Neutral Citation No: [2020] NIQB 62 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HOR11311** *ICOS No:* **2020/32194** *Delivered:* **09/10/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(COMMERCIAL HUB)

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BETWEEN:

TES GROUP LIMITED

Plaintiff;

-and-

NORTHERN IRELAND WATER LIMITED

Defendant.

_____

Gerry Simpson QC with Anna Rowan (instructed by Arthur Cox, Solicitors)
for the Plaintiff
David Dunlop QC with Alistair Fletcher (instructed by Tughans Solicitors)
for the Defendant

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HORNER J

A. INTRODUCTION

[1] TES Group Limited ("TES") is a private limited company. It has issued a writ of summons against Northern Ireland Water Limited ("the defendant"). It relates solely to the award of contracts under Lot 2 of the Framework Agreement known as IF105 which is divided into three lots. Collectively these relate to the provision of water and sewerage services which I will refer to collectively as "Water Services". Lagan Construction Limited ("Lagan") has issued a writ of summons in respect of Lots 2 and 3. Judgments are being delivered in respect of the Lagan challenge and the TES challenge at the same time. The focus of the Lagan judgment is primarily on Lot 3 as this was the central issue in those proceedings. Accordingly this judgment which relates to Lot 2 only should be seen as being complementary to the Lagan judgment. I have tried not to be too repetitive in giving these two judgments with, I fear, a conspicuous lack of success.

[2] The writ of summons issued by TES in respect of Lot 2 triggered an automatic suspension of the award of contracts under the competition by operation of Regulation 110 of the Utility Contract Regulations 2016 ("the Regulations"). The consequence was that the defendant was unable to enter into contracts with those tenderers which had been successful in the tender competition for Lot 2. The defendant then applied to set aside the automatic suspension imposed by the Regulations so as to enable it to go ahead and award contracts under IF105. As I have observed, similar proceedings took place between Lagan and the defendant in respect of Lots 2 and 3.

[3] Lot 1 was also the subject of a challenge by an unsuccessful tenderer. However, that challenge was abandoned and the defendant has been able to award contracts to the successful tenderers in respect of Lot 1 although it is claimed by the defendant, without contradiction, that its options for work under Lot 1 have been restricted by the automatic suspension imposed in respect of Lots 2 and 3. This judgment concentrates on the application by the defendant to remove the Order which prevents it from entering into contracts with the successful tenderers in respect of Lot 2.

[4] There has been considerable criticism by both sides of the other side's evidence and complaints have been made of exaggeration and hyperbole by the various deponents. There has been no oral evidence in this case. Both sides relied on affidavit evidence and that evidence has not been tested under cross-examination. However, deponents are providing sworn evidence to the court and should it turn out subsequently that a deponent has been guilty of deliberate exaggeration, or indeed, untruths, that will have significant adverse consequences not only for the deponent but also the party on whose behalf the sworn evidence was filed. The deponents must appreciate that there will be a day of reckoning should it become clear later on that they have tried to mislead the court with exaggerated or misleading evidence.

[5] Leaving aside the criticisms made by each side of the other side's affidavit evidence, the oral and written submissions on behalf of TES and the defendant were of the highest quality. It is only right that I should pay tribute to those involved in respect of all the legal teams (including that of Lagan). All relevant material has been opened to me so as to permit me to reach a fair and just decision at this interlocutory stage. I am acutely conscious not to rehearse all the points made because it would make the judgment unnecessarily long. However I can assure the parties that I have taken all the relevant ones into account in reaching my decision.

B. BACKGROUND INFORMATION

[6] The defendant is a statutory undertaker for water and sewerage services in Northern Ireland and has been since 1 April 2007 following the granting of a licence made pursuant to the Water and Sewerage Services (NI) Order 2006 ("the 2006 Order"). The defendant succeeded the Water Service. The 2006 Order introduced a

system for the provision of water and sewerage services ("Water Services") which involved the defendant assuming the responsibilities of the Water Service but being overseen by, and being held accountable to, the Northern Ireland Authority for Utility Regulation ("the Utility Regulator"). It had been intended that consumers would pay for Water Services and that this would allow the defendant to be self-funded. However, this has never happened. Non-domestic consumers do pay for Water Services in Northern Ireland but domestic consumers do not. They are subsidised by the Department for Infrastructure ("DfI").

