11KBW

Editors
Jason Coppel QC | Joseph Barrett

March 2020

"HEAD AND SHOULDERS ABOVE THE REST"

Chambers & Partners

Contents

Procurement law in a period of public health crisis: meeting the challenges arising from Coronavirus

(1) Conducting procurement challenges and litigation over the coming weeks and months

The current, unprecedented, circumstances in which we find ourselves pose a number of significant challenges for those of us conducting procurement litigation. This note briefly summarises some initial thoughts on issues that practitioners, regulatory authorities and the Courts may need to grapple with in the coming weeks and months.

A number of substantial procurements are currently scheduled to complete, and result in contract award notifications, in the near future. Economic operators who may wish to challenge those decisions remain subject to the strict 30-day time limit that applies under the PCR 2015, UCR etc. Complying with that very short time limit is likely to be all the more challenging in current circumstances, where important members of the bid team may be unwell or working from home, with limited ability to engage in the sort of detailed, forensic analysis and discussion that is often associated with the decision as to whether to initiate a procurement challenge.

Two important practical points should be borne in mind.

First, the only step that needs to be taken in order to 'stop the clock' for the purposes of limitation is to issue a claim form and notify the contracting authority that this has been done. Once this is done, the automatic suspension on contract-making is triggered and the contracting authority will be unable to enter into the relevant public contract unless and until it can persuade the Court that an order should be made lifting the automatic suspension. Contrary to what is often assumed, it is not necessary for an economic operator to fully particularise its legal claim at this stage. While an economic operator must have proper grounds to take the step of issuing proceedings, the claim form itself is a short and relatively simple document that can be prepared without incurring significant legal costs (other than the Court fee, which may be substantial if a damages remedy is sought). With the limitation clock stopped, it may well be possible in many cases to agree or obtain a Court order for an extension of time for preparation of particulars of claim (or even a stay of the proceedings) – the exigencies of the current situation may well provide compelling grounds for extension of time.

Secondly, if a claimant is genuinely prevented or seriously hampered from issuing a claim within the 30 day time limit due to the current public health situation, this limit should be extended. In **Mermec UK Ltd v Network Rail Infrastructure Ltd** [2011] EWHC 1847 (TCC) even Akenhead J (a Judge with a famously strict approach to the application of procurement time limits) recognised that:

"It is perhaps unhelpful to try to give some exhaustive list of the grounds upon which extensions [of the PCR limitation period] should be granted but such grounds would include factors which prevent service of the Claim within time which are beyond the control of the claimant; these could include illness or detention of the relevant personnel..."

It can be anticipated that the current public health emergency will impact on the conduct of procurement litigation in a variety of other ways. By way of example only, it is likely significantly to inform arguments in numerous sectors regarding the balance of convenience in applications to lift the automatic suspension. Tackling these issues is likely to call for flexibility and creativity from those of us working in this field.

(2) How public bodies can meet the current public health challenge while complying with procurement law

Current circumstances will also require contracting authorities to consider their ability to procure necessary goods and services on an urgent basis – without conducting an advertised and regulated procurement; and to vary their existing public contracts to respond to the exceptional circumstances with which we are now confronted (see, by way of example, NHS England's recent announcement of an £80 million 'deal' to procure additional services from private healthcare providers: https://www.england.nhs.uk/2020/03/nhs-strikesmajor-deal-to-expand-hospital-capacity-to-battlecoronavirus/)

Insofar as the need for an urgent direct award can be properly attributed to the current public health crisis, there will be significant scope to effect direct awards of public contracts pursuant to reg. 32(2)(c) of the PCR 2015, i.e.:

"The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts...(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with."

While the Court will be astute to ensure that reg. 32(2)(c) is not abused, the reality is that most Judges are likely to be receptive to any good faith, reasonable, use that is made of this power in the present circumstances.

A key step for contracting authorities in ensuring that reliance on reg. 32(2)(c) is legally robust will be ensuring that the reasons for relying on the power are documented in advance, including in particular (i) the causal link between the need to rely on the power and the current public health situation, and (ii) the reasons why an accelerated competitive procedure/call-off from an existing framework would not satisfactorily meet the authority's needs. As time goes on, however, it will become more difficult to establish that the restrictions caused by the current crisis were unforeseeable. Notably, the Crown Commercial Service have recently published a helpful policy note on these, and certain related, issues: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873521/PPN_01-20_-_Responding_to_COVID19.v5__1_.pdf.

In relation to existing contracts, it is undoubtedly the case that some public bodies will need to adapt their services and functions to address the current crisis. There have already been a number of examples of this process, including (strikingly) the Government's announcement that it will (temporarily) fundamentally recast the structure of the franchise agreements that govern the operation of the UK rail network. In summary, the Government has announced that it will assume all revenue and costs risks in respect of the services, with the train operating companies continuing to provide services in return for a "small predetermined management fee".

https://www.gov.uk/government/news/governmentensures-ticket-refunds-and-protects-services-forpassengers-with-rail-emergency-measures

The wide-ranging adverse effects of the current public health situation will inevitably give rise to the need for significant changes to be made to a wide range of existing public contracts. In this context, particular attention is likely to fall on reg. 72(1)(c). This provides that a modification of an existing public contract will be lawful:

"(c) where all of the following conditions are fulfilled:— (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen; (ii) the modification does not alter the overall nature of the contract; (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement."

The Court's approach to reliance on reg. 72(1)(c) is likely to be informed by similar considerations to those addressed above in relation to reg. 32(2)(c).

Finally, public bodies may also wish to give careful consideration as to whether the scope of the public contracts that they are currently in the course of procuring should be varied at this stage in order to reflect, and provide for, the rapidly changing landscape which coming months and years may bring. Such changes will themselves raise issues under the duties of equal treatment and transparency that will require careful consideration and advice. The ***Basingstoke*** case, dealt with elsewhere in this Bulletin, provides important guidance as to the remedies that might be available to an economic operator seeking to challenge a procurement which has changed significantly in scope after having been initially advertised.

Joseph Barrett
joseph.barrett@11kbw.com

The legal effect of abandoning a procurement

Amey Highways Ltd v West Sussex County Council

Case C-223/16

Recent years have shown an increasing trend towards litigation in the public procurement field. All the more important, therefore, for contracting authorities to know where they stand if something goes wrong and they get sued by a disappointed economic operator. Can the potential wound of lengthy and expensive proceedings be cauterised simply by the abandonment of the procurement exercise? Surely – so the thinking goes – if the procurement exercise no longer exists, and there is no public contract which can be let, no viable claim can be advanced in respect of it?

