 June 2012, Covanta and MWDA were involved in detailed discussions in relation to the RRC. Covanta were invited to submit their final tender by 22 June 2012, which they duly did.

15.
Although the tender process had already taken five years from PQQ to final tender, it took MWDA a further ten months before completing the evaluation of the tenders. On 19 April 2013, MWDA wrote to Covanta to notify it that its bid had been unsuccessful. The letter also informed Covanta that SITA's bid had been successful. In relation to the tender evaluation, the letter said:

(a)
Under the 'financial' criteria, which accounted for 40% of the total score, Covanta scored 17.85% compared with SITA's score of 11.33%;

(b)
Under both the ‘legal and contractual’ and the ‘overall integrity’ criteria, Covanta’s bid had been scored at 0%.

The letter went on to suggest that those two aspects of the Covanta tender were “fundamentally unacceptable’.

16.
Covanta commenced these proceedings within the 30 day period required by the Public Contract Regulations 2006 (as amended). As I have noted, in their Particulars of Claim, they raise a number of issues relating to the evaluation process alleging manifest errors in the scoring of their tender. In addition, they allege that something must have gone very wrong when a six year competitive dialogue procedure resulted in a conclusion that important aspects of the tender, that was the final result of that dialogue, were “fundamentally unacceptable”.

3. DO THE AMENDED OR UN-AMENDED PUBLIC CONTRACT REGULATIONS APPLY?

17.
The Public Contracts Regulations 2006 have their origin in the EU Council Directive 89/665/EEC, referred to at the hearing as “the Original Remedies Directive”. Amongst other things, that required Member States to ensure that the decisions of contracting authorities could be reviewed effectively and, in particular, as rapidly as possible. Relevant Articles from that Directive include the following:

Article 1 provides:

“1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, 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, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.”

Article 2 (1)(a)(b) provides:

“1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to: ”

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(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…”

Article 2 (6) provides:

“Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.”

18.
In **Alcatel Austria AG** (Case C-81/98) [1999] ECR 1-7671, the European Court of Justice was concerned with a contract in Austria that had been awarded before the unsuccessful tenderer could mount any sort of challenge to that decision. The Court held as follows:

“29. By its first question, the national court is asking essentially whether the combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Directive 89/665 must be interpreted as meaning that the Member States are required to ensure that the contracting authority's decision, prior to the conclusion of the contract, as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, regardless of the possibility, once the contract has been concluded, of obtaining an award of damages.

…

33. As is clear from the first and second recitals in the preamble to Directive 89/665, the directive reinforces existing arrangements at both national and Community level for ensuring effective application of Community directives on the award of public contracts, in particular at the stage where infringements can still be rectified

…

38. Moreover, the interpretation proposed … might lead to the systematic removal of the most important decision of the contracting authority, that is to say the award of the contract, from the purview of the measures which, under Article 2(1) of Directive 89/665, must be taken concerning the review procedures referred to in Article 1, thereby undermining the purpose of Directive 89/665 which, as noted in paragraph 34 of this judgment, is to establish effective and rapid procedures to review unlawful decisions of the contracting authority at a stage where infringements may still be rectified.

…

43. It follows … Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.”

19.
In the United Kingdom the Public Contracts Regulations 2006 came into force on 31 January 2006. They were designed to comply with the Original Remedies Directive. At Regulation 32(3) there was a provision requiring the contracting authority to allow a period of at least ten days to elapse between the date of dispatch of the contract award notice, and the date on which the authority proposed to enter into the contract. That was known as a standstill agreement and it appears that it was included in the Regulations specifically because of the decision in **Alcatel** and subsequent European Court decisions.

20.
However, also because of the decision in **Alcatel** and other procurement cases, the European Commission concluded that more specific provisions were needed in relation to the remedies for unlawful procurement. In consequence, Directive 2007/66/EC, referred to at the hearing before me as "the New Remedies Directive", expressly addressed this need. The Recitals included the following:

"(3) Consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms established by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected…

(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not…

(12) Seeking review shortly before the end of the minimum standstill period should not have the effect of depriving the body responsible for review procedures of the minimum time needed to act, in particular to extend the standstill period for the conclusion of the contract. It is thus necessary to provide for an independent minimum standstill period that should not end before the review body has taken a decision on the application. This should not prevent the review body from making a prior assessment of whether the review as such is admissible…

(18) In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective sanctions should apply. Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle…

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter."

21.
In addition, the Articles in the Original Remedies Directive were significantly revamped. It is unnecessary to set them all out but Article 2 is perhaps illustrative.

"Article 2: Requirements for Review Procedures

1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned,

including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority…

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review…

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits."

22.
It is also necessary to refer to Article 3 of the New Remedies Directive headed 'Transposition', because it dealt with the implementation of the New Remedies Directive. It required the Member States to bring them into force by 20 December 2009. There was no reference there to any transitional provisions.