[7] There has been a chronic underfunding over the years in Water Services in Northern Ireland. They are at breaking point and I have covered the consequences in some detail in paragraphs [7] to [14] of the Lagan judgment and I do not propose to repeat them save to say that further substantial capital investment is required to make the Water Services fit for public purpose.

[8] I have also set out at paragraphs [15]-[24] of the Lagan judgment how the various frameworks work. TES describes itself as a water technology engineering expert. Lot 2 relates to non-infrastructure minor works (primarily involving design and maintenance). It claims that the suspension of Lot 2 does not affect the defendant's ability to commence eight large infrastructure work projects under Lot 3 which Mark Mitchell of the defendant has identified in his affidavits as requiring immediate commencement. These works include the Strathfoyle sewerage syphons' upgrade and also the need to replace or extend the water tanks at Fofanny, Seagahan and Lough MacCrory Hill. Mr Wylie, the Finance Director of TES who has provided sworn evidence on behalf of TES has stressed without contradiction that these major infrastructure projects have no bearing on Lot 2 and relate to Lot 3 exclusively.

[9] It is TES's case that:

(a) The suspension of Lot 2 has virtually no adverse consequences for Water Services in Northern Ireland;

(b) There are other contractual routes allowing Lot 2 work to be carried out in the interim;

(c) Untold damage will be visited on TES if it fails to be added to the list of successful tenderers for Lot 2 of IF105. On the other hand any adverse consequences for the defendant can be remedied by an award of damages to the defendant.

[10] TES's case is set out by Mr Wylie and is supported by an expert opinion given by Mr Michael McAllister of ASM Chartered Accountants, a colleague of Ms Niblock who has provided expert evidence in the Lagan interlocutory application. Mr McAllister is also a chartered accountant who has provided a letter for Mr Wylie giving his professional opinion on various issues. The letter contains no expert's declaration. There is no up-to-date financial information about how TES is

performing whether by way of management accounts or even up-to-date draft statutory accounts. Mr McAllister gives evidence regularly in the Commercial Hub and is well regarded. Both he and the legal team instructing him are well aware of the Practice Direction regarding the submission of expert evidence in the Commercial Hub. Furthermore, his report fails to deal with the effect of an injection of damages, intended to put TES into the position it would have been in if there had been no breach of procurement law, if it is determined on the hearing of the plenary action that the defendant is in breach. Obviously if there is no breach of procurement law then there can be neither any entitlement to carry out the Lot 2 contract nor to claim damages from the defendant.

[11] In the Lagan judgment I have set out at some length the court's approach to expert evidence which does not comply with the Practice Direction and for which no explanation has been offered. In such circumstances where a decision has been taken to place expert evidence before the court which obviously does not comply with the Practice Direction, it will be difficult for the court to rely on that expert evidence with any confidence.

[12] I consider that the timescale for hearing and delivering a judgment in these proceedings will be similar to that of the Lagan case. I am satisfied that delivering a final judgment by the end of June 2021 in these uncertain times will be a reasonably attainable ambition.

C. THE APPLICATION

[13] I have set out as briefly as I can in the judgment I have delivered in the Lagan case the background to this dispute. I confirm that I have considered at great length the comprehensive submissions made both in writing and orally on behalf of both parties. I am indebted to Counsel appearing for both parties and to their respective legal teams. Again, I have tried at this interim stage to reach a conclusion which enables the court "to hold the balance as justly as possible in [the situation] where the substantial issues between the parties can only be resolved by a full trial": see *Cambridge Nutrition Limited v BBC* [1990] 3 All ER 523 at [534] per Kerr LJ. I am also reminded that in considering whether to continue the automatic suspension the burden of proof is upon TES who supports its continuance: see Stuart-Smith J in *Open View Security Solutions Limited v The London Borough of Merton Council* [2015] EWHC 269 at [39].

D. RELEVANT STATUTORY PROVISIONS, LEGAL PRINCIPLES AND CONSIDERATIONS

[14] Regulation 110 of the 2016 Regulations provides:

> "(1) Where –

(a) a claim form has been issued in respect of a utility's decision to award the contract;

(b) the utility has become aware that the claim form has been issued and that it relates to that decision; and

(c) the contract has not been entered into, the utility is required to refrain from entering into the contract.

