Neutral Citation Number: [2018] EWHC 2213 (TCC)

Case No: HT-2018-000185

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/08/2018

Before:

MRS JUSTICE O'FARRELL

- -

Between:

DHL SUPPLY CHAIN LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**
- and -	
UNIPART GROUP LIMITED	**Interested Party**

- -
- -

Richard Leiper QC and Joseph Barrett (instructed by **Dentons UK and Middle East LLP**) for the **Claimant**
Sarah Hannaford QC and Ewan West (instructed by **Mills & Reeve LLP**) for the **Defendant**
Fionnuala McCredie QC (instructed by **Macfarlanes LLP**) for the **Interested Party**

Hearing date: 7th August 2018

- -

Approved Judgment

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

.....

MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. There are two applications before the Court:

   i) an application by the Claimant ("DHL") for summary judgement; and

   ii) an application by the Defendant ("DHSC"), supported by the Interested Party ("Unipart"), for the lifting of the automatic suspension which arose on issue of the claim and which prevents DHSC from entering into a contract with the successful tenderer, Unipart.

Background

2. These proceedings concern a procurement exercise conducted by DHSC under the Public Contracts Regulations 2015 (as amended) ("the Regulations"), in respect of a contract for the provision of logistics services for the NHS and social care services with a value of £730 million.

3. Since 2006, DHL has provided NHS supply chain services under the Master Services Agreement ("the MSA"). These services included the procurement of all medical devices and hospital consumables (excluding medicines), associated IT, logistics and transactional services. The initial contract duration was 10 years, with an option to extend for a further period of up to 5 years. In 2015, the parties agreed to extend the MSA until 30 September 2018. On 28 March 2018, DHSC notified DHL that various elements of the MSA would be extended for a further period, including an extension to the logistics services, which expires on 28 February 2019.

4. The procurement exercise, the subject of these proceedings, is part of a reorganisation of the NHS supply chain to form the Future Operating Model ("the FOM"). Under the FOM, the NHS supply chain is broken down into a number of different components, comprising 11 separate contracts for the procurement of medical devices and hospital consumables (other than medicines) ("the Category Towers"), a single IT contract and a single logistics contract. Those contracts will be overseen by Supply Chain Coordination Limited ("SCCL"), a company wholly owned by the Secretary of State, which will also provide all transactional services. It is anticipated that the FOM will achieve value for money for the NHS, release savings to be used in frontline services, increase buying power, improve management and efficiency, drive innovation and secure better pricing through competition.

5. The Category Towers contracts and the IT contract have been awarded. The only outstanding contract is the logistics contract that is the subject of these proceedings. The planned implementation date for all component parts of the FOM is 31 March 2019.

The procurement exercise

6. On about 29 August 2017 the procurement for the logistics services was published in the Official Journal of the European Union ("the OJEU"), using the open procedure under the Regulations. The notice stated that the contract duration would be 60 months with a value of £730 million. The services were described as:

i) management of existing logistics services, including transport, inventory management and site facilities;

ii) provision of inbound logistics and inter-depot trunking services;

iii) support for expansion of logistics services to meet projected increased demand;

iv) provision for home and community delivery services for continence products (and potentially other products), on behalf of the NHS, to residential homes, care homes, domestic premises and any NHS funded providers of community health care services.

7. The invitation to tender ("ITT") documents stated that the scope of the services comprised (i) core logistics services and (ii) home delivery service ("HDS") logistics services. The core logistics services were described as warehousing, transport, inventory management, operational finance, customer services, internal audit and inbound logistics and transshipment. The HDS logistics services were described as warehousing, transport and customer services.

8. The HDS transport services specification was contained in Schedule 2 of the ITT documents and included the following:

> "The Logistics Service Provider must ensure that a sufficient number of appropriately qualified drivers are available to meet the delivery obligations for the HDS.
>
> a) All drivers undertaking deliveries to a Service User's home must have an Enhanced Disclosure and Barring Service (DBS) clearance.
>
> b) All drivers undertaking deliveries to a Service User's home must be insured to cross a Service User's threshold and access their home.
>
> HDS deliveries can be in two types:
>
> a) Individual for Service User's own home
>
> b) Bulk for residential care homes or nursing homes.
>
> Drivers may be required to deliver individual packages across the threshold and in some cases to break the Products into storage receptacles.
>
> Drivers will not be required to unpack bulk deliveries at locations such as care homes… "

9. Service User was defined for the purpose of Schedule 2 as:

> "an individual who is resident in a nursing home, residential care home or their own home and receives Products delivered to them by the HDS."