Facts

The Council ran a procurement exercise in respect of a contract for highway maintenance. In the end there were two bidders: Amey, the Claimant in the subsequent litigation, and Ringway Infrastructure Services Ltd (**"Ringway"**). The procurement was a close run thing – Ringway scored 85.51 and Amey scored 85.48. Ringway therefore exceeded Amey's score by only 0.03 points. The contract was due to commence on 1 July 2018.

In March 2018 Amey brought proceedings against the Council alleging a breach of the principle of transparency with regard to the way in which its costs model was treated, and manifestly erroneous scoring of the tenders (**"the First Claim"**). But for the Council's errors, Amey's pleaded position in the First Claim was that it would have been awarded the contract. It sought an order that the contract award be set aside. It also pleaded a claim for damages for loss of profit over the lifetime of the contract (c.£28m) and, alternatively, for the wasted costs of preparing its tender (c.£1m).

The Council applied to strike out key parts of Amey's claim, and Amey applied, in response, for summary judgment on its claim. Both applications were unsuccessful. The Council then took stock of its options. It decided to abandon the procurement exercise. On 2 August 2018 it told Amey and Ringway that it was terminating the procurement and would start again.

Amey promptly brought a claim challenging the abandonment decision (**"the Second Claim"**). It alleged that the abandonment decision had been made in breach of the principles of transparency and equal treatment and that it was tainted by manifest error. The Second Claim was set down for trial, along with a preliminary issue in the First Claim as to whether it had been extinguished by the abandonment of the procurement.

The decision

Various issues arose for Stuart-Smith J's determination in the Second Claim, but the key issue, and the one which is of wider importance, was 'What was the effect of the abandonment decision on the First Claim?'

As to that, the judge's findings were broadly as follows:

- The Council took the abandonment decision principally because of the risks associated with litigating the First Claim and with the hope and intention that abandonment would bring the First Claim to an end, but without being certain that it would do so;
- This was a lawful basis for abandoning the procurement, in respect of which the Council had a broad discretion;
- The Council would not have abandoned the procurement in any event and would, but for the First Claim, have simply entered into the contract with Ringway as from 1 July 2018;
- If Amey had scored higher than Ringway then it would have been awarded the contract as from 1 July 2018. The difference in the scores was wafer thin and the Council did not suggest that Ringway's score should itself have been higher. It followed that a slightly higher score would necessarily have changed the outcome of the procurement;
- In those circumstances, *"all the constituent elements of an accrued cause of action would be in place on and from 1 July 2018 because Amey lost what is taken to be a profitable contract on and from that date";*
- The cause of action which an economic operator has in these circumstances is a private law claim for breach of statutory duty, subject to the Francovich ('sufficiently serious') conditions. Regulation 98(2) of the Public Contracts Regulations 2015 (**"the PCR"**) confers a right to damages for breach of statutory duty even where a contract may no longer be set aside;
- It was therefore not right to say, as the Council did, that the public law consequences of any decision to abandon are what really matter. Not all decisions taken pursuant to the PCR sound only in public law: *"to assert that decisions taken in the course of a procurement only engage public law principles and remedies is as wrong as it was wrong in Chandler to assert that only private law principles and remedies were engaged…the same act may simultaneously have the characteristics of a public law act that is susceptible to public law remedies and also be a breach of a private law duty that gives rise to what is acknowledged to be a private law remedy".*
- Whilst a decision to abandon a procurement process would prevent causes of action arising in the future, there was nothing in the language of the PCR to suggest that a lawful abandonment could deprive an economic operator of a private law cause of action which had already accrued. An accrued cause of action was an asset and allowing a contracting authority to 'cancel' it by means of an abandonment decision was not, in the Judge's view, justified by *"public law principles, public policy more generally or the purposes underlying and embodied in the PCR";*
- Nor was the Council's argument justified by the domestic and European authority to which reference was made. The CJEU decisions on which the Council relied affirmed that a contracting authority is not obliged to carry through to its end the procedure for the award of a public contract and has a wide discretion in deciding when and how to abandon any process. However, in none of the cases relied upon was there an accrued cause of action which could survive the abandonment of the procurement process and so they were not directly on point. Such domestic authority as exists was also of limited value and did not advance the analysis one way or another.

Comment

This is an important decision.

First, it is apparent that the issue Stuart Smith J grappled with goes to the heart of the troublesome amalgam of public law and private law principles which make up the legal framework of public procurement law. The tension between the two has previously largely arisen in the procedural context and the dividing line between Part 7 procurement claims and judicial review claims: see, for example, ***R (Chandler) v Secretary of State for Education*** [2009] EWCA Civ 1011 and ***Faraday Development Ltd v West Berkshire Council*** [2018] EWCA Civ 2532. That tension has now basically resolved itself in favour of the view that nearly all claims by economic operators are properly to be brought as Part 7 claims in the TCC. The West Sussex decision is in some ways a consequence of that result. Quite reasonably, the intellectual starting point for a commercial judge hearing a Part 7 claim in the TCC is likely to be that it is fundamentally a private law claim with a statutory overlay (similar, perhaps, to an adjudication claim) and is therefore to be treated as such.

Second, the Judge's treatment of the EU case law on which the Council relied appears to have been driven by his basic view that Amey was in possession of an accrued private law cause of action and could not be deprived of the same by an abandonment decision. However, this arguably does not do justice to the broader principles articulated in cases such as ***Embassy Limousines*** [1999] 1 CMLR 667.

Third, there may be an interesting question as to whether the availability of damages in circumstances such as those in the West Sussex case is a matter to be decided at the EU level or whether it would be regarded as a matter for member states under the principle of national procedural autonomy. The right to damages in Article 2(1)(c) of the Remedies Directive is drawn in quite broad terms and its implementation was said by the CJEU in ***Stadt Graz*** [2010] ECR I-8769 to *"come under"* the principle of national procedural autonomy, subject to the principles of equivalence and effectiveness. The Supreme Court of course gave some consideration to this issue in a slightly different context in ***EnergySolutions EU Ltd v Nuclear Decommissioning Authority*** [2017] UKSC 34, but many questions remain about the precise scope of the damages remedy.