23.
In the United Kingdom effect was given to the New Remedies Directive by the Public Contracts (Amendment) Regulations 2009 introduced by way of S.I. 2009 No. 2992. The amendments provided, at Article 47G that, where proceedings were started before the contract was entered into, the starting of the proceedings required the contracting authority to refrain from entering into the contract. Regulation 47H provided as follows:

"47H.—(1) In proceedings, the Court may, where relevant, make an interim order—

(a) bringing to an end the requirement imposed by regulation 47G(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 47A or 47B 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 47G(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)."

24.

In addition, Regulation 47K dealt with the grounds for ineffectiveness, which related back to Regulation 47J and the court's power to rule that a contract had been entered into in disputed circumstances was ineffective.

25.
The S.I. also included transitional provisions. Paragraph 11 provided as follows:

"11. (1) Nothing in these Regulations affects any contract award procedure commenced before 20th December 2009."

26.
On behalf of Covanta, Mr Giffin QC argued that, whilst changes in the substantive law will normally be presumed not to affect existing situations, no such presumption applies in relation to procedural provisions concerned with breaches yet to occur. In this regard he relied on, amongst others, the European cases **Salumi**[1981] ECR 5735 and **Hochtief**[2009] ECR 1-9889. He argued that the new remedies introduced by the New Remedies Directive were "quintessentially procedural" and therefore, in the absence of any transitional provisions in that Directive, they applied to this procurement situation, regardless of when the tender procedure actually started. Secondly, he maintained that the Public Contract Regulations as they stood prior to the amendments in 2009 were deficient in EU law, because they did not properly provide a remedy to prevent an authority from entering into a contract when the tender process was in dispute. He submitted that it could not have been the intention of the New Remedies Directive that such a deficiency should be permitted to continue to affect procurements that just happened to have started before 20 December 2009. He maintained that, because the un-amended Public Contracts Regulations were deficient, EU law did not permit that deficient regime to be left in place, potentially for a substantial number of years.

27.
Those submissions led to Mr Giffin's final point which was that, because the effect of the transitional provisions at paragraph 11 of the S.I., would be to deny the remedies set out in the New Remedies Directive to tenderers in the United Kingdom where the process commenced before 20 December 2009, those transitional provisions were unlawful and of no effect.

28.
In response to that submission, Ms Hannaford QC, on behalf of MWDA, relied on three basic points. First, she pointed to the transitional provisions of these and other similar Regulations, such as the Utilities Contracts Regulations 2006 and the Defence and Security Public Contracts Regulations 2011, each of which provided that they did not affect any contract award procedure commenced before a particular date. She said that these, and the transitional provisions in issue here, were a legitimate implementation of the relevant Directives and had never before been challenged as unlawful. Secondly, she submitted that the position pursuant to the amended Regulations and the Statutory Instrument were clear and that there was no room for suggesting that the amendments did not comply with EU law. And thirdly, she argued that, in any event, the Directive was not directly effective; in other words, it did not permit an individual to bring a claim pursuant to that Directive in circumstances where it had been implemented by the United Kingdom. In support of that submission she said that there was nothing in the New Remedies Directive that was 'unconditional' and/or 'sufficiently precise' in order to allow an individual to bring proceedings pursuant to it.

29.
I consider that on this point, Ms Hannaford's submissions are to be preferred. My reasons are briefly as follows:

(a)
I consider that it is very important that the regulations governing the procurement process itself, and its aftermath, should be clear and certain. In **The Law of Public and Utilities Procurement (Arrowsmith, 2nd Edition paragraph 3.37)**, the learned author says that:

"For reasons of legal certainty and coherence, the general rule should be that decisions made pursuant to a procedure properly launched need follow only the legal rules in force at the time the procedure is launched."

I respectfully agree with that. As a result of the transitional provisions in the S.I. certainty dictates that the position in the present case was governed by the original, unamended Public Contracts Regulations, which excluded the remedy of automatic suspension.

(b)
The transitional provisions say expressly that the amendments do not affect any contract award procedure commenced before the 20 December 2009. It seems to me that that is unambiguous. It has never been challenged. It is similar to other S.I.'s introducing other similar Regulations, which have also not been the subject of this sort of challenge.

(c)
Directives do not generally have direct effect. They are instead to be implemented by the Member States. Accordingly, it is for Member States to choose the form and method by which the result in the Directive is to be achieved. In my judgment, that is what both the Public Contracts Regulations 2006 and the Amendment Regulations 2009 have done. The New Remedies Directive did not expressly require automatic suspension of contract award procedures in the form set out in Regulation 47H to apply to procurements which commenced before implementation date. Moreover, I do not consider that that conclusion is contrary to the decision in **Lammerzahl**[2007] ECR 1-8415.