10. Evaluation guidance was set out at attachment 4 to the ITT. The evaluation process included administrative compliance (Gate A), legal and commercial compliance (Gate B) and suitability assessment (Gate C). The scoring methodology stated that the suitability assessment would be carried out using the responses to Section 6, Attachment 5 – Selection Questionnaire. The scoring scheme provided for a score of 0 to 3 but a score of 2 or below would constitute a fail and disqualify the bidder from further stages of the procurement.

11. The selection questionnaire at section 6 included SQ 6.1: evidence of relevant contract experience, SQ 6.2: evidence of any sub-contractor's experience, SQ 6.4: experience in managing customer services for the Core Logistics Service, SQ 6.5: customer services for the HDS, SQ 6.6: project management experience and SQ 6.7: inventory management experience.

12. SQ 6.9 stated as follows:

EVALUATION INTENTION	Seeks to establish that the Potential Provider has experience of providing a Logistics Service within a Health or Social Care Environment in line with the Authority's requirements.
SUBJECT	**Experience of providing Logistics Service within Health or Social Care Environment**
QUESTION	The Health and Social Care Environment presents unique challenges and considerations to a logistics service. Specific product and Customer requirements often require adjustments in storage and delivery practices, for example. For the HDS, it can include direct contact with Service Users in a domestic setting. Potential Providers are to describe where they have provided logistics services within this environment, and where 'across the threshold' delivery was a key component of the service and stakeholder experience.
RESPONSE REQUIREMENT	The Potential Provider response should demonstrate that it has experience of managing a service in the Health and Social Care Environment of similar size, complexity and scope… Additionally the response should demonstrate that the Potential Provider has experience in delivering an 'across the threshold service' irrespective of sector. Particular emphasis will be placed on the:

	- Understanding of how the unique challenges of operating a logistics service in the Health and Social Care Environment can impact on Service User health and well-being. - Evidence, regulatory compliance and experience around interacting with Service Users.

13. The glossary forming part of the ITT defined 'Health and Social Care Environment' as:

> "a complex system in which health and social services and care are provided to Service Users."

14. 'Service User' was defined in the glossary as:

> "an individual in receipt of services from an NHS England body or under an NHS England managed contract."

15. On 6 October 2017 DHL submitted a tender in respect of the logistics contract.

16. By letter dated 4 June 2018 DHSC notified DHL that it had been unsuccessful in the procurement and that the successful tenderer was Unipart. The award of the contract was based on the most economically advantageous tender ("MEAT"), evaluated on a quality to price ratio of 60:40 respectively. The scores of DHL and Unipart were as follows:

BIDDER	QUALITY SCORE (60%)	PRICE SCORE (40%)	FINAL MEAT SCORE
DHL	40.92%	14.26%	55.18%
Unipart	43.32%	25.74%	69.06%

Proceedings

17. On 26 June 2018 DHL issued proceedings seeking to challenge the procurement on the ground that DHSC conducted the procurement in an unlawful manner contrary to the Regulations. The Particulars of Claim were served on 2 July 2018 and amended on 13 July 2018. The relevant breach is pleaded at paragraphs 36 and 37 of the Amended Particulars of Claim:

> "[36] The defendant purported to evaluate the Unipart response to SQ 6.9 as meeting the scoring criteria

> required to be awarded a score of 3. The Defendant has not identified any proper basis on which its decision in respect of the Unipart response to SQ 6.9 can be justified. It is averred that in purporting to award the Unipart response to SQ 6.9 a score of 3, the Defendant breached its duties, failed to apply the published selection criteria, applied undisclosed selection criteria, breached its duties of equal treatment and transparency, misdirected itself and/or committed manifest errors…
>
> [37] It follows that applying the published scoring criteria the Unipart response to SQ 6.9 could not lawfully be awarded a score of 3. Pursuant to the express terms of the ITT, the Unipart response was also, therefore, required to be excluded from the procurement."