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

(a) the Court brings the requirement to an end by interim order under Regulation 111(1)(a);

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

[15] In this case the court has been asked to bring the "requirement" to an end under Regulation 111(1)(a). This provides:

"111(1) In proceedings, the Court may, where relevant, make an interim order –

(a) bringing to an end the requirement imposed by Regulation 110(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 …

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

(a) the Court must consider whether, if Regulation 110(1) were not applicable, it would be appropriate to make an interim order requiring the

> utility to refrain from entering into the contract; and
>
> (b) only if the Court considers it would not be appropriate to make such an interim order may make an order under paragraph (1)(a).
>
> (3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in Regulation 110(1).
>
> (4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the substantial period."

[16] So in this case the writ has been issued and there is a requirement on the part of the defendant to refrain from entering into any contract in respect of the procurement competition. The defendant has asked the court to make an interim order under Regulation 111 to bring to an end the requirement imposed by Regulation 110.

Abnormally low tenders

[17] Regulation 84 of the 2016 Regulations deals with abnormally low tenders. Regulation AD4(1) states:

> "Utilities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.
>
> (4) The utility may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or cost proposed …"

[18] In *SRCL Ltd v National Health Service Commissioning Board (also known as NHS England)* [2018] EWHC 1985 (TCC) Fraser J looked in some detail at the issue of abnormally low tenders. He determined at paragraph [193]:

> "I consider there is no basis for imposing a general duty to investigate such tenders in all cases. If, in any particular competition, the contracting authority considers that a particular tender has the appearance of

> being abnormally low, **and the contracting authority considers that the tender should be rejected for that reason**, there is a duty upon the contracting authority to require the tenderer to explain its prices. Absent a satisfactory explanation, it is obliged to reject that tender as expressly stated in Article 69, namely non-compliance with certain legislation in the specified fields of environmental and social legislation. Otherwise, it is entitled to reject it if the evidence does not satisfactorily account for the low level of price, but is not required to do so."(Emphasis added)

[19] Under the Regulations there is only a duty to investigate if the contracting authority considers a particular tender is abnormally low **and** that contracting authority considers that the tender should be rejected for that reason. Further, under the Regulations, there is no duty to reject a tender if no satisfactory explanation is given for the low level of price, but there is a power to do so.

The approach to set aside applications

[20] In *DHL Supply Chain Ltd v Secretary of State for Health and Social Care* [2018] EWHC 2213 [TCC] O'Farrell J said at [36] in respect of the proper approach the court should take to applications under Regulation 111 as follows:

> "The Court must consider the following issues:
>
> (i) Is there is a serious issue to be tried?
>
> (ii) If so, would damages be an adequate remedy for DHL [the plaintiff] if the suspension were lifted and if it succeeded at trial?
>
> (iii) If not, would damages be an adequate remedy for DHSC [the defendant] if the suspension remained in place and it succeeded at trial?
>
> (iv) Where there is doubt as to the adequacy of damages for either or both parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong, that is, where does the balance of convenience lie?"

[21] Both parties agreed that this clearly sets out the approach which the court should follow to ensure that it takes the "course which seems likely to cause the least irremediable prejudice to one party or the other": see Lord Hoffmann in *National*

Commercial Bank Jamaica Ltd v Olint Corp Ltd [2009] 1 WLR 1405. I intend to consider each of these issues separately and together.

E. DISCUSSION

Serious issue to be tried

[22] It has been conceded that there is a serious issue to be tried. I consider that it is a sensible way to proceed and I have dealt with this at length in my judgment in the Lagan case. I am not in a position at the interlocutory stage to form a final view on the merits. But on the papers TES does not have a killer blow which guarantees its success in its claim against the defendant. I have set out in the Lagan judgment why the assertion that Lagan has an unbeatable case in respect of abnormally low tenders is flawed. The same reasoning applies, *mutatis mutandis*, to the present case. There was never any legal requirement on the defendant to reject an abnormally low tender, only a power to do so. There is therefore no basis, legal or factual, which has been disclosed to the Court which would permit a conclusion that the defendant was legally compelled to reject any abnormally low tender in respect of Lot 2, if indeed there was one.