(d)
Furthermore, I do not consider that the contents of the New Remedies Directive mean that the unamended Public Contracts Regulations 2006 can properly be described as deficient. The New Remedies Directive was a refinement, an advance on that which had been proposed in the original Directive. And although it therefore required amendments to the 2006 Regulations, it seems to me that that is a long way from saying that, in consequence, those unamended Regulations were, in themselves, defective.

30.
I also disagree with a more fundamental aspect of Mr Giffin's submissions. I do not accept that remedies, or at least the remedies in the New Remedies Directive, are "quintessentially procedural". Indeed, in the present case, when we come on to consider the balance of convenience, Mr Giffin argues that the specific nature of the remedies provided for in the Directive, now included in the amended Regulations (particularly the emphasis on there being a proper review before the contract is let), is of critical importance to Covanta's case. It seems to me that such a submission is based on a premise that the remedies are substantive rather than procedural.

31.
That conclusion was also supported by Ms Hannaford's final submission on this topic, which was to identify a hypothetical tender procedure in which the authority made one manifest error in relation to one tender before 20 December 2009, and another manifest error in relation to another tender after that date. She said that on the basis of Covanta's case, that would allow the second tenderer to allege

ineffectiveness, the most draconian of the new rights and remedies set out in the amendments to the Regulations, whereas the first tenderer would not have such a remedy. She submitted that such a situation could not possibly be appropriate and fell far short of the necessary certainty required in the procurement process. For the reasons that I have given, I agree with that submission.

32.
In the round, therefore, I take the view that there is no tension between the Directives and the transitional provisions in the amended 2006 Regulations. Moreover, even if there was, it is not enough to warrant my taking the very significant step of disapplying part of the S.I. Accordingly, in my judgment, the automatic suspension provisions do not apply to this case. The issue that remains is whether or not, in all the circumstances, the court should award an interim injunction preventing MWDA from contracting with SITA until the trial of the issues in this case.

33.
Finally I should add this on the first issue. The dispute about the Regulations shows up clearly the importance of the particular remedies provided for in the EU Directives and the Regulations. There is now, for the reasons that I have given, a definite emphasis on remedies which strive to allow an unsuccessful bidder to challenge a proposed contract before it has been let. The point becomes relevant of course when, later in this judgment, I turn to consider the balance of convenience.

4. THE BASIC APPROACH

34.
The procedure to be adopted by the court in hearing an application for an interlocutory injunction, and the test to be applied, were laid down by the House of Lords in **American Cyanamid Co v Ethicon Ltd**[1975] AC 396. The first question is whether there is a serious issue to be tried. If there is, then there are two further questions: namely whether damages are an adequate remedy for a party who was injured by the grant or the failure to grant the injunction, and the more general question as to where the balance of convenience lies. These two questions have to be considered in stages because, as Lord Goff noted in **R v Secretary of State for Transport ex parte Factortame Ltd (No 2**[1991] 1 AC 603, the relevance of the availability of an adequate remedy in damages, either to the claimant seeking the injunction or to the defendant in the event that an injunction is granted against him should always be considered first.

35.
As to the overall approach required by these principles, I have reminded myself of the dicta in a number of the subsequent cases to which I was referred, including **Fellowes and Son v Fisher** [1976] 1 QB 122 CA, and **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] 1 WLR. In addition, I find considerable assistance in the judgment of Chadwick J (as he then was) in **Nottingham Building Society v Eurodynamics Systems**[1993] FSR 468 where he said that:

“The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be ‘wrong’ in the sense of granting an interlocutory injunction to a party who fails to establish his rights at trial (or would fail if there was a trial) or, alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trail.”

In a case such as this, involving a large, long-term contract which has been many years in the making, ‘the least risk of injustice’ is, I think, a particularly important consideration.

36.

It is common ground that the **American Cyanamid** is the appropriate test to be applied in a procurement case where an unsuccessful tenderer is seeking an injunction preventing the authority from entering into a contract until the end of the trial. The following decisions make that plain:

(a)
Letting International Ltd v Newham LBC[2007] EWCA Civ 1522 (and in particular paragraph 12 of the judgment of Moore-Bick LJ);

(b)
Altsom v Eurostar[2010] EWHC 2747 (Ch) (and in particular paragraphs 76-81 of the judgment of Vos J).

5. IS THERE A SERIOUS ISSUE TO BE TRIED?

37.
Before Akenhead J last month, MWDA conceded that, for the purposes of the application for an interim injunction, there was a serious issue to be tried. I consider that that concession was properly made. In particular, I am aware that there is very little authority on the rights and obligations imposed by the competitive dialogue procedure. It may seem, at least at first sight, a curious result that six years of procurement process (including two and a half years of intensive dialogue between authority and tenderer) can lead to the authority's rejection of important aspects of that tender in so firm a manner as occurred here. That suggests that something, somewhere, went very wrong with the tender process. Of course, the issue as to what that was, and the nature of any and all warnings given by MWDA during the process, about the matters to which they ultimately objected, can only be resolved at the trial. I deal below with some of the practical considerations that arise from such a trial.