18. On 27 July 2018 the Defence was served. Its case on SQ 6.9 was set out in paragraph [27] and included:

> "[27.1] The interpretation and application of SQ6.9 falls to be determined in the context of the Procurement as a whole, the requirements of the Contract to be awarded, and the contents of the tender documentation as a whole, in particular the other selection questions.
>
> [27.2] As explained at the Bidder Engagement Days and Site Visits and as is clear from the requirements of the Contract and the contents of the tender documentation, the majority of the services to be provided by the successful tenderer are general logistics services which require no particular experience or expertise in the health or social care sector. The only element of the contract which requires specific experience and expertise is the HDS, in particular the ability to provide an "over the threshold" service to vulnerable individuals.
>
> …
>
> [27.4] … a requirement that a tenderer had to demonstrate experience of delivering a contract of the size, complexity and scope of the Contract as a whole within the health and social care sector would have the effect of rendering the Claimant the only economic operator capable of bidding. That was not and could not have been the Defendant's intentions, given that it would have been unlawful to design the competition for procurement of a public contract in a manner which permitted only the incumbent to tender successfully.

> [27.5] … the purpose of SQ 6.9 was to focus on the operational side of the HDS …
>
> [27.8] … The requirement was both to "describe where [the tenderer has] provided logistics services within this environment, and where 'across the threshold' delivery was a key component of the service and stakeholder experience" (emphasis added). The conjunctive "and" makes clear that SQ 6.9 was not simply looking at a logistics service in the health and social care sector, but one with a specific "across the threshold" element.
>
> [27.9] Consistent with that approach, the evaluation criteria sought demonstration of both elements. However in order to ensure that there was effective competition, the Defendant was willing to accept relevant experience in the health and social care sector that did not include an "across the threshold service" provided that experience of that element could also be demonstrated in another sector. However, where a tenderer had experience of an "across the threshold service" in the health and social care sector, description of that experience alone would suffice. References to similar size, complexity and scope were not therefore to be read as referring to the entirety of the services to be provided under the Contract but to the HDS element specifically.
>
> [27.10] The approach outlined above is both clear and one that would be obvious to the reasonably well informed and normally diligent ("RWIND") tenderer participating in the Procurement …"

19. On 1 August 2018 the Reply was served. DHL reiterated its interpretation of SQ 6.9, namely, that it required demonstration of experience of managing a service similar to that provided under the proposed contract and was not limited to the HDS. DHL further stated that paragraph 27.9 of the Defence amounted to an admission that, in evaluating the Unipart response to SQ 6.9, DHSC was in breach of its obligations under the Regulations.

20. On 3 July 2018 DHL issued its application for summary judgement. On 10 July 2018 DHSC issued its application to lift the automatic suspension.

Summary Judgment

21. CPR 24.2 provides that:

> "The court may give summary judgment against a … defendant on the whole of the claim or on a particular issue if:

> (a) it considers that …
>
> (ii) the defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

22. The principles applicable to a claim for summary judgment are well established and not in dispute:

    i) The court must consider whether the defendant has a realistic as opposed to fanciful prospect of success. A realistic defence is one that carries some degree of conviction and is more than merely arguable: *ED&F Man Liquid Products Limited v Patel* [2003] EWCA Civ 472 per Potter LJ at paragraph [8].

    ii) The court must not conduct a mini trial and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process: *Swain v Hillman* [2001] 1 All ER 91 per L. Woolf MR at p.95.

    iii) More complex cases are unlikely to be capable of being resolved on a summary basis without disclosure and oral evidence at trial. CPR 24.2 is designed to deal with cases that are not fit for trial at all: *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 260 per Lord Hope at p.261B; *Yeheskel Arkin v Borchard Lines Ltd (No.2)* [2001] WL 606419 per Coleman J at paragraphs [20] and [21].

    iv) However, the court should not decline to deal with a short point of construction merely on the basis that something relevant to the matrix might turn up if there were a full trial. If the court is satisfied that it has before it the factual matrix necessary for determination of the proper construction issue, it should determine it on the summary judgment application: *Saleem Khatri v Cooperative Centrale Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397 per Jacob LJ at paragraphs [3] – [5].

23. There is no dispute as to the material requirements of the Regulations. Regulation 18 states:

> "(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
>
> (2) The design of the procurement shall not be made with the intention of … artificially narrowing competition.
>
> (3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."

24. The obligations of transparency and equal treatment require a contracting authority to apply the selection criteria set out in the ITT. The meaning and effect of the ITT criteria

is a matter of law for the court. The transparency obligation does not allow for any margin of appreciation: *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 per Coulson J at paragraphs [7] & [8].

