Neutral Number: [2021] EWHC 2221 (TCC)

HT-2021-000145

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: 04/08/2021

Before:
MRS JUSTICE O'FARRELL DBE
- - - - - - - - - - - - - - - - - - - -
Between:

DRAEGER SAFETY UK LIMITED	**Claimant**
- and -	
THE LONDON FIRE COMMISSIONER	**Defendant**
- and -	
MSA (BRITAIN) LIMITED	**Interested Party**

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Jason Coppel QC and Ben Mitchell (instructed by **Womble Bond Dickinson**) for the **Claimant**
Philip Moser QC, Fiona Banks and David Gregory (instructed by **Weightmans LLP**) for the **Defendant**

Hearing date: 14th July 2021
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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.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 4th August 2021 at 10:30am"**

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Mrs Justice O'Farrell:

1. There are two matters before the Court:

   i) an application by the Defendant ("LFB"), for the lifting of the automatic suspension which arose on issue of a procurement challenge by the Claimant ("Draeger") pursuant to regulation 96(1)(a) of the Public Contracts Regulations 2015 ("the PCR 15");

   ii) an application by Draeger for an expedited trial.

Background

2. LFB is the fire and rescue authority for London, responsible for providing London's fire and rescue service.

3. Draeger is a company providing medical and safety technology and is the incumbent supplier to LFB of respiratory protective equipment ("RPE") under a contract awarded in 2010.

4. RPE is a type of personal protective equipment that allows the wearer to breathe safely without inhaling hazardous substances, including smoke. Draeger currently provides LFB with the following RPE:

   i) PSS 7000 Standard Duration Breathing Apparatus ("SDBA"), a single 8-litre cylinder of air which provides for a working duration of 31 minutes breathing time;

   ii) Extended Duration Breathing Apparatus ("EDBA"), twin 6.8-litre cylinders which provide for a working duration of 43 minutes breathing time;

   iii) FPS 7000 face masks;

   iv) PSS Merlin Telemetry Entry Control Board ('ECB') and telemetry repeaters, used to communicate information about the status of the breathing apparatus to those in command of a particular firefighting operation; and

   v) PSS Bodyguard 7000 electronic monitoring systems - the control unit on the set that sends and receives data to the ECB.

5. The existing RPE has been in operation for 10 years and certain parts require replacement. The existing RPE features an ECB with a design that is 20 years old. In recent years there have been significant advancements in RPE technology. Newer models are lighter and smaller than the existing stock, reducing the risk of dangerous heat strain in firefighters and reducing physical stress on their weight-bearing joints. Also, there have been significant improvements in communications technology, making available equipment that is more intuitive to use and which can be operated wirelessly. LFB wishes to upgrade its existing equipment to improve the safety of its firefighters and its ability to respond effectively to critical events in London.

6. On 5 August 2020, LFB published a contract notice in the Official Journal of the European Union ("the OJEU notice") in respect of the procurement of a ten-year

contract for firefighting equipment together with repair and maintenance services. The stated aim of the procurement was to obtain lighter and easier to use equipment to improve the safety of firefighters and improve the service to the public. The documents issued with the OJEU Notice included an invitation to tender ("the ITT") with Annexes and associated documents, including the "The Respiratory Protective Equipment Replacement Specification" and the "RPE Pricing Schedules".

7. On 14 October 2020, Draeger submitted a bid for the project, before the deadline of 16 October 2020.

8. By letter dated 25 March 2021, revised by further letter dated 19 April 2021, LFB informed Draeger it that it had been unsuccessful in the procurement and that it intended to award the contract to MSA Britain Limited ("MSA"):

    i) Draeger scored 39% on price, a weighted score of 11.7; MSA scored 100%, a weighted score of 30;

    ii) Draeger was awarded a weighted score of 46.52 on quality; MSA scored 58.04;

    iii) Both Draeger and MSA had a weighted sustainability score of 6;

    iv) Draeger had an overall score of 64.22; MSA had an overall score of 94.04.

Proceedings

9. On 23 April 2021, Draeger issued proceedings seeking to challenge, as in breach of the PCR 15, the decision to award the contract to MSA.