38.
Notwithstanding her concession, Ms Hannaford pointed out that part of MWDA's case is that Covanta had knowledge of some of the matters in respect of which it now complains for much longer than the final thirty days before commencement of the proceedings. Thus it is clear that limitation will be very much in issue at the trial. In one sense, that only makes good my previous point: since Covanta started these proceedings within thirty days of being told that their tender was unacceptable, MWDA's limitation argument must, of necessity, rely on its alleged disclosure to Covanta of some, or all, of their concerns before the notification of the failure of the bid in April 2013. That highlights the importance at the trial of the exchanges between the parties during the competitive dialogue procedure. It also raises a point of mixed fact and law because it means that on MWDA's case, a contractor involved in a competitive dialogue would still be obliged to start proceedings before the end of that dialogue.

6. THE ADEQUACY OF DAMAGES

(a)
The Relevant Principles

39.
Although leading counsel on both sides said, on more than one occasion, that all they were seeking to do was to apply **American Cyanamid** to the facts of the case, in relation to the issue of adequacy (or otherwise) of damages as a remedy, they each hinted at a more subtle subtext. Thus, on behalf of Covanta, Mr Giffin, although expressly disavowing the argument that the specific remedies allowed by

the New Remedies Directive led to any sort of presumption or bias in favour of granting an interim injunction, made submissions which, from time to time, certainly implied that such a steer was at least a possibility. And, although Ms Hannaford agreed that every case should be judged on its own facts, there was sometimes a hint in some of her submissions that, as a matter of principle, wherever damages were capable of being assessed by the court, no matter how difficult or rough and ready such a process might be, an injunction would be appropriate.

40.
In my view, to the extent that they were relied upon, both of these extreme positions are wrong in principle. There is no presumption in favour of an injunction merely because the various EU Directives stress the importance of a review of the tender procedure before the contract is finally let. And by the same token, there is no presumption in favour of refusing an injunction merely because, if it had to, the court could make some attempt at ascertaining damages. However, once those two extreme positions are firmly ruled out, it is, I think, instructive to look at some of the authorities concerned with the adequacy, or otherwise, of damages.

41.
The cases following **American Cyanamid** make clear that it will normally be the case that, if damages are an adequate remedy, the claim for an interim injunction will fail. However, such an outcome is not guaranteed and there are cases where, in the exercise of the court's discretion, an interim injunction has been granted even though damages might be capable of being an adequate remedy. That is particularly true in cases where the assessment of damages might be difficult, or where the assessment is by reference to the loss of a chance.

42.
At paragraph 27/005 of **Chitty on Contracts, 31st Edition**, the learned author notes that, when dealing with the adequacy of damages, the courts have more recently asked whether specific performance was the most appropriate remedy in the circumstances of each case. He goes on:

"The question is not whether damages are an 'adequate' remedy, but whether specific performance will 'do more perfect and complete justice than an award of damages'."

A subsequent passage in the book makes clear that this applies to interim injunctions as much as to specific performance.

43.
Thus, in **Evans Marshall & Co v Bertola SA (No 1)** [1973] 1 WLR 349 at 379, the court noted that the standard question 'Are damages an adequate remedy?' might perhaps, in the light of more recent authorities, be re-written as: 'Is it just, in all the circumstances, that a claimant should be confined to his remedy in damages?' However, it is right to note, as Ms Hannaford did, that that was not an injunction case. In the more recent case of **Iraci v Fallon**[2011] EWCA Civ 668, an interim injunction was granted in part because of difficulties in assessing the loss of chance, and therefore the risk that damages were not an adequate remedy. In that case, Jackson LJ expressly approved the passage in **Chitty** to which I have already referred.

44.
There are a number of procurement cases where the difficulty in assessing damages, particularly where the claim has to be calculated by reference to the loss of chance, has led the court to conclude that damages were not an adequate remedy for the claimant, even though, on the balance of convenience, an interim injunction was not granted in every case. Those cases include:

(a)

Letting International Ltd v Newham LBC[2007] EWCA Civ 1522, where the difficulty in assessing the value of a lost chance was one factor that persuaded the Court of Appeal that an interim injunction should be granted. Moore-Bick LJ said:

"33. I turn first, then, to consider the adequacy of a remedy in damages. Mr Giffin's principal submission was that if the contractor is confined to a remedy in damages, as it will be if the present order is discharged, the quantification of its loss would prove very problematical. That is because it will have to take account not only that the claim will for the loss of a chance of being successful in a fairly operated tender process (which will have to take account of how other bidders would have acted under those circumstances), but also the consequential loss of the chance of being called on by the council to provide services pursuant to the framework contract…

35. To some extent I have already dealt with Miss Holmes' [counsel for the authority] points, which in my view tend, if anything, to reinforce the contractor's argument that, since loss is likely to be so difficult to assess, damages are not an adequate remedy as far as it is concerned. However, they also overlook the fact that the tender procedure is not yet complete and no contract has yet been awarded…

36. A loss of an opportunity to take part in a fair tendering process on equal terms with other bidders may be difficult to evaluate in monetary terms but cannot be said to be on no commercial value at all."

