11 April 2017

PRESS SUMMARY

Nuclear Decommissioning Authority (Appellant) v EnergySolutions EU Ltd (now called ATK Energy EU Ltd) (Respondent) [2017] UKSC 34
On appeal from: [2015] EWCA Civ 1262

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Sumption, Lord Carnwath

BACKGROUND TO THE APPEAL

The respondent ("ATK") brought a public procurement claim against the appellant, a non-departmental public body ("the NDA"), in connection with ATK's unsuccessful bid for a contract for services to decommission sites previously used for nuclear generation. The parties have agreed to compromise the claim, but have requested the Court to issue its judgment nonetheless. For this purpose, the NDA is to be taken, as the judge held, to have failed wrongly to award the contract to the consortium to which ATK belonged, in breach of its obligations under the Public Procurement Regulations 2006 ("the 2006 Regulations"), which give effect in the UK to the Public Procurement Directive No 2004/18/EC ("the PP Directive").

Directive No 89/665/EEC, as amended ("the Remedies Directive"), requires effective remedies for economic operators to be made in such cases, including compensation and the setting aside of awards. It was given domestic effect by amendment of the 2006 Regulations. Regulation 47G of the 2006 Regulations thus requires a contracting authority, on becoming aware of the issue of a claim form relating to its procurement decision, to refrain from entering into the contract with the successful tenderer, if not already entered into, until court order or disposal of the proceedings. Although the NDA observed an extended standstill period during which, pursuant to regs.32(1) and 32A(5), it could not enter into a contract with the successful tenderer, it refused ATK's request for a further extension and proceeded to enter into the contract. ATK subsequently issued the present proceedings, within the 30-day time limit provided by reg.47D.

The following preliminary issues regarding the circumstances in which damages may be recoverable for breaches of the 2006 Regulations arose for consideration: (i) whether the Remedies Directive only requires a damages award to be made when any breach of the PP Directive is "sufficiently serious"; (ii) whether reg.47J(2)(c) of the 2006 Regulations confers a power to award damages in respect of any loss or damage suffered by an economic operator in the case of any breach (not merely a "sufficiently serious" breach) of the Regulations; and (iii) whether (and, if so, when) a damages award under reg.47J(2)(c) of the 2006 Regulations may be refused on the basis that an economic operator issued proceedings within the 30-day period provided by reg.47D, but not before the contracting authority entered into the contract. The Court of Appeal determined these issues to the following effect: (i) Yes; (ii) Yes; and (iii) No. The NDA appeals to the Supreme Court on issues (ii) and (iii).

JUDGMENT

The Supreme Court allows the NDA's appeal on issue (ii) but dismisses it on issue (iii). Lord Mance gives the judgment, with which the rest of the Court agrees.

REASONS FOR THE JUDGMENT

Issue (i) – The "sufficiently serious" condition in EU law

ATK's case in the Supreme Court was that EU law requires a remedy in damages for any breach, whether serious or not, or that this issue should at least be referred to the Court of Justice. This case would, if accepted, have constituted a reason for reaching the same result as the Court of Appeal did by reference to domestic law. ATK's case is not, however, accepted on this issue. The decision of the Court of Justice in *Spijker* (Case C-568/98) provides clear authority that the liability of a contracting authority under the Remedies Directive for breach of the PP Directive is assimilated to that of the state or of a public body for which the state is responsible **[19-25]**. Such liability is only required to exist where the minimum *"Francovich"* conditions are met, the second of which is that the breach must be sufficiently serious **[9]**. Articles 1 to 3 of the Remedies Directive do not evince an intention to provide a remedy in damages for harm caused by infringements generally **[14; 25]**. Any further international obligation (if any) to which the EU may have committed itself under the Government Procurement Agreement ("GPA 1994"), including under article XX(7), provides only weak support for ATK's argument to the contrary and cannot in any event withstand the clear impact of the Court's judgment in *Spijker* **[15; 25]**.

Issue (ii) – The second Francovich condition at domestic law level

The UK legislator has not, by the 2006 Regulations, gone further than EU law requires by conferring a power to award damages in respect of loss or damage suffered by an economic operator in the case of *any* breach, as opposed to only a "sufficiently serious" breach, of the Regulations. The Court of Appeal was correct to consider that the explanatory materials preceding the amendments to the 2006 Regulations indicate the legislator's intention to do only what was necessary to implement the Remedies Directive without any 'gold plating' **[33-35]**. However, the Court of Appeal erred in its assumption that any claim for damages under the 2006 Regulations was no more than a private law claim for breach of a domestically-based statutory duty, and that this categorisation automatically freed the claim from any conditions which would otherwise apply under EU law **[37-39]**. The scheme of the Remedies Directive is a balanced one, with the *Francovich* conditions representing the Court of Justice's conclusion as to the appropriate level of minimum protection by way of damages which an economic operator can expect. The UK legislator would not have gone further than required by EU law when implementing this scheme without considering this and making it clear **[39]**. This conclusion is also consistent with the use of the word "may" in regs.47I(2) and 47J(2)(c) which would otherwise have no real significance **[32; 39]**.

Issue (iii) – Failure to claim before the contract is made

ATK cannot be said to have failed to mitigate (or avoid) its loss by not having taken steps to prevent the NDA from carrying its breach of duty into effect. The remedies scheme aims specifically at giving an economic operator the opportunity to stop the wrongful award of a procurement contract to a competitor. But an operator will not act unreasonably in not taking advantage of that opportunity. The scheme gives both parties choices as to how to proceed and how to protect themselves **[53-55]**. The NDA could have delayed entry into the contract under after the 30-day period which ATK had to commence proceedings. ATK may not have issued its claim form at a time when this would have put an automatic stop on the NDA entering into the contract because it appreciated that this would lead to the NDA seeking to lift the stop, and ATK in turn having to put up security for any loss the NDA would suffer through the continuation of the stop **[51-52]**. An economic operator cannot be said to have acted unreasonably in deciding not to pursue a course which exposes it to the risks associated with the possibility of its challenge to the contract award decision failing **[54]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html