[23] The present application is an interlocutory one. The court should be careful not to turn it into a trial or a quasi-trial of the issues that will ultimately be determined after a full hearing. In *Alstom Transport UK Limited v London Underground Limited and Another* [2017] EWHC 1521 (TCC) Stuart-Smith J said at paragraph [15]:

> "It is as well to remind myself at the outset of the fact that the present application is an interim application that does not and cannot amount to a trial or quasi-trial of the issues that will ultimately be determined."

[24] In *Open View Security Solutions Limited v LB Merton Council* [2015] EWHC 2694 (TCC) Stuart-Smith J said at [26]:

> "The first prerequisite to the application of *American Cyanamid* principles is no more demanding than that there is a serious issue to be tried. In some cases, of which the present is one, the party resisting the interim injunction may consent to the application proceeding on the assumption that this pre-requisite is satisfied while maintaining that, if put to the test, the Court would conclude that it was not. It will only be in rare cases that the potential outcome of the ultimate hearing can be predicted with any confidence, and *American Cyanamid* itself is clear about the caution to be exercised when attempting to

> assess the relative strength of the parties' cases at this stage. First, it features in the House of Lords' statement of principle if there are uncompensatable disadvantages to each party and the extent of their disadvantages would not differ widely. Secondly, it is worth repeating that:
>
> **This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case**."

[25] In *Sysmex (UK) Limited v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC) Coulson J said in respect of the argument that one party had a strong case which should be taken into account at paragraph [19]:

> "I do not consider, on an application to lift the suspension in a typical procurement case, that this is an appropriate matter for the court to investigate. Such cases are a long way from a straightforward claim for an interlocutory injunction, where a particularly good point on the substantive dispute (an admission, say, or an unequivocal contractual term in one side's favour) might well be of assistance to the court's consideration of the application overall. It is not appropriate to have a mini-trial in a complex procurement dispute like this. Where, as here, it is accepted that there is a serious issue to be tried, then (save in exceptional circumstances) both sides should resist any further temptation to argue about the merits."

I endorse the views of both Stuart-Smith J and Coulson J. I agree that it will only be in exceptional circumstances where one party has a "simple knockout point" that a judge in the Commercial Hub in an interlocutory hearing will try and reach any conclusion about what the ultimate outcome of the proceedings might be after the case has been fully argued at trial.

[26] In the instant case there has been a concession that there is a serious issue to be tried by the defendant and I consider it would be unwise for me to attempt to conduct what would in effect be a quasi-trial. The court is unable by reading the evidence and considering the submissions to form a clear view that there is no

credible dispute that the strength of TES's case "is disproportionate to that of the defendant's."

Are damages an adequate remedy?

[27] It being accepted quite properly that there is a serious issue to be tried for the purposes of this interlocutory application, the next issue for the court to consider is that of damages.

[28] If damages are an adequate remedy then they will usually but not always defeat an application to remove the stay. The court's task is always to determine "whether it is just in all the circumstances that the claimant should be confined to his remedy in damages": see *Arraci v Fallon* [2011] EWCA Civ 668 at [42].

Damages to TES

[29] There is no suggestion that if TES is correct and the defendant is in breach of procurement law, its loss cannot be accurately quantified. Certainly Mr McAllister, chartered accountant, retained on behalf of TES had no difficulty in assessing what loss TES will suffer by being excluded from Lot 2 of IF105. The defendant is obviously able to discharge any award of damages. Of course, in doing so the defendant runs the risk under the **Regulations** that in those circumstances it would have to pay not only the successful tenderer but also damages to TES. So it would in effect have to pay twice over. As Stuart-Smith J said in *Alstom Transport UK Limited v London Underground Limited and Anor* [2017] EWHC 1521(TCC) at [39]:

> "… The prospect of paying damages as well as a contract price if it breaches its obligations is an integral part of the scheme under the Regulations for encouraging proper and principled procurements since it is to be assumed that contracting authorities will (in general) wish to avoid double payment."