(b)

Morrisons Facilities Services Ltd v Norwich City Council[2010] EWHC 487 (Ch) where Arnold J concluded that damages would not be an adequate remedy in part because of the difficulty in assessing those damages. He accepted the submission that "in a case where one of the complaints is that of undisclosed criteria, it is very difficult indeed for the court at trial, to assess damages because assessment of what chance has been lost by the claimant, in those circumstances, is virtually impossible." The judge also said that the fact that the only remedy available once a contract had been entered into was that of damages, as opposed to the potential remedies envisaged by the New Remedies Directive, was a relevant consideration to be taken into account in assessing the overall balance of convenience, but was not relevant to the issue as to the adequacy of damages. In that case, he granted an injunction, in part because he considered that the delay, which was likely to be three months, was not unreasonable in the context of a new regime following the expiry of a ten year contract term.

(c)

Alstom Transport v Eurostar International Ltd [2010] EWHC 2747 where again the difficulty of assessing damages, including the effect on future market advantage, meant that damages were found not to be an adequate remedy for the claimant. An interim injunction was however refused because of the particularly adverse consequences to Eurostar if the contract was held up. As Vos J (as he then was) put it at paragraph 132 of his judgment, "It could be disastrous for Eurostar's business model if it were to be delayed still further in procuring its new trains". He concluded that since damages were an inadequate remedy for both parties, the balance of convenience favoured Eurostar for that reason and he refusing the injunction.

(d)

Indigo Services (UK) Ltd v The Colchester Institute Corporation[2010] EWHC 3237 (QB) where, in another loss of a chance case, the Deputy High Court Judge said:

“33…quantification of the profits which would be earned by Indigo over the period of the contract would be inherently difficult, and necessarily very imprecise, though of course an operation which the court can, if required, carry out.

34. Some might consider a discounted monetary remedy is in principal preferable to an all-or-nothing gamble possibly obtaining the contract on a re-run of all or part of the tender process. I do not however consider that this evaluation is one with which the court should be involved.

35. I have therefore concluded that a claim for damages would not be intrinsically an adequate remedy and that in that regard failure to continue the standstill could properly be regarded as a prejudice to Indigo.”

Again, however, the balance of irredeemable prejudice pointed in favour of lifting the standstill. The various reasons for that are set out in the latter part of the judgment.

(e)

Metropolitan Resources Northwest Ltd v Home Secretary[2011] EWHC 1186 (Ch) where again the difficulty of assessing damages meant that they were not regarded by Newey J as an adequate remedy. On that occasion an injunction was refused because of the particularly adverse consequences to the authority, and the accommodation that it was seeking to build, if there was a delay in the letting of the contract.

45.
In addition to those cases, Ms Hannaford QC rightly drew my attention to two decisions of Akenhead J, **European Dynamics SA v HM Treasury**[2009] EWHC 3419 (TCC) and **Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust**[2010] EWHC 3332 (TCC). In both of those cases, Akenhead J concluded, on the particular facts before him, that damages would be an adequate remedy for the claimant and he refused an interim injunction principally on that ground. There was a suggestion that his judgments in both those cases were based on the conclusion that, since damages could be assessed by the court, they were an adequate remedy, even if the ascertainment might be imprecise, and that this was therefore a complete answer to any application for an interim injunction.

46.
I do not regard either of the judgments of Akenhead J as laying down this or any other point of principle. Instead, they are both based on a careful assessment of all of the circumstances relevant to the adequacy of damages and the balance of convenience. In both cases, he found on the facts that damages were (or would likely to be) an adequate remedy, and it was that important factor which pointed away from the granting of the injunction.

47.
If, however, I am wrong about that, and in **European Dynamics** and **Exel** Akenhead J was saying that, as a matter of principle, wherever damages could be calculated, no matter if the ascertainment was difficult or likely to be imprecise or inaccurate, an injunction should automatically be refused, then I do not consider that such an approach was in accordance with the cases which I have noted in paragraph 44 above. Whilst those cases make clear that there was no presumption in favour of an injunction they also demonstrate that there is no presumption the other way. The mere fact that damages could be ascertained in some rough and ready manner did not automatically mean that an interim injunction should be refused.

48.
Accordingly, I would summarise the relevant principles concerning the adequacy of damages as follows:

(a)
If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so (**American Cyanamid**, **Fellowes**, **National Bank**);

(b)
In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages (as in **Evans Marshall** and the passage from **Chitty**);

(c)
If damages are difficult to assess, or if they involve a speculative ascertainment of the value of a loss of a chance, then that may not be sufficient to prevent an interim injunction (**Araci**);

(d)
In procurement cases, the availability of a remedy of review before the contract was entered into, is not relevant to the issue as to the adequacy of damages, although it is relevant to the balance of convenience (**Morrisons**).