25. A material issue raised on the pleadings is whether the ITT criteria were sufficiently clear to permit of uniform interpretation by all reasonably well informed and diligent ("RWIND") tenderers. Although evidence may be relevant to the question of how a document would be understood by the RWIND tenderer, the test is an objective one and does not depend on the subjective intention or understanding of the contracting authority or any tenderer: *Healthcare at Home Ltd v The Common Services Agency (Scotland)* [2014] UKSC 49 per L.Reed at paragraph [5], [8], [14], [26] and [27].

26. DHL's case is that DHSC acted unlawfully in its evaluation of Unipart's response to SQ 6.9. Mr Leiper QC, on behalf of DHL, submits that on a proper interpretation of SQ 6.9, each tenderer was required to demonstrate its capability in respect of two distinct elements, namely: (i) experience of managing a service in the Health and Social Care Environment of similar size, complexity and scope; and (ii) experience in delivering 'an across the threshold service' irrespective of sector. SQ 6.9 included, but was not limited to, the HDS; element (i) required evidence of the provision of logistics services within the health and social care sector of a similar size, complexity and scope to the proposed contract.

27. Mr Leiper submits that the above interpretation of SQ 6.9 is clear from the express words used in the ITT. The RWIND tenderer would not read SQ 6.9 as confined to the HDS. DHSC's admission in the Defence, that it applied SQ 6.9 so that all a tenderer needed to demonstrate was experience of an "across the threshold service" in the HDS, shows that it applied the wrong test. Unipart could not demonstrate experience of the provision of logistics services within the health and social care sector of a similar size, complexity and scope to the proposed contract. If DHSC had applied the correct test, the Unipart response would have failed SQ 6.9 and its bid would have been excluded from the remainder of the tender process. In those circumstances, DHSC has no realistic prospect of defending the claim and there is no other compelling reason why the claim should be disposed of at trial.

28. DHSC's case is that the score of 3 awarded to Unipart's response to SQ 6.9 was one that it merited and was within DHSC's discretion to award. The necessary experience was provided by Unipart's response, in particular through reliance upon its subcontractor, Movianto.

29. Ms Hannaford QC, for DHSC, submits that DHL's interpretation of SQ 6.9 is wrong. It is accepted that SQ 6.9 required each tenderer to demonstrate its capability in respect of two distinct elements: (i) experience of managing a service in the Health and Social Care Environment of similar size, complexity and scope; and (ii) experience in delivering 'an across the threshold service' irrespective of sector. The Health and Social Care Environment is a defined term and is concerned with the delivery of health and social care services to Service Users. Service Users are individuals who benefit from the HDS. Therefore, the relevant environment is the HDS. "Across the threshold" is part of the HDS but the HDS is of wider scope. Not all HDS deliveries are to Service Users in their homes; the HDS includes deliveries to Service Users in nursing and care homes where an "across the threshold" service is not required. Element (i) requires evidence of experience of logistics services in the HDS as a whole; element (ii) requires

evidence of experience of "across the threshold" services within or outside the HDS. SQ 6.9 was not directed to the wider Core Logistics services which are dealt with elsewhere in section 6. DHL's interpretation would require the Court to read additional words: "to the whole contract" at the end of the response requirement for element (i) but there is no basis for re-writing the ITT.

30. Ms Hannaford submits that in any event this issue is not suitable for summary judgement. Evidence would be needed as to the context, definitions and factual matrix within which SQ 6.9 should be read and understood by the RWIND tenderer. Further there are disputed factual issues, such as what was said at the tender meetings, whether other bidders could meet the requirements if the DHL interpretation were to be correct, whether Unipart could have merited a score of 3 for SQ 6.9 on the DHL interpretation and whether the confidential allegations set out in paragraph 36 of the Amended Particulars of Claim could be established on the balance of probabilities by DHL.

31. On the documents currently before the Court, DHSC has a real prospect of successfully defending the claim. Ms Hannaford's submissions as to the proper construction of the ITT are supported by the express definitions of "Health and Social Care Environment" and "Service User". Those defined terms used in SQ 6.9 suggest that the question could be limited to the HDS as claimed. Of course, it will be necessary to construe SQ 6.9 against the relevant factual matrix and together with the other provisions of the ITT. The Court does not speculate as to what such an exercise will show. The witness statements of Mr Sahota, Senior Procurement Officer for DHSC, and Mr Jones, Vice President (Business Development) for DHL, indicate that there are factual disputes as to: (a) what was said to tenderers at the pre-bid meetings, (b) what would be required to be demonstrated to show the relevant experience required by SQ 6.9, (c) whether there were other bidders who could meet the stated criteria and (d) whether Unipart's response satisfied the criteria. The Court cannot determine those matters fairly without giving the parties an opportunity to test the evidence at trial.