Fourth, it will be very interesting to see how the domestic law of damages – notoriously flexible when presented with hard cases – will be interpreted in this context. Are the principles of causation, mitigation and remoteness sufficient control mechanisms to ensure that economic operators are not 'over compensated' in respect of contractual opportunities which have ceased to be available to anyone?

Fifth, the Judge accepted that abandoning the procurement would have extinguished the First Claim if it had been done before the date on which the contract was originally intended to commence (1 July 2018), as it was only on that date that Amey cause of action was fully accrued. This approach presents a number of issues. It is by no means self-evident that a cause of action could not accrue before the intended date of commencement of the contract, and that date may be an arbitrary cut-off. The date of commencement of the contract in this case had slipped for various reasons, including the litigation; and the Council was in fact only delayed in taking its decision as a result of waiting for the Judge to hand down his ruling on the strikeout application.

Notably, the Court of Appeal granted the Council permission to appeal the decision of Stuart-Smith J, both on grounds of realistic prospect of success and the public importance of the issues. However, the litigation subsequently settled before the appeal could be heard with the result that the Judge's reasoning will stand as the governing law in this area for the foreseeable future.

Jason Coppel QC and Joseph Barrett appeared for the Council, instructed by Acuity Legal.

Edd Capewell
edd.capewell@11kbw.com

Ryhurst v Whittington NHS Trust:

The TCC clarifies the outer-limits of a contracting authority's power to abandon a procurement exercise

There is an implicit power in the PCR to abandon procurement exercises. In reviewing the exercise of it, the courts tend to afforded contracting authorities a wide discretion. The rationale being that, as public bodies are not obliged to go out to tender in the first place, they should also be able to change their mind and reverse a decision to do so. Also, as the purpose of procurement exercises is to obtain good or services that the contracting authority wants or needs, there is little public interest in forcing the process to go ahead where its assessment of its interests has changed. If a contracting authority decides to abandon the exercise close to the conclusion, however, an already chosen preferred bidder will understandably feel less sanguine about the decision.

The case of ***Ryhurst Ltd v Whittington Health NHS Trust*** [2020] EWHC 448 (TCC) tested the limits of a contracting authority's discretion in just that context. The Defendant ("the Trust") decided to abandon a procurement exercise after it had chosen Ryhurst as the preferred bidder. Aggrieved, Ryhurst argued that the decision was unlawfully and politically motivated by a connection between one of its sister companies and the Grenfell Tower disaster (Rydon Maintenance Limited having been party to the refurbishment of the Tower during which flammable cladding was installed).

Facts

The Trust conducted a procurement exercise for a "strategic estates partnership" ("SEP") contract. Essentially, the SEP contract would see a contractor provide advice and assistance to the Trust for a decade on the management of its property so as to "maximise the value of the estate", meet its clinical, health and social care objectives, and improve the Trust's efficiencies (i.e. maximising income or reducing costs). The reason it launched the procurement exercise, which became important to the Court's reasoning, was that the Trust had been through a number of years of financial difficulty and was concerned that it needed expert support to realise the capital which was necessary to redevelop its estate.

At the conclusion of the procurement process, the Trust announced that Ryhurst was the preferred bidder. Some nine months later, however, the Trust changed its mind about the entire SEP contract and decided to abandon the procurement, giving the following reasons:

i) The Trust's financial position had improved significantly since it started the procurement exercise. The underlying rationale for the SEP contract was less pressing as a result.

ii) During that time, the Trust had also strengthened its relations with other partner organisations, which would help it to achieve its objectives without the need for the SEP contract.

iii) The approval of NHS Improvement ("NHSI", the Trust's regulator) would be required. However, NHSI had expressed doubts about the advisability of the SEP contract, which it regarded as "novel and contentious".

iv) There was a risk of insufficient stakeholder engagement and stakeholder support for the SEP contract.

Ryhurst had a somewhat different account of the decision to abandon. It claimed that the reason was political and improper, as summarised by HHJ Davies:

> *"2. Ryhurst claims that the central reason for the decision to abandon was pressure exerted upon the Trust from various individuals and entities, primarily a local campaigning group and a number of local MPs, including Jeremy Corbyn and Emily Thornberry, as well as .. NHSI.*
>
> *3. Ryhurst claims that this pressure was exerted solely or primarily because it is part of the Rydon group of companies of which one company, Rydon Maintenance Ltd ("Rydon Maintenance"), had been responsible for the refurbishment, including the supply and installation of the cladding, at Grenfell Tower in London where the devastating fire with tragic consequences occurred on 14 June 2017. Ryhurst contends that this ostensible connection with Grenfell was illusory and in any event of no relevance whatsoever to this procurement exercise, so that the Trust could and should never have allowed itself to be swayed by political pressure into abandoning the procurement for that reason."*

The scene was thus set for a two-tiered dispute; what was the real reason for the Trust's decision to abandon, and was that decision lawful?

Real reason for the decision to abandon

HHJ Davies accepted the Trust's version of events; put simply, there were a number of good reasons that motivated the Trust to abandon the procurement. The Judge made findings of fact that each of the four reasons relied on the Trust for the abandonment was valid (paras.219, 231, 241 and 242).

Ryhurst had maintained that a contracting authority was not entitled to abandon a procurement because of characteristics of the economic operator it had chosen to be the preferred bidder. However, HHJ Davies held that a contracting authority may decide to abandon a procurement exercise *"by reference to reasons connected with the individual circumstances of the tenderer concerned"*, provided that it did not breach the fundamental principles of EU law (para.25), citing the CJEU decision in *Croce Amica One Italia* [2015] PTSR 600. This was because the relevant issue for the Trust was the lack of stakeholder support; the underlying reason for this was secondary:

"Whilst I am inclined on the evidence before me to conclude that the Trust would probably have been able to proceed with the SEP [if a tenderer other than Ryhurst had been the preferred bidder] because the opposition would not have been able to trade on the emotive Grenfell connection to whip up sufficient support from local MPs and other influential stakeholders so that NHSI would have continued to support the SEP, in my view that is the wrong question to ask. The right question to ask in my judgment is whether or not the Trust was entitled to take the lack of stakeholder support into account. In my view the Trust was entitled to do so because in deciding whether or not to proceed with or to abandon the procurement it was entitled to have primary regard to its own interests. If it had concluded, as it plainly always had, that the SEP was only workable with wide stakeholder support, then if that wide stakeholder support was not present in June 2018 for a number of reasons, many if not most of which were in no way irrational or improper, then in my judgment the Trust Board did not act improperly in taking that factor into account in deciding to abandon the procurement, looking not just at the present but also to the future." (para.241)

Lawfulness of the decision to abandon

Having accepted the Trust's factual account, HHJ Davies went on to find that the decision to abandon was lawful (para.247). His reasoning considered and clarified some important points of principle. An analysis of it also reveals areas where we may expect future litigation.