10. On 10 June 2021, Draeger served its Particulars of Claim, including the following grounds of challenge:

    i) LFB evaluated warranty options and made its contract award decision prior to choosing the full warranty (pricing Option A) as the preferred option;

    ii) LFB failed to score the bids against the criteria and methodology disclosed to bidders in the ITT; it applied the criteria inconsistently, allowed MSA materially to improve the quality of its tender through clarifications and made manifest errors in its assessment of the bids;

    iii) MSA's bid was abnormally low and LFB failed properly to investigate whether the price tendered by MSA was abnormally low.

11. The remedies claimed by Draeger include:

    i) declarations that the procurement and/or the contract award decision was unlawful and that LFB was in breach of its legal obligations; that the contract award decision should be set aside; and the contract should be awarded to Draeger;

    ii) further or alternatively, damages to be assessed representing the net revenue (including profits and contribution to overheads) that Draeger would have

derived from the contract and/or its wasted costs of participation in the tender process.

12. On 8 July 2021, LFB served its Defence, denying the allegations and disputing Draeger's standing to bring a claim under the PCR 15 on the ground that it would not have been in a position to achieve technical and compliance certification prior to contract award to appropriate B.S. or European (CEN) standards and, therefore, did not suffer any loss or damage as a result of any alleged breach, as required by regulation 91(1) to found a cause of action.

13. On 11 June 2021, LFB issued its application to lift the automatic suspension. The application is opposed by Draeger.

14. On 5 July 2021, Draeger issued its application for an expedited trial. The application is supported by LFB if the Court is not minded to lift the suspension.

15. By consent, on 13 July 2021, MSA was joined as an interested party to the claim for the purposes of disclosure and inspection of MSA's confidential information.

16. The following witness statements have been served for the purpose of the applications:

    i) First statement of Martin Vincent, solicitor and partner at Weightmans LLP, dated 10 June 2021;

    ii) First statement of Patrick Tawney, Group Commander and Respiratory Protective Equipment Replacement Project Manager, Operational Policy and Assurance at LFB, dated 11 June 2021;

    iii) Second statement of Richard Collins, solicitor and a partner at Womble Bond Dickinson (UK) LLP, dated 5 July 2021;

    iv) Statement of Matthew Bedford, Managing Director of Draeger, dated 5 July 2021;

    v) Second Witness statement of Martin Vincent dated, 9 July 2021;

    vi) Second Witness Statement of Patrick Tawney dated, 9 July 2021;

    vii) Statement of Brian Hesler, a consultant on strategic, operational, safety and technical Fire and Rescue Service (FRS) issues engaged by Draeger, dated 12 July 2021;

    viii) Third Witness Statement of Patrick Tawney dated 13 July 2021.

17. The Court also has the benefit of correspondence from Bird & Bird LLP, solicitors representing MSA. MSA, as the interested party, has not participated in this hearing but attended the hearing as an observer.

Principles to be applied

18. The commencement of proceedings brought into effect the automatic suspension under regulation 95(1) of the PCR 15, preventing LFB from entering into the contract with MSA.

19. The automatic suspension may be lifted by the Court as provided by regulation 96 of the PCR 15:

> "(1) In proceedings, the Court may, where relevant, make an interim order -
>
> (a) bringing to an end the requirement imposed by regulation 95(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,
>
> in relation to which the breach of the duty owed in accordance with regulation 89 or 90 is alleged;
>
> (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.
>
> (2) When deciding whether to make an order under paragraph (1)(a)—
>
> (a) the Court must consider whether, if regulation 95(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).
>
> … (5) This regulation does not prejudice any other powers of the Court."

20. The applicable principles for determining such an application are those set out in *American Cyanamid v Ethicon* [1975] AC 396 as explained in *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 per Coulson J (as he then

was) at [34] and [48] and summarised by this court in *Alstom v Network Rail Infrastructure Ltd* [2019] EWHC 3585 (TCC) [29].

21. When determining an application to lift the automatic suspension in a procurement challenge case, 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 the claimant if the suspension were lifted and they succeeded at trial; is it just in all the circumstances that the claimant should be confined to its remedy of damages?

    iii) If not, would damages be an adequate remedy for 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 of the 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

22. Mr Moser QC, leading counsel for LFB, submits that there is no serious issue to be tried because regulation 91(1) of the PCR 15 provides that a breach is only actionable if an economic operator suffers, or risks suffering, loss or damage as a result of any breach, Draeger has not suffered any loss or damage, and therefore has no standing to bring the challenge.