32. For those reasons, DHL is not entitled to summary judgment and its application is dismissed.

Application to lift the suspension

33. The claim form being issued resulted in an automatic suspension imposed by Regulation 95(1), preventing DHSC from entering into the logistics contract with Unipart:

> "Where –
>
> (a) a claim form has been issued in respect of a contracting authority's decision to award the contract; and
>
> (b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision; and
>
> (c) the contract has not been entered into,

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

34. Regulation 96 empowers the Court to lift the suspension as follows:

> "(1) In proceedings, the Court may, where relevant, make an interim order –
>
> (a) bringing to an end the requirement imposed by regulation 95(1) …
>
> (2) When deciding whether to make an order under paragraph (1)(a) –
>
> (a) the Court must consider whether, if regulation (1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and
>
> (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).
>
> (3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 95(1)."

35. It is established law that the applicable test is the *American Cyanamid* test: *DWF LLP v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900 per Sir Robin Jacob at [45]-[47]; *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 per Coulson J at [34] and [48], *OpenView Security Solutions Limited v The London Borough of Merton Council* [2015] EWHC 2694 per Stuart-Smith J at [10]-[11]; *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 200 per Fraser J at [16]-[18].

36. The Court must consider the following issues:

i) Is there a serious issue to be tried?

ii) If so, would damages be an adequate remedy for DHL if the suspension were lifted and it succeeded at trial?

iii) If not, would damages be an adequate remedy for DHSC 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?

Serious issue to be tried

37. DHSC concedes, for the purpose of this application, that there is a serious issue to be tried.

38. As set out above in relation to the summary judgment application, the Court does not have before it the material to allow it to speculate as to the likely strengths and weaknesses of either party's case at trial or to evaluate and compare the capacity and capability of DHL and Unipart to provide the logistics services. Therefore, it would not be appropriate for the Court to go any further and make any preliminary findings as to the weight of the arguments or evidence.

Adequacy of damages for DHL

39. Mr Leiper submits that damages would not be an adequate remedy for DHL if the suspension were to be lifted. Firstly, the logistics contract is highly prestigious and amounts to 50% of DHL's work in the health and social care and life-sciences sectors. Loss of this contract will affect adversely DHL's reputation and standing in these sectors, and its ability to secure other commercial opportunities. Reliance is placed on the evidence of Mr Jones in his first witness statement. Such damage to its reputation would be very difficult to quantify.

40. Secondly, as explained by Mr Jones, if the suspension is lifted, DHL will suffer the loss of experienced and senior employees under TUPE regulations. Currently, there are more than 1800 employees working on the existing contract. DHL has made significant investments in recruiting and training that workforce. At least some of those roles cannot be adequately or reliably filled by others.

41. Thirdly, the impact of the decision of the Supreme Court in *Nuclear Decommissioning Agency v Energy Solutions EU Ltd* [2017] UKSC 34 raises the real prospect that if the suspension were lifted and DHL established its claim, it would be deprived of any damages on the ground that the "sufficiently serious" criterion could not be satisfied. In those circumstances, DHL would be left without any effective or substantive remedy in respect of DHSC's breach of the Regulations.

42. DHSC submits that damages would be an adequate remedy for DHL. DHL has been able to indicate with some precision the amount of profit it expects to earn over the lifetime of the contract, as set out in Mr Jones' first witness statement. Therefore, it will not have difficulty in computing its claim for lost profits. The contract that has been lost is not the MSA but one of a number of different contracts forming part of the FOM. As such, DHL is in the same position as any other unsuccessful commercial tenderer and will not suffer any loss of reputation that it might have had under the MSA. DHL's evidence that it will lose valuable commercial opportunities is speculative and does not discharge the required burden of proof.

43. As to DHL's complaints concerning loss of staff through TUPE, such employees must be engaged currently in performing the relevant parts of the MSA and therefore would not be playing a major role in any other of DHL's activities.