[30] It is against this background that Mr Wylie, finance director of TES, claims in his affidavit that damages are not an adequate remedy because failure to win Lot 2 would have catastrophic consequences for TES. In particular he relies on Mr McAllister's opinion when he says:

(a) The loss of profits would "threaten the future viability of the Company";

(b) It will be necessary to terminate the employment of a number of key senior technical and operations management staff within the company. A consequence will be that it will then be impossible to find satisfactory replacements in the future and TES will lose its ability to tender for future contracts in Water Services.

[31] It is difficult to accept that the assertion of imminent financial catastrophe is likely if TES fails to become a successful tenderer in respect of Lot 2. If TES is correct then it will succeed with its claim and be entitled to damages to compensate it for its loss of this contract. Those damages are intended (and are quantified) to remedy the wrong done to it. There has been a wholesale failure to take them into account in these assertions of financial ruin. Further, TES's water division has supplied a water treatment plant in Iraq. It has been involved in water contracts to the Republic of Ireland and Cumbria. According to Mr Mitchell its power division has operated successfully over the past number of years and it is involved in a complete package of complementary services to clients "from project conception right through to design, manufacture, project management, testing, installation, commissioning and maintenance". Further expansion is expected. The appearance is of a successful company with good long-term prospects. TES has provided no effective challenge to these claims.

[32] But no company can expect to be successful in every tendering competition it enters. If an unsuccessful tenderer is intending to make the case that the loss of a competition will spell financial ruin, then it should provide convincing evidence as to why this is likely. There has been a complete failure to provide such evidence. I have already commented on the expert opinion of Mr McAllister. Indeed, it is difficult not to conclude that there has been a deliberate attempt to keep the court in the dark as to how TES will perform should it lose this tender by starving it of up to date financial information as to how TES is currently performing. If TES had wanted to make such a case, namely that winning Lot 2 was essential for its long-term survival, I would have expected the following evidence to be provided at a bare minimum:

(a) Up-to-date management accounts and detailed financial information as to turnover etc.

(b) A breakdown of how TES's turnover was made up and what was attributable to Water Services.

(c) What contracts TES had in the Water Services sphere apart from those with the defendant.

(d) What alternative work sources there were in the Water Services sphere available to it.

(e) What plan TES had if it was unsuccessful in this tender to seek other work. If it had no plan how and why had it become so dependent on winning this particular contract.

(g) The effect of a successful claim on its finances and its ability to retain its employees.

[33] In the circumstances I remain deeply unimpressed by the claim made by TES of financial ruin if it fails to win this contract and by its failure to provide any cogent financial evidence to support it.

[34] The evidence from TES as to why it will lose its staff and how this will affect its ability to tender in the future is also unconvincing. It is lacking in detail. Firstly, it fails to take into account the injection of funds that a successful claim against the defendant will bring if the defendant has breached procurement law. Secondly, if TES was serious about making such a claim it would have provided much more detailed financial evidence to allow the court to consider this issue objectively.

[35] I find myself in a similar position to Edwards-Stuart J who said in *Mitie Limited v Secretary of State for Justice* [2020] EWHC 63 (TCC) at paragraph [59]:

> "I accept that from time to time valuable employees will be lost when the employer fails to win a new contract or, more probably, the renewal of an existing contract. However, there is no satisfactory evidence before the court to the effect that any current employees have been given notice or how many are likely to do so; see the issue in relation to the employees at the Bristol hub which is discussed above. In any event, this is a hazard that is inherent in this type of business. In the circumstances of this particular case, I do not consider it is a factor that has any significant impact when assessing the adequacy of damages as a remedy. As to the balance of convenience, I do not regard it as a matter which tips the balance to any material extent."

[36] Mr Dunlop QC on behalf of the defendant complains quite reasonably that Mr Wylie has asserted he will lose important staff and be unable to tender for other contracts, but that these have only ever amounted to assertions. When examined the suggestions do seem rather ambitious and I would certainly have expected TES to make good such claims with hard evidence. For example in what circumstances were the staff originally hired, what training did they receive, what jobs have they carried out since they were hired and why are there no comparable employees either on the market or working for other firms who could be taken on when needed?