(e)
There are a number of procurement cases in which the difficulty of assessing damages based on the loss of a chance and the speculative or 'discounted' nature of the ascertainment, has been a factor which the court has taken into account in concluding that damages would not be an adequate remedy (**Letting International**, **Morrisons**, **Alstom**, **Indigo Services**, and **Metropolitan Resources**). There are also cases where, on the facts, damages have been held to be an adequate remedy and the injunction therefore refused (**European Dynamics**, **Exel**).

49.
I now turn to apply these principles to the facts of this case.

(b)
Analysis: Covanta's Position

50.
The first question is whether damages would be an adequate remedy if Covanta do not obtain the injunction that they seek and then went on to be successful at trial. In my judgment, for the reasons noted below, damages would not be an adequate remedy.

51.
Taking first Covanta's case based on manifest errors in the tender evaluation, I accept that the court may be able to attempt to ascertain the loss thereby caused. But I consider that such a process would be difficult and imprecise. That is partly because of the number of errors alleged: in contrast to **Exel**, **European Dynamics** and the **Lettings** case when it came to trial ([2008] EWHC 1583 (QB)), where the errors were few in number and their effect was readily ascertainable, or thought to be so, the present case involves a large number of alleged errors. Thus, the effect of each of which would need to be evaluated before any assessment could be made as to the value (if any) of the loss of a chance. Moreover, for a contract such as this, it would be difficult to work out what Covanta's actual rate of return might have been, because it would depend on so many variables. There is also a scaling factor

to which Mr Giffin referred, and which I accept would also add another layer of difficulty. I therefore consider that the authorities noted in paragraph 44 above, which stress the difficulties of ascertaining the quantum of the loss of a chance claim in this sort of situation, and the relevance of those difficulties to the issue of adequacy of damages as a remedy, are directly in point here.

52.
However, I am in no doubt at all that that conclusion is even more applicable in relation to the other element of the Covanta claim, namely the allegations that the competitive dialogue procedure was not followed by MWDA.

53.
I consider that the ascertainment of damages arising from this part of the claim would be, to use Arnold J's words in **Morrisons**, "virtually impossible". That is because the court will have to look at each relevant exchange between MWDA and Covanta, which may run to hundreds or even thousands, to see if Covanta were materially misled by MWDA or whether, conversely, MWDA were making it plain what they wanted and how they expected Covanta to react. Each relevant potential miscommunication would need to be identified and analysed. Then, in order to calculate loss in respect of each such exchange or miscommunication, the court would have to ask itself whether, if either party had taken a different position, that would have made a difference to Covanta's bid strategy and/or bid. In addition, it may also be relevant, where there was any lack of clarity from, or change of position by, MWDA, to consider whether, if they had taken a different course, that would have made a difference to SITA's bid as well. This is because, sometimes, it is only possible to look at causation in an exercise like this by reference to the likely impact on each of the competing bids. The court would then have to decide whether, if there were such miscommunications or areas of confusion, a different approach by either MWDA or Covanta might have led to a different result or, at the very least, might have been part of a cluster of such miscommunications which could have led to a different result. Finally, the court would have to ascertain how the loss of chance could fairly be expressed and how it could be quantified, all by reference to a hypothetical tender that had never in fact been submitted.

54.
It is also inherent in Covanta's claim that important matters were never made clear to them by MWDA. In my view, that is very similar to those procurement cases where the complaints concern undisclosed tender evaluation criteria (although, for the reasons that I have given, the exercise is going to be much more complex and fact-specific here). Cases involving undisclosed criteria are always difficult to ascertain by way of damages: indeed it was just such a claim that Arnold J described in **Morrisons** as virtually impossible to calculate. Moreover, although I consider it to be of less significance here, there is also a possible issue of reputational damage, which was a factor which Vos J took into account in **Alstom** in reaching the same conclusion.

55.
Accordingly, for those reasons, I conclude that damages would not be an adequate remedy for Covanta if MWDA entered into a contract with SITA before the court had reviewed the tender process and it turned out that Covanta's criticisms were justified.

(c)
Analysis: MWDA's Position

56.

I then turn to MWDA's position. If an injunction was granted, and Covanta were then unsuccessful at trial, could MWDA be properly compensated for in damages?

57.
On this hypothesis, MWDA would have various financial claims, in particular the claim for the additional cost of sending waste for landfill rather than using it to extract energy. There is no dispute between the parties that these additional costs, referable to any period of delay, would be quite capable of being ascertained by the court. Moreover, given that MWDA accept that a guarantee from Covanta's parent company would be sufficient security for such losses, that part of MWDA's hypothetical financial claim would be easily capable of ascertainment. Damages would, therefore, be an adequate remedy.