HHJ Davies adopted the guidance provided last year by Stuart-Smith J in *Amey Highways Ltd v West Sussex CC* [2019] EWHC 1291 (TCC) on the wide breadth of a contracting authority's discretion in this area. It is constrained only by the fundamental principles of EU law and the need not to make manifest errors. As a result, it is not limited only to those cases where abandonment *"can be justified as being expedient in the public interest"*.

The Ryhurst judgment provides important guidance on the outer limits of that broad discretion. Of particular significance is the clarification of how a contracting authority's margin of appreciation applies to the fundamental principles of EU law. In the judgment, those principles without a margin of appreciation are described as "hard-edged".

Transparency

The principle of transparency imposes a "hard-edged" obligation (para.28). The absence of a margin of appreciation is obviously of assistance to tenderers seeking to challenge a decision. However, the judge blunted the effectiveness of transparency-based arguments for claimants, first by limiting what has to be disclosed to bidders, which will be limited in most cases to the fact that an abandonment decision has been taken and the reasons for it – he said that "the transparency obligation does not require a contracting authority to give chapter and verse as to the reasons for every decision" (para.251) and that *"the duty of transparency does not, in effect, require a contracting authority to provide a running commentary on its own internal decision making process and the factors which are influencing it one way or another"* (para. 254). Second, by emphasising the importance of causation:

"it would be necessary for Ryhurst to establish on the facts that, had the Trust not breached the transparency obligation, it would either on the balance of probabilities have entered into the SEP or, alternatively, not have wasted further time and expenditure at a time when the Trust was in breach of its transparency obligation." (para.32)

In other words, a technical breach of the transparency principle in a decision to abandon a procurement exercise is not enough for a claimant; it must also show that it has lost something as a result of the breach of transparency, rather than simply as a result of the abandonment.

Equality and non-discrimination

The principles of equality and non-discrimination, in contrast, are not "hard-edged" (para.41). These principles generally contain two stages of analysis: (i) whether there has been differential treatment, and (ii) whether there is an objective justification. One of the most important issues resolved in the judgment is that the margin of appreciation applies to both stages of analysis. There had been a significant point of dispute as to whether the margin of appreciation applied only to the differential treatment stage of the analysis (as Ryhurst contended) or also to the justification stage (as the Trust contended). The judge preferred the Trust's submissions:

"I agree with Mr Coppel that the decision in [Rotherham MBC v SSBIS [2015] UKSC 6] does show that equal treatment is not a hard edged issue where there are always two logical steps in the enquiry, with no room for a margin of appreciation in the first question as to whether or not the claimant has been treated unequally. It is also apparent from the decision that the extent of the margin of appreciation must depend on the particular circumstances of the individual case.....Instead it seems to me that the Trust has a margin of appreciation in such cases and, in accordance with the approach in Amey and [C-440/13 Croce Amica], in the context of abandonment decisions Ryhurst must go further and establish that the decision was manifestly erroneous or irrational or disproportionate or not objectively justified." (paras.41, 44)

This is a noteworthy conclusion. It appears to make the equality and non-discrimination principles commensurate with irrationality in certain contexts (one being a decision to abandon a procurement exercise). Other litigation to clarify the remaining contexts in which the equality and non-discrimination principles apply in this way is likely to follow. The judge's analysis also goes beyond the approach in Abbvie v NHS Commissioning Board [2019] EWHC 61 (TCC) which had recognised a margin of appreciation only at the differential treatment stage of an equal treatment claim. It is possible also that further litigation will seek to challenge HHJ Davies's conclusions on these points.

Proportionality

Similarly, the proportionality principle is not "hard-edged" (para.49). Proportionality is not a standalone principle, to the extent that a decision has to be proportionate to something. In clarifying this, HHJ Davies stated: *"the decision to abandon must be proportionate to the reasons given by the Trust for its decision to abandon, albeit allowing the Trust a proper margin of appreciation in making that decision"* (para.51).

Public law challenge

The judgment addresses an important question as to the relevance of general public law grounds of review to a challenge brought under the PCR. Ryhurst argued that the Trust's decision was unlawful as in breach of the public law requirement not to take irrelevant considerations into account, the irrelevant consideration being the link between Ryhurst and Grenfell Tower (paras. 55-56).

HHJ Davies rejected this. He accepted the Trust's submission that an action under the PCR is simply different to a claim for judicial review, and that there is no basis for incorporating general judicial review grounds within a manifest error or other PCR analysis (notwithstanding that manifest error under the PCR is often equated with Wednesbury irrationality). Ryhurst's approach would have created a novel claim in damages for breach of public law. It is important not to overstate the judge's conclusion. He held that the various heads of review in public law do not, of themselves, establish that a decision is manifestly erroneous or otherwise contrary to the PCR. Nonetheless, if an irrelevant consideration is determinative in a decision, that could amount to a manifest error, justifying a PCR claim.

Jason Coppel QC and Rupert Paines represented the Trust, instructed by Bevan Brittan.

Ben Mitchell
ben.mitchell@11kbw.com

Will a declaration of ineffectiveness be granted where a concluded contract is materially different from what has been advertised?:

AEW Europe v Basingstoke and Deane Borough Council

Under reg. 99(2) of the PCR, the first ground on which a declaration of ineffectiveness will be made is where a contract has been awarded without prior publication of a contract notice in any case in which the PCR required the prior publication of a contract notice. The usual situation in which this ground will apply is where there has been a direct award, with no contract notice having been published at all. But the ground could also apply where a contract has been advertised but significant changes are subsequently made to the proposed contractual terms during the procurement, such that the contract which is signed is materially different to what was advertised. In that situation, the PCR might well require the commencement of a new procurement, for the materially different contract which is now being awarded by the contracting authority. If that is not done, can the resulting contract be declared ineffective?