44. In response to the *Nuclear Decommissioning* issue, Ms Hannaford confirmed that if DHL succeeded in establishing that DHSC acted unlawfully in awarding the contract

to the wrong bidder, DHSC accepts that the breach would be sufficiently serious to sound in damages. This concession was made without prejudice to any argument on causation or quantum of loss.

45. When considering whether damages would be an adequate remedy for DHL, the Court must have regard to the issue whether it is just, in all the circumstances that DHL should be confined to its remedy of damages: *Covanta* (above) at [48]. Damage to reputation may be a relevant factor but requires cogent evidence showing that such loss of reputation would lead to financial losses that would be significant and irrecoverable as damages or very difficult to quantify fairly: *Alstom Transport v Eurostar International Ltd* [2010] EWHC 2747 per Vos J at [129]; *NATS (Services) Ltd v Gatwick Airport* [2014] EWHC 3133 per Ramsey J at [84]-[85]; *DWF* (above) at [52]; *Openview* (above) at [33]-[40].

46. I accept Mr Jones' evidence that the loss of this contract is likely to have a substantial adverse effect on DHL's reputation which would be very difficult properly to quantify. The logistics contract is prestigious and high value. DHL is the incumbent provider of the logistics services. The fact that the MSA has been broken into a number of separate contracts does not detract from the fact that DHL will be seen in the marketplace as having lost a valuable contract for the provision of these services in a procurement exercise where the outcome is not determined solely on price. DHL will lose a unique selling point when bidding for other, similar projects that is likely to affect its ability to win them.

47. I also accept Mr Jones' evidence that DHL will lose a skilled workforce that is a valuable resource and the product of DHL's investment and training. Those employees will have been engaged on the MSA but they will be lost to DHL through TUPE transfers. DHL will not benefit from their productivity on the new logistics contract and will no longer have them at its disposal to work on other projects. Although DHL will be able to go out into the market and recruit a new workforce, it will be at a disadvantage in the short term in bidding for other work. The damage suffered by the loss of this human resource will be very difficult to quantify and prove.

48. For the above reasons, it is likely that damages would not be an adequate remedy for DHL if it were to establish its claim at trial.

Adequacy of damages for DHSC

49. Ms Hannaford submits that DHSC would suffer loss that could not be adequately compensated for in damages if its application were refused. If the suspension were not lifted, the full implementation of the FOM would be delayed until after conclusion of the proceedings. One of the objectives of the FOM is to achieve savings of over £600 million per annum for the NHS as explained by Mr Sahota in his first witness statement. If the suspension were to be maintained, DHSC would seek the provision of a cross-undertaking in damages in respect of the delayed benefits of the FOM.

50. Ms McCredie QC, echoes DHSC's submissions on behalf of Unipart and similarly seeks a cross-undertaking in damages.

51. DHSC's case is that other losses cannot be compensated in damages. Reliance is placed on Mr Sahota's evidence that a delay to the implementation of the FOM would impact

adversely on DHSC's contingency planning for NHS winter pressures in 2018/2019 and for potential changes to trading rules as a result of Brexit at the end of March 2019. The building of stock to deal with these risks necessitates additional warehousing space for the increased supplies. Expansion of warehouse capacity is part of the new logistics contract. Further, each component part of the FOM is designed to be operated as part of an integrated, centrally-managed, system. If the contract were not awarded to Unipart as planned, although warehouses, trucks and, potentially, employees could be transferred to SCCL, there would be no logistics management structure in place within SCCL. As the HDS service currently operates from a DHL warehouse, SCCL would need to set up a new HDS operation. The only realistic options open to DHSC would be to extend the MSA in respect of logistics or to enter into a short-term emergency contract.

52. DHL contends that damages would be an adequate remedy for DHSC. I accept Mr Leiper's submission that any lost economic efficiencies and additional costs could be compensated for in damages. Although the issue of cross-undertakings was not dealt with in DHL's witness evidence, DHL is a large, global company with considerable financial strength. Mr Leiper stated in his skeleton and confirmed in open court that appropriate undertakings could be provided by DHL.

53. Mr Leiper is also correct that the risk that a further extension of the MSA would be illegal is small, given the original permitted extension of 5 years from 2016. Both options would attract a substantial premium, although I note that Mr Jones has confirmed that DHL would continue to provide its services without any price increase.