[37] Having considered the evidence put before the court I am satisfied that damages would be an adequate remedy for TES if it subsequently succeeds in its claim against the defendant.

The defendant and damages

[38] There was some dispute about whether it was possible to have the non-infrastructure work of Lot 2 carried out without the implementation of IF105 at all. The short answer is that the work could be carried out under other Framework Agreement(s). It would be possible for the defendant to extend IF100 and to hold individual competitions for infrastructure work. .

[39] The consequences of using IF100 which was only designed for large non-infrastructure work are, it is claimed:

(a) The necessity of bundling different jobs together which will be slow, inefficient and increase costs;

(b) Basic maintenance will be delayed and this could result in the failure of plant later on;

(c) It is impossible to integrate work under Lot 1 with Lot 2 work.

[40] There was also a dispute about whether work under Lot 2 could be awarded under IF019 because to do so would breach procurement law. Furthermore, it is likely to incur the wrath of the Utility Regulator when the financial limits under IF019 have been exhausted. It is not possible for me to reach a definitive view although I note that on 16 December 2019 TES were told by the defendant it was going to extend IF019 for a further year.

[41] Further it is claimed that there will be real problems in attributing loss due to delayed base maintenance, calculating additional costs and working out efficiency savings. I can see force in those arguments. On balance, I can see real problems in quantifying the defendant's loss.

[42] However, regardless of whether or not damages can be calculated, the real problem lies not with the quantification of damages but the payment of those damages. The loss suffered by the defendant if it is unable to make the efficiency savings on any view is likely to be very substantial amounting to hundreds of thousands of pounds over the course of the contract.

[43] Even if damages could be quantified, an award of damages would not be an adequate remedy because the court has no evidence before that it could rely on which would permit it to conclude that TES could honour any undertaking to discharge the defendant's loss. There can be no doubt that TES has been profitable in the past and that there were cash reserves. But that is in the past and TES's own case is that failure to win this tender will put its lights out. A deliberate decision was taken not to adduce up-to-date financial information as to TES's performance. The consequence is that the court is at a loss to know whether the undertaking being

offered has and will have any substance. In all of those circumstances I conclude that damages will not be an adequate remedy for the defendant if TES's claim fails.

Reputational damage

[44] It is also alleged that TES has suffered reputational damage that will not be reflected in any monetary award for damages. I find it difficult on the evidence to accept that TES will suffer reputational damage. If such a claim was going to be made then I would have expected TES to have produced cogent evidence of the risk of such damage. In *Open View Security Solutions Limited v The London Borough of Merton Council* Stuart-Smith J said at paragraph [37]:

> "When there are the criteria to be applied before a court accepts that **loss of reputation** is a good reason for holding that damages which otherwise would be an adequate are an inadequate remedy for **American Cyanamid** purposes. In the absence of prior authority directly on point (none having been cited by the authorities) but with an eye to the approach adopted by the Court in *Alstom*, *DWF* and *NATS* I suggest the following:
>
> (i) Loss of reputation is unlikely to be of consequence when considering the adequacy of damages unless the Court is left with a reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and irrecoverable as damages;
>
> (ii) It follows that the burden of proof lies upon the party supporting the continuance of the automatic suspension and the standard of proof is that there is (at least) a real prospect of loss that would retrospectively be identifiable as being attributable to the loss of the contract at issue but not recoverable in damages;
>
> (iii) The relevant person who must generally be shown to be affected by the loss of reputation is the future provider of profitable work."

[45] Furthermore, it seems to me that this is a case similar to *Solent NHS Trust v Hampshire County Council* [2015] EWHC 457 (TCC) where Akenhead J said at [19]:

> "… the fact that it pre-qualified to tender for the new contract is itself evidence that it was considered sufficiently qualified and experienced. In any event, even if the suspension was lifted, it remains open to Solent to pursue its case on liability and establish if it can that it should have won the contract, which would restore any reputation which it thinks it might lose."