58.
That leaves the environmental aspects of any delay caused by the grant of an interim injunction. Using waste for landfill is less environmentally friendly than using it for energy. There will therefore be a detrimental environmental effect if the RRC is delayed. On that basis, it is unarguable that, in relation to that aspect of MWDA's position at least, damages would not be an adequate remedy. Any detriment to the public interest in protecting the environment is simply not something that is capable of being compensated for by a subsequent financial payment. Accordingly, I conclude that, in relation to that part of MWDA's case, for them too, damages would not be an adequate remedy. I return subsequently to that point when considering the balance of convenience.

7. THE BALANCE OF CONVENIENCE

(a)
The Factors in Favour of Granting the Injunction

59.
In considering the balance of convenience, I find that the following factors favour granting the interim injunction. First, it is in the public interest that authorities such as MWDA comply with procurement legislation. This is a major contract involving a large sum of public money. Secondly, for the reasons that I have given, damages would not be an adequate remedy for Covanta. Thirdly, if an injunction was not granted, Covanta would be deprived of the remedy prescribed by EU law, a relevant factor in relation to the balance of convenience (Arnold J in **Morrisons**).

60.
Fourthly, if Covanta did not obtain an injunction but were successful at trial, their financial claim, however it is ascertained, is likely to be considerable, and much larger than MWDA have the resources to meet. Covanta say their loss of profit is in the order of £160 million. Whatever the final amount of any damages claim, the money would have to be paid for by the customers, namely those on whose behalf MWDA collect waste. Essentially, therefore, those taxpayers would be paying for this service twice over: one payment to SITA to actually perform the service pursuant to the RRC, and one payment to Covanta who (on this hypothesis) were unfairly denied the opportunity of providing that same service. It cannot be in the public interest for taxpayers to make two payments for one service. Realistically perhaps, Ms Hannaford did not contradict this aspect of Covanta's case on the balance of convenience.

61.
In my judgment, when taken together, those four factors make a powerful case in favour of granting the injunction. But critically, I consider that that case is strengthened still further by a fifth and final

point. I address that point in detail below in relation to MWDA's position on delay. It is that, in my view, in the context of this particular procurement exercise, the impact of any likely further delay in the letting of the RRC, could properly be described as modest.

(a)
The Factors in Favour of Refusing the Injunction

62.
There are plainly factors in favour of refusing the injunction. I have dealt already with the financial costs of the delay, although those are unlikely to be significant, certainly in the context of the value of the RRC. In addition, Ms Hannaford properly raises the possibility that a delay could have an adverse effect on SITA. However, it is right that this point is not over-exaggerated because there is no evidence in the papers that this is a significant or likely risk. As Mr Giffin QC notes, the latest communication from SITA makes plain that whatever happens, they currently remain willing and keen to carry out this large contract. The possible risk, therefore, is a factor, but it is not a significant one on the evidence.

63.
There are, however, two remaining points which I need to consider in greater detail, because they are particular matters which MWDA claimed should tilt the balance of convenience in favour of refusing the injunction. The first concerns Covanta's change in strategy and the second is the impact of any further delay, both in the environmental context and generally.

64.
As to Covanta's change of strategy, the evidence shows that, following their failure to be awarded this contract, Covanta considerably reduced the scope of their United Kingdom operations. Ms Hannaford argued that, in such circumstances, Covanta may not be able to perform this contract in any event, and that because of that change of strategy, the balance of convenience favoured allowing the contract with SITA to be concluded next month.

65.
I do not accept that submission for two reasons. Firstly, I do not consider that it is borne out by the evidence. On the contrary, the evidence here is that, although Covanta have, not unreasonably, taken steps to reduce their cost overhead as a result of their failure to obtain the RRC, and have significantly scaled down their UK operation, they remain active in the United Kingdom waste market. They have explained precisely how they would perform this contract should it be awarded to them after any review. In particular, there is the detailed information in the statement of Mr Klett as to how he envisages such performance to occur. In my view it is not appropriate for the court to go behind that evidence.

66.
Secondly, as I discussed with Ms Hannaford during the course of her submissions, I am uncomfortable with making any finding that this change of strategy should be regarded as a matter to be weighed in the balance against Covanta, when the documents make plain that it is a change brought about, principally at least, by their failure to obtain the RRC in the first place. That is a matter on which there is a serious issue to be tried. On this hypothesis, therefore, MWDA are relying on what Covanta say is MWDA's own failure to carry out the tender procurement process properly, in order to deny Covanta the opportunity to have the result of that process reviewed prior to the letting of the RRC. That seems to me to be wrong in principle. In my view, it is unsurprising that Covanta have reduced their costs and overheads as a consequence of not getting this major contract and, given my

conclusion that Covanta are ready and able to perform the RRC, it does not seem to me to be a point that MWDA can rely on as a factor in their favour on the balance of convenience.