54. However, both options would result in disruption to a key part of the FOM, which could affect patients in hospitals and at home. DHSC would be required to put in place a new arrangement for the interim period, running alongside the other parts of the FOM, and then introduce a different arrangement, namely the new logistics contract, to complete the FOM. I accept Mr Sahota's evidence that such disruption could not be quantified properly or fairly compensated for by way of damages. On that basis, it is likely that damages would not be an adequate remedy for DHSC if it were to succeed at trial.

Balance of convenience

55. The starting point in assessing the balance of convenience is to consider how long the suspension might have to be kept in force: *DWF* (above) at [50]. Mr Leiper seeks to persuade the Court that the parties could be ready for an expedited trial with a 1-2 day estimate in September or October 2018. This would reduce any prejudice to DHSC in maintaining the suspension pending resolution of the dispute. However, the position of Ms Hannaford and Ms McCredie is that a reasonable estimate would be 3 days and that it is unlikely that the parties would be ready for trial before October or November 2018. I note that an application for an expedited hearing was made by DHL and rejected by the Court at the hearing on 12 July 2018. I consider that it is unlikely that the parties could be ready for a trial before October/November 2018, particularly as I understand that disclosure will be required but has not started and there are material issues of factual evidence that will need to be addressed, as identified in respect of the summary judgment application. Even if the Court could give a judgment shortly after the hearing, realistically, it would not allow the current FOM implementation deadlines to be met.

56. The Court may have regard to the public interest when determining the balance of convenience: *Alstom v Eurostar* (above) at [80]; *Openview* (above) at [16]. In this case, the public interest militates very strongly in favour of lifting the suspension for the following reasons.

57. Firstly, the public interest would be served by the timely introduction of the FOM reforms. The date for the introduction of "buy price equals sell price" and elimination of a "cost plus margin" approach for all Category Towers is 1 April 2019. That reform will provide greater transparency and value for DHSC throughout the service. The anticipated savings will free up scarce resources from the supply chain and release funds for patient care. The planned expansions of the logistics services will enable DHSC to meet the increased supply demand and the challenges of Brexit.

58. Secondly, all components necessary for the FOM are in place save for the logistics contract. DHL contends that the other contracts could go ahead but that ignores the inter-dependency explained by Mr Sahota in his evidence. The new procedures need to be introduced across all components. The new IT system needs to be installed and integrated between the SCCL and each contractor. The new HDS centre and other warehouses need to be connected to the new IT system. Without all parts of the system in place, the FOM will not function as an integrated and effective supply chain, and the ability to deliver the anticipated savings and efficiencies will be impeded.

59. Thirdly, the ITT documents provided for a transition period of 6 months for handover to the new logistics contractor. The tasks involved in the transition are set out by Mr Sahota in his first witness statement. They include the TUPE consultation and transfer of staff, recruiting and training staff, and setting up the HDS warehouse management system. Claire Walters, Chief Commercial Officer of Unipart Logistics, provides further details in her first witness statement as to the nature and extent of the work required by Unipart during the transition period. Unipart indicated that it could reduce the transition period to 5 months but only if it undertook some of the required activities before contract commencement. DHL indicated that it could reduce the transition period to 5 months but only at the expense of meeting the specification. Thus, the consensus is that the transition period must start in September 2018 if it is to be complete and in accordance with the requirements of the specification when the MSA expires at the end of February 2019.

60. Fourthly, there has been some delay to the procurement timetable but there is no evidence that DHSC was at fault in permitting the slippage. The procurement exercise covered 13 separate contracts with a collective value of £1.2 billion. In those circumstances, it is not surprising that some elements of the exercise took longer than planned. The delay of 5 months to date does not indicate that there is no urgency to meet the deadline for the FOM to be in place by the end of March 2019.

61. Fifthly, there is a risk that if the suspension is lifted and DHSC is found to be in breach, the taxpayer will have to pay twice. However, the evidence of Helen Prandy, solicitor of Mills & Reeve, shows that, even if DHSC was required to pay Unipart for the logistics services and DHL for lost profits, it would still make significant savings over the existing arrangements.

62. Finally, there is a public interest in ensuring compliance with EU procurement law. However, compliance is the very issue that the Court will have to determine at trial.

Having rejected DHL's case that it could be disposed of by way of summary judgment, this factor does not assist in assessing the balance of convenience pending such determination.

63. In conclusion, the balance of convenience lies in lifting the automatic suspension and permitting DHSC to enter into the contract with Unipart. Accordingly, DHSC's application is granted.