Case Alcatel C-81/98

‘The combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts must be interpreted as meaning that the Member States are required to ensure that the contracting authority’s decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages’
Remedies Directive

- Article 1 – Amendments to Directive 89/665/EEC

‘Articles 1 and 2 shall be replaced by the following:

**Article 1**

**Scope and availability of review procedures**

(1) This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive’

Remedies Directive (cont’d)

**Article 1(4)**

‘Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c’
Remedies Directive (cont’d)

Article 1(5)

‘Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract’

Remedies Directive (cont’d)

‘Article 2
Requirements for review procedures

(1) Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority’
Remedies Directive (cont’d)

Article 2(5)

‘Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits’

Automatic Suspension : England, Wales and Northern Ireland

• Automatic suspension under Regulation 47G(1):
  
  • Where proceedings are started in respect of a contracting authority’s decision to award the contract and the contract has not been entered into, the starting of the proceedings requires the contracting authority to refrain from entering into the contract
  
• Contracting authority can apply to bring the automatic suspension to an end under Regulation 47H(1)(a)
Automatic Suspension: England, Wales and Northern Ireland (cont’d)

- Under Regulation 47H(2) when deciding whether to make an order:
  - the court must consider whether, if regulation 47G(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
  - 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) of regulation 47H

- American Cyanamid test:
  - Is there a serious issue to be tried?
  - Would damages be an adequate remedy?
  - Where does the balance of convenience lie?

Automatic Suspension: Scotland

- Automatic suspension also applies under the Scottish procurement regulations

- Under Regulation 47(10) – Automatic Suspension applies before the contract is awarded

- Once an automatic suspension is in place the authority cannot award the contract until the proceedings are disposed of or the suspension is lifted by the court

- Proceedings must be served on the contracting authority in accordance with court rules
Automatic Suspension: Scotland (cont’d)

• Under Regulation 47A(2) - the Court may recall an automatic suspension where the negative consequences are likely to outweigh the benefits

• In making this assessment, the Court should have regard to:
  ▪ The need for effective and rapid review
  ▪ The consequences for all interests likely to be harmed
  ▪ The public interest

Automatic Suspension: Case Law

No reported Scottish decisions concerning automatic suspension (one unreported case from Livingston Sheriff Court)

English courts have also dealt with recall of automatic suspension (NB. slightly different provisions apply):

• Indigo Services (UK) Ltd v Colchester Institute
• Excel Europe Ltd v Coventry & Warwickshire NHS Trust
• HALO Trust v Secretary of State for International Development
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