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Legal Briefing

Declaratory proceedings arising out of a PFI Contract

Ealing Care Alliance Ltd v the Council of the London Borough of Ealing [2018] EWHC 2630 (TCC)

Before Recorder Andrew Singer QC

In the Technology and Construction Court

Judgement delivered 11 October 2018

The facts

On 31 March 2005 the Council entered into a PFI project agreement with ECA for the provision of care home services over a period of 27 years. As is typical for a PFI contract, the project agreement included mechanisms for benchmarking and market testing every 5 years. In benchmarking, the cost of the services is compared with the cost of similar services provided in similar facilities and if this exercise indicates that the comparable prices are higher or lower than specified thresholds, either party can call for market testing. Market testing requires the parties to agree a procedure for re-tendering elements of services. Benchmarking and market testing can ultimately lead to adjustments to the cost of the services provided under the project agreement.

During March 2017 a benchmarking exercise was undertaken but ECA and the Council could not agree upon the outcome. In June 2017 ECA commenced an adjudication and in a decision dated 6 August 2017 the adjudicator decided that the benchmarking exercise had been validly undertaken and that the costs of the relevant services exceeded the 10% threshold set out in the project agreement, thereby triggering an entitlement for either party to require that these services be market tested.

On 24 August 2018 the Council served a notice of dissatisfaction indicating an intention to challenge the adjudicator's decision. Thereafter the Council promised but did not commence proceedings and repeatedly suggested to ECA that the market testing process be suspended. On 5 January 2018 the Council demanded that any information put out to tender in connection with the market testing exercise should bear a written warning making it clear that the market testing process and the validity of that process was the subject of a legal challenge by the Council. ECA responded that any such warning would entirely undermine the process and amounted to non-compliance with the adjudicator's decision.

During May 2018 ECA issued a Part 8 application seeking a declaration that it was entitled to proceed to market testing without the need for any written warning in its tender material. In reply Ealing contended that the proceedings should be stayed to adjudication on the grounds that the Part 8 application did not concern enforcement of the adjudicator's decision but comprised a separate dispute over the arrangements for market testing which therefore ought to be the subject of a fresh adjudication. In the alternative, Ealing argued that a declaration was not entitled where, amongst other things, ECA had agree to mediate and where public knowledge of the Council's notice of dissatisfaction would discourage market testing tenders in any event.

The issue

Was ECA entitled to the declaration?

The judgment

The judge noted that there had been no substantive comment by the Council on ECA's market testing proposal other than to demand the written warning. He also accepted ECA's evidence that with this written warning in place, the market testing exercise would be frustrated.

The judge agreed with ECA that the Part 8 application was not about market testing but about the effect of the adjudicator's decision: the written warning demanded by the Council was not in reality a comment on ECA's market testing proposal but a stipulation as to how the process was to be carried out. The judge added that he would have anyway exercised his discretion to refuse a stay where the matter had been fully argued so that it would be a significant waste of costs if the parties were required to repeat the same arguments in adjudication.

On the substantive issue of the declaration, the judge found that there had been no agreement to mediate and that where the Council had issued a notice of dissatisfaction but not commenced proceedings, granting the declaration would be worthwhile as it would permit the market testing to proceed without the hindrance of the written warning demanded by

the Council. Finally, the judge considered that the declaration sought was sufficiently clearly worded and that the balance of justice favoured granting the relief sought by ECA.

Commentary

The key conclusion reached by the judge was that the Council's attempts to fetter the market testing process amounted to non-compliance with the adjudicator's decision. Granting the declaration sought by ECA was therefore equivalent to enforcing the adjudicator's decision.

Where the Council had failed to commence proceedings following its notice of dissatisfaction it was appropriate that ECA should be allowed to complete the market testing process to which it was contractually entitled in light of the adjudicator's decision.

Ted Lowery
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