That was the issue in AEW Europe v Basingstoke and Deane Borough Council [2019] EWHC 2050 (TCC). A procurement was commenced for the redevelopment of a leisure park, to include "ancillary" retail uses. During the procurement, and in order to secure the profitability of the development, the Council agreed to a proposal from the sole remaining bidder to include a substantial designer outlet centre on the site. The Claimants, who own a nearby shopping centre, and had not participated in the procurement, challenged the development agreement after it had been signed, seeking, amongst other remedies, a declaration of ineffectiveness.

The TCC (Sir Robert Akenhead, briefly emerging from his retirement) heard a preliminary issue as to whether a declaration of ineffectiveness could be available in these circumstances. It was assumed in the Claimant's favour for the purposes of determining the preliminary issue that the development agreement signed by the Council "departs from the contract sought by the tender process to such an extent that it is a materially varied contract which was not actually the subject of the previous tender process and would have required a fresh process in accordance with the applicable regulations".

AEW argued that if a fresh process was required, it must follow that the agreement had been signed without prior publication of a contract notice that was mandated by the PCR.

The TCC disagreed, applying an earlier ruling of Mann J in the context of a qualification system under the Utilities Contracts Regulations (Alstom v Eurostar International Limited [2011] EWHC 1828 (Ch)). The first ground of ineffectiveness would not apply where there was a valid OJEU notice which is capable of being related to the procedure and the contract awarded; regard should be had to whether the OJEU Notice had sparked the competition which led to the contract; and the question is the existence or absence of an OJEU notice which involves the application of a mechanistic test, if the remedy is to operate sensibly in a commercial context (§41). In other words, given the draconian consequences of ineffectiveness, whether the relevant grounds are satisfied must be easily ascertainable and cannot depend upon a detailed investigation of the ins and outs of negotiations during a tender process (§45). Sir Robert rejected an argument by AEW that Alstom was decided in a materially different context, as a qualification system permits the award of contracts without the publication of a contract notice, hence a variation to contract terms in the course of a procurement would not trigger the obligation to publish a new notice.

Applying the Alstom test to the facts of the case, the Judge was not persuaded that the addition of the designer outlet centre broke the connection between the OJEU Notice and the eventual contract that was entered into. The OJEU Notice had sparked the competition which led to the contract and the two were closely related. It was not necessary to decide whether the newly proposed retail use fell within or outside the wording of the OJEU Notice and subsequent procurement documentation (§47).

The upshot of AEW is that a declaration of ineffectiveness will rarely be available to strike down a contract which is substantially different from that which was originally advertised. Although injunctive relief and damages still exist as remedies against award of a contract which departs materially from the advertised terms.Surprisingly perhaps, given the significance of the point and the absence of appellate authority, the Court of Appeal (Coulson LJ) refused permission to appeal and the proceedings are now at an end.

Jason Coppel QC, who, with Patrick Halliday, represented the Council, instructed by Womble Bond Dickinson.

Proving reputational harm

Circle Nottingham Limited v NHS Rushcliffe Clinical Commissioning Group [2019] EWHC 1315 (TCC) concerned an application to lift the automatic suspension on the award of a contract under Regulation 95 of the Public Contracts Regulations 2015 (**"PCR"**). In his judgment, Sir Antony Edwards-Stuart addressed in detail the role of reputational harm and the circumstances in which a party's reliance upon evidence of reputational harm if a suspension were lifted and a contract were entered into with a competitor would be regarded as particularly persuasive. Circle Nottingham clarifies that evidence and submissions ought to address reputational harm with a high degree of particularity and with an eye to the commercial context of the contract in issue.

Facts

In 2018, NHS Rushcliffe Clinical Commissioning Group, the Defendant, carried out a procurement for the provision of non-emergency medical services (including gynaecology, rheumatology, dermatology, trauma and orthopaedics and gastroenterology) at the Nottingham Treatment Centre (**"NTC"**).

The Claimant, Circle Nottingham Limited, was the incumbent provider of the services at the NTC, and had been since 2008. The Claimant was one of a number of wholly-owned subsidiaries of the Circle Group, through which the Group carried out its operational functions. The Claimant was, in that sense, a special purpose vehicle. No criticism was made of the Claimant in that regard; this was a perfectly proper corporate structure by which to conduct business.

Bids in the procurement were submitted by 1 November 2018. Standstill letters under regulation 86 of the PCR were issued on 4 December 2018 informing the unsuccessful bidders (including Circle Nottingham, the Claimant) that the contract would be awarded to the Nottingham University Hospital NHS Trust, the Interested Party. The Claimant questioned the result and issued a claim form on 10 January 2019, thereby triggering an automatic suspension, which the Defendant applied to lift.

American Cyanamid principles

It was common ground that Regulation 96(2) of the PCR requires that in an application of this sort the approach to be adopted by the Court is to decide whether, if there were no suspension in place, it would be appropriate to grant an interim injunction to the claimant preventing the defendant from entering into the new contract. The American Cyanamid test governs that question.

As is common in applications to lift an automatic suspension, the Defendant conceded that there was a serious issue to be tried. The focus of the application was therefore on the adequacy of damages and the balance of convenience. At §16, the consequent issues were articulated as follows:

"(1) If the claimant were to succeed at trial, would damages provide adequate compensation for its loss? Or, putting it another way: is it just, in all the circumstances, that the Claimant is confined to its remedy in damages? If the answer is yes, and the defendant is likely to be in a position to pay any damages awarded, then an interim injunction would not ordinarily be granted and so, in a procurement case, the stay will be lifted.

(2) If damages would not provide an adequate remedy to the claimant, then the court should consider whether, if the injunction was granted, the defendant would be adequately compensated under the claimant's cross-undertaking in damages.

(3) If the answer to either of these questions is no, then the court must consider whether the balance of convenience favours the grant of an injunction. Or, as O'Farrell J put it, the court must consider which course of action is likely to carry the least risk of injustice if it transpires that it was wrong (see, for example, DHL Supply Chain Ltd. v Secretary of State for Health and Social Care [2018] EWHC 2213 (TCC), at paragraph 36).