As the President of the European Court of Justice said in *Unity OSG FZE v Council of the European Union and EUPOL Afghanistan* Case T-511/08R at [39]:

> "Insofar as the applicant pleads damage to its reputation, suffice it to note that participation in a public tendering procedure, by nature is highly competitive, involves risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial. Where an undertaking has been unlawfully eliminated from a tendering procedure, there is even less reason to believe that it is liable to suffer serious and irreparable harm to its reputation, since its exclusion is unconnected with its consequences and the subsequent annulling judgment will in principle allow any harm to its reputation to be made good…"

[46] If TES does suffer any damage to its reputation by failing to win a contract for Lot 2, which I do not accept, that damage will be repaired by an award of damages if it is able to establish a breach of procurement law by the defendant at the full trial.

F. BALANCE OF CONVENIENCE

Delay

[47] The first issue to consider is how long the suspension is likely to last. As I have stated in *Lagan* that is a difficult question to answer given the present restrictions imposed by the COVID-19 pandemic. I would hope that both cases could be heard and determined by the end of the summer term. I consider that this is a reasonable timescale, being neither unduly optimistic nor pessimistic.

Public interest

[48] It is undoubtedly true that the public interest weighs heavily in the balance of convenience: see Fraser J's dictum in *Lancashire Care NHS Foundation Trust, Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council* [2018] EWHC 20 at [27] where he said:

> "The public interest should be taken into consideration as part of the balance of convenience."

[49] There is obvious public interest in ensuring that there is compliance with procurement law. However whether the defendant has breached procurement law in not awarding the tender to TES will not be known until there is a plenary trial.

[50] In *Alstom Transport UK Ltd v London Underground Ltd* [2017] EWHC 1521 Stuart-Smith J said at [39]:

> "Of course, setting aside the automatic suspension at a time when the Court does not know what the final outcome of the Claimants' allegations will be gives rise to the possibility that the Defendant will end up paying a contract sum to the successful tenderer and damages to the aggrieved Claimant. However, that possibility is not a reason for maintaining the automatic suspension if it is otherwise inappropriate to do so. On the contrary, the prospect of paying damages as well as a contract price if it breaches its obligations is an integral part of the scheme under the Regulations for encouraging proper and principled procurements since it is to be assumed that contracting authorities will (in general) wish to avoid double payment.

[51] The risk of a major disaster as a result of the failure to implement Lot 2 is of a wholly different order from the risk of failing to implement Lot 3. The court accepts there is a risk of lack of basic maintenance and deteriorating assets leading to leakage of water and sewerage. However, nowhere is there the same pressure that exists with the Lot 3 works. There is, for example, no imminent prospect of a catastrophic calamity if Lot 2 work is not carried out such as exists, for example, with the Strathfoyle sewage syphons under Lot 3. However it cannot be in the public interest to endure dilapidated and deteriorating Water Services because, inter alia, basic maintenance is not carried out in a timely fashion. So the public interest is in favour of the defendant but not to the same overwhelming extent that it is with Lot 3.

Interests of the other successful parties

[52] There are the interests of the other parties who successfully tendered for Lot 2 to be taken into account. Their interests require that they should be awarded the contracts for which they successfully tendered. They are being denied the opportunity to revamp, improve and transform the Water Services and earn profits because of this legal action by TES. It is not suggested that they have done anything untoward.

Status quo

[53] Lord Diplock in *American Cyanamid* said that:

> "Where other factors appear to be evenly balanced it is a council of prudence to take such measures as are calculated to preserve the status quo" (see 408(f)).

[54] The factors in this case are not evenly balanced. The factors come down in favour of setting aside the order and permitting the defendant to award contracts to the successful tenderers in respect of Lot 2. However, even if the arguments were evenly balanced, which they are not, the status quo ante bellum is to permit the defendant to award the contracts in respect of Lot 2 to the successful tenderers.

CONCLUSION

[55] I am satisfied on the evidence that:

(i) Damages are an adequate remedy for TES;

(ii) Damages are not an adequate remedy for the defendant;

(iii) The balance of convenience favours the defendant;

(iv) But if all things were equal, which they are not, I should favour the status quo, which means setting aside the prohibition on the defendant awarding Lot 2 contracts to successful tenderers.

[56] I am wholly satisfied that permitting the defendant to go ahead and award the Lot 2 contracts to the successful tenderers will cause the least irremediable prejudice. I will hear the parties on the issue of costs only if there is an objection to the costs being reserved to the trial judge which is the costs order I propose to make.