67.
I turn back to the environmental issue which is itself related to the delay in the letting of the RRC. I have already accepted the submission that this is not a loss that is capable of being compensated for in damages. But as I have indicated, the delay and its environmental impact are also relevant to the exercise of the court's discretion when considering the balance of convenience. Just how significant, in the overall context of this case, is the likely delay and therefore the extent of the environmental impact? To answer that question, I address briefly the delays in the process so far and the likely further delay if the injunction is granted, before addressing separately the environmental impact of that likely further delay.

68.
On any view, there has been a considerable delay in the letting of the RRC thus far. In 2006, MWDA envisaged that services pursuant to the RRC (alongside services under two other contracts) would commence in 2008. In July 2007 that date had slipped by two years, but even then they envisaged that the preferred bidder would be appointed in July 2010.

69.
There is no real explanation as to why the dates were repeatedly pushed back, why the competitive dialogue procedure took so long, or why the final stage took from December 2009 to July 2012. Further, there is no explanation for the delay between the completion of the final tenders in July 2012 and the notification of the result in April 2013.

70.
Of course, I quite understand that this is an extremely large contract, which is due to last half a lifetime. In those circumstances, nobody can criticise MWDA for wanting to ensure that they get the bidding process, and the subsequent letting of the RRC, right from the outset. Moreover, there is nothing to indicate any culpability on the part of MWDA for the delay thus far. But if an injunction is granted, so that there is a delay, that delay has to be considered in the context of a procurement process which has always been within MWDA's control and has already taken six years from the PQQ.

71.
As to any further delay, if the injunction is granted, the parties estimate that the trial of this case will take fifteen days. It can either be heard in the TCC in Leeds in March 2014, or I can hear it in Rolls Building in London in late April/May 2014. As I indicated during argument, I consider that the former is unrealistically tight, but I consider that the latter is achievable. A trial in April/May would lead to a judgment about the end of June. Therefore, the delay between now and the final result of the trial is something like nine months.

72.
In my judgment, simply as a measurement of time, a further delay of nine months is a modest delay when set against the delays thus far of six years, and the fact that the RRC itself is due to last 30-35 years. That analysis means that, subject to the environmental impact of the further delay, I consider that this is a further factor in favour of granting the injunction until the review can be carried out. Does the environmental impact of the further delay change that?

73.

The anticipated amount of waste for the purposes of the RRC is around 400,000 tonnes per annum. This estimate may be on the high side because similar waste tonnages across the United Kingdom are reducing, in part because of the economic conditions.

74.
In 2012, MWDA put in place interim measures to try and ensure that, until the RRC is up and running, as much waste as possible is not sent for landfill. These interim measures were taken not because of these proceedings, because they pre-date the April 2013 contract notification. I can only assume that they were taken because MWDA were properly concerned about the extended procurement process and wished to put interim measures in place. At present, those measures mean that about 100,000 tonnes per annum of waste is being diverted away from landfill. It is plain that there is the capacity within those interim measures for greater tonnages than that to be diverted. Accordingly, a delay of nine months would equate to, at most, an additional 225,000 tonnes of waste not being diverted away from landfill. I calculate that in this way: 400,000 tonnes per annum, less 100,000 tonnes by way of interim measures, equals 300,000 tonnes waste going to landfill for a year. The period of further delay here is nine months or three-quarters of that, which produces a figure of 225,000 tonnes. That is, as I have stressed, a maximum likely figure, for the reasons that I have given.

75.
The 225,000 tonnes of waste which would not go to EfW during the nine months has to be set in the context of the many millions of tonnes of waste which, every year, local authorities in the United Kingdom send to landfill. It has also to be seen in the context of the extended procurement process, so far six years and counting from the PQQ, and the delays from the estimated completion dates of three years, if one takes the estimated date of 2010, or five years if one takes the estimated completion date of 2008. Even if one takes the estimated start date of 2010, we are three years on from that. The three year delay equates, on these figures, to 900,000 extra tonnes of waste going to landfill. That 900,000 tonnes of waste must, on MWDA's case, be waste which, if the procurement process had been concluded in accordance with their own estimates, would have been diverted to EfW.

76.
Accordingly, for those reasons, I consider that, whilst the environmental impact is plainly a factor to be taken into account in the balance of convenience, it does not alter my view that, in the round, a delay of nine months in the context of all the circumstances of this case does not support the refusal of the interim injunction and is, in the round, a further factor in favour of granting the injunction.

(c)
Summary on the Balance of Convenience

77.
For the reasons set out above, on the balance of convenience, I consider that the factors in favour of granting the injunction outweigh the factors in favour of refusing it. To put it another way, granting an injunction for what is a relatively short time in the context of this case, involves the least risk of injustice. Subject therefore to the provision of the guarantee in respect of the cross-undertaking in damages, I would grant Covanta the injunction sought.