(4) If the factors relevant to the balance of convenience do not point in favour of one side or the other, then the prudent course will usually be to preserve the status quo (or, perhaps more accurately, the status quo ante), that is to say to lift the suspension and allow the contract to be entered into.

(5) If the extent of the loss which each party might sustain over and above that which can be compensated by damages in the event of success at trial is not evenly balanced, that is a significant factor when assessing where the balance of convenience lies.

(6) By contrast, where such loss to each party does not differ widely, it may be legitimate to take into account the relative strength of each party's case (as revealed by the written evidence on the application), but only if there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.

(7) Finally, there may be other special factors to be taken into account in the particular circumstances of that case."

As noted above, the Claimant was a special purpose vehicle. The thrust of the Claimant's evidence was that the loss of reputation that had been or would be suffered as a result of it losing the contract to NUH was a loss suffered by the Circle Group or the Circle brand, rather than Circle Nottingham Limited specifically. Sir Antony Edwards-Stuart addressed the Claimant's evidence and submissions from §§34-57.

He adopted the following observations of Horner J in ***Eircom UK Ltd v Department for Finance*** [2018] NIQB 75, which called for a commercially-realistic approach to be adopted when considering the adequacy of damages in the context of a corporate group:

"However, even if … the loss of the NIPSSN contract was to result in the winding up of the Northern Ireland business, I still remain of the view that damages, which would be capable of ready calculation on the basis of the plaintiff's loss of profits, will constitute an adequate remedy for the plaintiff for a number of reasons:

. . . The plaintiff is not a small fish swimming through hostile and uncharted waters. It is a member of a Group with access to very substantial assets. If the Group wants the plaintiff, or indeed any of its companies, to compete with BT or one of its subsidiaries in Northern Ireland, then it has the assets and the expertise to do so. I reject the submission that the plaintiff must be viewed in splendid isolation. That would be to ignore reality.

… If a large, successful commercial organisation was able to claim successfully that because one of its offshoots might go out of business if it failed to win a tender, and that therefore the award of that contract should be suspended, it will allow such an organisation to game the system. All such organisations would place their bids through small companies, which they could then claim would be "wiped out" if was proposed at the next procurement exercise to award the tender to another competitor and thus sabotage the prompt award of these types of contracts."

Applying that approach, it would not be sufficient to establish that damages were not an adequate remedy that a special purpose vehicle group company would lose all or substantially all of its revenue as a result of a contract going to a competitor.

However, in keeping with established rules of separate corporate personality, at §40, Sir Antony Edwards-Stuart emphasised *"… in my judgment it is the position of the Claimant that must be considered on this application, and not the position of the Circle Group or the Circle brand. No other Circle Group company is a party to this litigation."*

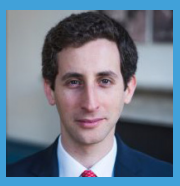
It followed from that ruling that assertions (and evidence) of reputational harm had to be confined to prejudice to the Claimant itself rather than extending to the Circle Group generally. At §41, the Claimant's evidence was held to be deficient in that context: *"What is missing from the Claimant's evidence on this application is any link between damage to the reputation of the Claimant itself (to the extent that the evidence establishes that there is any) and its effect on the Claimant's future commercial operations."* *There was no evidence before the Court that the Claimant intended to use a successful renewal of the contract in issue as a springboard from which to obtain further work of the same type. Accordingly, at §56, the Court held: "… my conclusion is that no head of loss has been identified by the Claimant that could be attributed to the loss of the Contract and for which the Claimant would not be properly compensated by an award of damages"*

A distinction was drawn between the Claimant's evidence and other authorities in which the loss of reputation allegedly suffered by a company resulting from the failure to secure a valuable contract was said to matter because it was regarded as likely to have an adverse effect on the ability of that company to win future business, which it would be difficult or impossible to quantify fairly.

Comment

When considering ***Circle Nottingham***, it is important to be mindful of Waksman J's observation in ***Central Surrey Health Ltd v NHS Surrey Downs CCG*** [2018] EWHC 3499 (TCC) at §34 that cases of this type are highly fact-sensitive such that it is difficult to be prescriptive about the weight to be given to a particular factor, like loss of reputation, in the abstract. However, the exacting burden on a party asserting reputational harm in ***Circle Nottingham*** can be expected to be reflected in other cases. The separate corporate personalities of companies in a corporate group can be of great commercial benefit in many respects; however, under the *American Cyanamid* test, separate companies fall to be treated as distinct from the group of which they form part.

Jason Coppel QC appeared for the Defendant, instructed by Gowling WLG (UK) LLP.



Stephen Kosmin
stephen.kosmin@11kbw.com

Court of Session considers state aid for ferries

Pentland Ferries v Scottish Ministers

[2019] CSOH 39

The facts

The 'Scrabster ferry route' crosses the Pentland Firth waters, in the Northern Isles of Scotland. The route has been subsidised by the Scottish Ministers since the mid-1990s. Two other companies, including Pentland Ferries, operate routes which cross the Pentland Firth. Both do so without public subsidy. Pentland Ferries' route is known as the 'Gills Bay route'.

The Scottish Ministers issued a notice of a procurement of a subsidised public service contact for the Northern Isles ferry link service (**"NIFS"**), which included the Scrabster route. Prior to doing so, the Ministers had commissioned an appraisal of options for the Pentland Firth waters. This included the production of a draft market analysis, socio-economic baselining, future-planning horizon etc. These showed that in 2017, the Scrabster route and the Gills Bay route represented 38% and 39% of the market share respectively for passengers, and 40% and 55% respectively for cars.

The pre-appraisal report therefore noted there was a competitive dynamic in the Pentland Firth market, that it was difficult to appraise the options in that context, and that that there were a number of prospective changes which could impact upon the market. One was the purchase by Pentland Ferries of a new vessel. The report presented this prospective option as a replacement for their current vessel which accorded with Pentland Ferries' public stance. In contrast, the report noted that a 2-vessel service would be "transformative" and could affect whether there was a justification for continuing a public service contract.

Privately, in informal discussions with the Minister of Transport in both 2010 and 2018, the petitioner had mentioned the prospect of operating a 2-vessel service on the Gills Bay route.

The pre-appraisal report explicitly considered discontinuing the Scrabster route altogether. It rejected this option "for reasons of public acceptability". The route was considered to be a supported lifeline service, essential for the economies and sustainability of Orkney and Shetland Islands.

Analysis of the petition

Pentland Ferries brought judicial review proceedings challenging the Ministers' decision to subsidise the Scrabster route and bundle it with the rest of the NIFS.

The applicable legal principles were not in dispute between the parties.

Article 106(1) TFEU subjects undertakings entrusted with services of general economic interest (**"SGEI"**) to the rules on competition in the EU Treaties. Article 107(1) TFEU prohibits state aid. The Marine Cabotage Regulations (EEC No 3577/92) (**"the Regulations"**) are directly effective. Article 4 of the Regulations empowers a Member State to enter into a public service contract with a shipowner to provide adequate transport services and impose public service obligations (which the shipowner would not otherwise assume acting according to its commercial interest).

The Court of Session approached the claim on the basis that if the principles in ***Altmark Trans and Regierungspräsidium Magdeburg*** (Case C-280/00) were satisfied then a classification of state aid would be avoided and the subsidy would be consistent with the internal market and TFEU. Further, to be lawful the subsidy must also be necessary and proportionate to the aim being pursued by the Scottish Ministers (***Analir v Adminstracion General del Estado*** (Case C-205/99)). The burden was on the claimant to show that the Scottish Ministers had committed a manifest error, which equated to the Wednesbury test of irrationality.

The Court said that three of the ***Altmark*** principles were relevant. First, that the recipient must have clearly defined public service obligations to discharge. Second, that the basis on which the compensation is calculated must be established in advance in an objective and transparent manner. Third, that the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations.

The Court of Session held that the starting point in the analysis was to consider the Scrabster route in isolation, rather than (as the petitioner had argued) the entire market of the Pentland Firth waters through which various ferry routes ran (§§47-48). In this regard it followed Analir, where the emphasis was on specific transport service routes in determining whether there was a public service need for those routes. The Ministers were therefore entitled to designate the Scrabster route as an SGEI. Considering the Scrabster route, the issue was "whether the compensation for providing the service on a specific route has the effect of putting the subsidised route at a real financial advantage over undertakings competing with the subsidised route", and that this was decided through the application of the ***Altmark*** tests (§48).

The Court of Session held that the decision to subsidise the Scrabster route as an SGEI was not "irrational or unfounded" (§50). The Scottish Ministers had provided a "wealth of evidence" to support their conclusions regarding demand, capacity and the economic benefits of supporting the route.

The Court considered that even though the Scottish Ministers had not conducted a specific analysis in relation to market failure on the Scrabster route, there was "ample evidence" that the route was unviable without a subsidy (§58). It noted a shortfall between operating costs and revenue in the range of £7-8m. Notably, the claimant had not advanced arguments to suggest otherwise or that the Scrabster route could be operated without a subsidy.

The Court held that the subsidy was necessary and proportionate. The claimant challenged this on the basis that the level of subsidy was double that provided under the previous contract. The Court of Session considered that this figure was a misunderstanding that had arisen from an incomplete answer in the pleadings. Although the cost of the contract was higher than the previous one, there were "fairly stringent methods for the calculation of the grant" and provisions for the recoupment in evidence before the Court. Following ***Altmark***, it was also fair for there to be reasonable profit under the subsidy.

Comment

This case raises some interesting points of practice in relation to challenges based on state aid.

From an economic operator's perspective, there is the matter of tactics in the lead up to decisions on public service contracts. Operators should engage meaningfully and early with the contracting authority to ensure that the right evidence is placed before it when it takes its decision on the procurement. The Court of Session noted that Pentland Ferries' 2-vessel service had not been presented as a concrete proposal and had not been raised in the consultation prior to the contract notice being formulated and issued. Had it been put forward in the consultation, the Court noted that the Scottish Ministers would have considered the proposal (§52). Indeed, they would have been under a duty to do so lawfully.

From a contracting authority's perspective, it is helpful that the Court accepted diffuse evidence of market failure

in lieu of a single substantive analysis contained in one document. However, best practice would be to ensure a single, comprehensive market failure analysis is produced. This would greatly assist in resisting any legal challenge.

Jen Coyne
jen.coyne@11kbw.com

Ambulance services in the City of Blades

Falck Rettungsdienste GmbH v Stadt Solingen

C-465/17

As everyone knows, article 10 of the Public Contracts Directive excludes from the scope of the Directive inter alia certain *"danger prevention services that are provided by non-profit organisations or associations"* identified by CPV code, including the CPV codes for *"emergency/rescue services"* and *"ambulance services"*. The latter is in turn subject to an exception for "patient transport ambulance services", which instead fall within the 'light touch' regime. The exclusion (and the exception) are transposed into our domestic law by reg. 10(1)(h) PCR.

In 2016 the City of Solingen sought to award a contract for ambulance services (presumably much in demand, given Solingen's history of knife- and sword-making). The contract comprised two lots: (1) emergency rescue services (with care and treatment of emergency patient by emergency worker and paramedic) and (2) transport by qualified ambulance (with care of patient by paramedic assisted by medical assistant). The City did not advertise the contract in the OJEU, but instead invited four public aid associations to submit tenders. The contract lots were ultimately awarded to two such associations.

Falck, a provider of emergency and health services, challenged the award of the contract. It argued that the services in question were not excluded by art 10(h), on the basis that:

- 'Danger prevention' referred *"only to prevention of danger to large groups of people in extreme situations"*; in its view, ambulance transport should instead be subject to the 'light touch' regime under the carve-out.
- German public aid associations were not necessarily non-profit associations.

The German court referred these issues to the CJEU. The CJEU rejected Falck's interpretation of 'danger prevention', holding that the concept covered *"both collective and individual risks"*. The carve-out for 'patient transport ambulance services' itself indicated that, but for the carve-out, such services would fall within 'danger prevention' services.

However, it was necessary to consider separately whether the services obtained by Solingen fell within the relevant CPV codes. There was no doubt but that lot (1) (emergency rescue services) fell within CPV 7525000-7 (rescue services). The more difficult question was whether lot (2) (transport by qualified ambulance) was covered by that code also, or by CPV 85143000-3 (ambulance services), or neither. The CJEU held that:

- It was not possible to see transport by qualified ambulance as a rescue service, as the referring court had indicated that the two lots were different and were to be distinguished, and rescue services were the object of lot (1);
- The exclusions under reg. 10(h) were, as exclusions from the procurement rules, required to be read strictly;
- Both Solingen and the German Government had explained that *"transport by qualified ambulance is characterised by the fact that, due to the patient's state of health, an emergency situation could arise at any time in the transport vehicle"*, necessitating the presence in the ambulance of medical experts;
- Where that was the situation – and the Court felt that *"it must be possible for the risk of deterioration in the patient's state of health to be, in principle, objectively assessed"* – then such transport would constitute an 'ambulance service' within CPV 85143000-3. The transport must be undertaken *"by personnel properly trained in first aid and … provided to a patient whose state of health is at risk of deterioration during [the ambulance] transport."*

The second set of questions concerned the meaning of "non-profit organisations or associations" within Article 10(h). The CJEU held, in essence, that this was an autonomous concept (unsurprisingly), and that *"organisations and associations whose purpose is to undertake social tasks, which have no commercial purpose and which reinvest any profits in order to achieve the objective of that organisation or association"* are 'non-profit organisations or associations'. Overall, hardly groundbreaking stuff, but a practical and sensible decision from the CJEU which will be of assistance to anyone designing procurements for ambulance services.

Rupert Paines
rupert.paines@11kbw.com

Specific disclosure: a warning to contracting authorities

Serco Ltd v Secretary of State for Defence

[2019] EWHC 515 (TCC)

The principles governing specific disclosure in procurement claims will be familiar to practitioners. They were summarised in the well-known decision of Coulson J (as he then was) in ***Roche Diagnostics Ltd v The Mid Yorkshire Hospitals NHS Trust*** [2013] EWHC 933 (TCC) and have been settled law ever since. Fraser J's judgment in Serco v Secretary of State for Defence provides a stark illustration of the consequences that can follow if those principles are ignored by a contracting authority.

The claim concerned a substantial procurement for a contract worth some £1.1 billion for the global provision of fire and rescue services to the Ministry of Defence. The procurement itself took 4 years to complete, and the evaluation of the final tenders took 9 months.

Serco was unsuccessful in the procurement. Shortly after it was notified of that outcome, it sought disclosure from the Secretary of State of the contemporaneous evaluation documents. This request was refused, and Serco subsequently issued a claim based on the limited information it had by then been provided with.

After issuing its claim, Serco repeated its request for voluntary disclosure of contemporaneous evaluation documents. This request was also refused, and Serco issued an application for specific disclosure.

The Secretary of State maintained its refusal to disclose any contemporaneous evaluation documents until very shortly before the hearing of that application. By time the application came before Fraser J, the MOD had agreed to provide Serco with the disclosure that it sought. The only issue that remained between the parties was the appropriate order as to costs.

Fraser J decided that issue in Serco's favour. Citing Roche, he explained that *"so far as procurement is concerned, there are separate identifiable principles in relation to disclosure"* (§6). Fraser J emphasised that claimants in procurement challenges *"ought to be provided promptly with the essential information and documentation relating to the evaluation process", and that "there is a mountain of other authority which makes clear that the reasons for evaluation are important documents, and must be disclosed"* (§7)

The contemporaneous evaluation documents sought by Serco fell squarely within the category of "essential information and documentation". Fraser J was highly critical of the Secretary of State's failure to disclose those documents until the eve of the hearing. The Secretary of State's position, he held, was and had always been hopeless. Fraser J explained at §10 that *"the MoD appears, and if properly advised, should always have realised that it could not possibly argue before the High Court with any degree of seriousness that Serco is not entitled to these documents"*.

Perhaps unsurprisingly, given the strength of that criticism, Fraser J went on to make an order for indemnity costs against the Secretary of State. That order, he explained, was made *because, as far as I am concerned, the Secretary of State's conduct in respect of disclosure has fallen well outside the norm and is entirely suitable for, and justifies, an award of indemnity costs"* (§11).

The judgment of Fraser J stands as an important warning to defendants facing an early request for voluntary disclosure. Defendants would be well advised to take a sensible approach to such requests at an early stage in the process. Failing to do so may well be costly.

Joseph Barrett and Zac Sammour acted for Serco, instructed by DWF.

Zac Sammour
zac.sammour@11kbw.com


11
1814
11

Procurement & State Aid Briefing

11KBW's procurement and State aid practice is cutting edge. We have been at the forefront in developing procurement law from an occasional item to one of the fastest-growing areas of public law and litigation.

11KBW members have acted in many of the leading High Court claims brought under the Public Contracts and Utilities Contracts Regulations and have appeared in numerous judicial reviews concerning contract awards.

We also represent parties in CJEU litigation and in infraction proceedings.

We act for tenderers and other claimants, and public authorities of all types. We offer a comprehensive service, from early advice on avoiding engagement or breach of the procurement rules, to representation at interim hearings and at trial, and beyond in the appellate courts.

We advise on and litigate all aspects of State aid law.

Our Barristers

James Goudie QC
Nigel Giffin QC
Peter Oldham QC
Jason Coppel QC
Charles Bourne QC
Jonathan Moffett QC
Andrew Sharland QC
Jane Oldham
Jonathan Auburn
Harini Iyengar
Julian Milford
Joanne Clement
James Cornwell
Marcus Pilgerstorfer
Holly Stout
David Bedenham
Patrick Halliday
Tom Cross
Amy Rogers
Christopher Knight
Joseph Barrett
Edward Capewell
Heather Emmerson
Michael Lee
Sean Aughey
Ronnie Dennis
Hannah Slarks
Stephen Kosmin
Thomas Ogg
Rupert Paines
Peter Lockley
Zoe Gannon
Zac Sammour
Natalie Connor
Daniel Isenberg
Jen Coyne
Christopher Parkin
Ben Mitchell

11KBW Practice Areas

We are a leading chambers specialising in employment, public and commercial law. We have expertise in a wide range of areas of law surrounding these fields. For more information on the work that we do please get in touch with our team of clerks.

- Commercial
- Education
- Employment
- European Union
- Health & Community Care
- Human Rights
- Information, Privacy & Data Protection
- Mediation & Arbitration
- Procurement & State Aid
- Professional Discipline & Regulatory Law
- Public
- Sport
- Tax Litigation

Contact us:

Email
clerksroom@11kbw.com

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123

Address
11 King's Bench Walk,
Temple, London, EC4Y 7EQ
DX: LDE 368

Website:
www.11kbw.com