23. The test for establishing that there is a serious issue to be tried is whether the Court is satisfied that the claim is not frivolous or vexatious. In *Bristol Missing Link* [2015] EWHC 876 (TCC), Coulson J explained at [33] that:

> "in the ordinary procurement case, where there may be points to be made on both sides, it will often be unproductive for the parties (and a waste of judicial resources) to spend a good deal of time arguing about the merits or otherwise of the underlying claim. The threshold is, after all, a low one: see The Newcastle upon Tyne NHS Foundation Trust v Newcastle Primary Care Trust [2012] EWHC 2093 (QB)."

24. However, the Court can take into account the strength or weakness of a claim as part of its assessment as to whether there is a serious issue to be tried: *Group M v Cabinet Office* [2015] 1 CMLR 43 per Akenhead J:

> "[16a] The adoption at an initial stage of the test of the need for it to be established that proceedings raise relevant serious issues to be tried must be a sensible and pragmatic test. It cannot have been intended that the Remedies Directive can or should be used to disrupt public procurements with clearly weak or unsustainable challenges. The serious issue test is a pragmatic approach to weed out weak cases whereby suspension of public procurements has been triggered … as part of the overall

> exercise the Court must have a right to take into account the weakness of a claim in deciding whether to lift the suspension.
>
> [30] … The "serious issue to be tried" simply involves an assessment and judgment by the Court whether the law and the pleaded, disputed or not readily disputable facts as presented demonstrate a serious issue to be tried…"

25. Mr Moser submits that none of the alleged breaches in the Particulars of Claim have caused Draeger to suffer or risk suffering loss or damage because it had not achieved the necessary mandatory accreditations by the time of contract award, with the result that LFB could not have entered into the contract with Draeger, even if it were the successful bidder.

26. Paragraphs 3.4 and 3.5 of the ITT stated:

> "The Tender must meet the Commissioner's minimum requirements…
>
> As the response of the successful Tenderer will be incorporated into the Agreement between the parties, it is vital that method statements, proposed solutions or claims are realistic and thorough but do not contain promises of a level of service which cannot be provided, achieved or maintained."

27. The Specification stipulated:

> "1.3 … Essential User Requirements must be met in order for the equipment to be evaluated for purchase …"
>
> 1.4 It is required that all equipment supplied will meet (as a minimum) all relevant UK (British Standard) and European Committee for Standardization (CEN) requirements and legislation in force.
>
> 2. Essential Requirements
>
> …
>
> 2.2.1 … BS EN 137:2006, Respiratory protective devices: Type 2 positive pressure, Self Contained Open Circuit Compressed Air Breathing Apparatus with full face mask.
>
> 6. Essential Customer Support Services
>
> …

> 6.3 Technical and compliance certification shall be provided prior to contract award to appropriate B.S. or European (CEN) standards."

28. The timetable in the ITT indicated that the contract award date would be 17 May 2021, with an expected commencement date for the contract of 31 May 2021. LFB's case is that the equipment offered by Draeger as part of its bid did not meet the requirements of the Specification and could not do so before the contract award. As part of its tender response, Draeger indicated that it was in the process of obtaining BS EN 137:2006 accreditation for its Draeger AirBoss series SCBA products. However, on 8 January 2021, Draeger informed LFB that it did not yet have accreditation for the equipment. By letter dated 19 May 2021, Draeger stated that it had not achieved all of the required accreditations but expected to do so by June 2021. Mr Bedford's evidence is that full accreditation will now be achieved by mid-August 2021.

29. Mr Moser submits that even if Draeger's case on breach succeeded, such that Draeger's bid would have been identified as the most economically advantageous tender, there is no compelling evidence before the Court that Draeger could have achieved what it in fact failed to do and have satisfied LFB's Essential Requirements as to certification prior to the time of contract award. In those circumstances, LFB could not lawfully have entered into the contract with Draeger and the outcome of the procurement would ultimately have been the same: LFB would have made the award to MSA as the only supplier that had fulfilled LFB's specified essential requirements. On that basis, Draeger has not suffered any loss or damage as a result of any of the alleged breaches. It follows that Draeger has no standing to bring the claim under regulation 91(1) of the PCR 15 and the Claim fails for want of causation.

30. Mr Coppel QC, leading counsel for Draeger, submits that there is a serious issue to be tried. The meeting notes and evaluation sheets contain very limited comments and no details as to the basis of the evaluation exercise. Draeger challenges a number of its scores on the grounds of breach of transparency, inequality of treatment or manifest error. These are arguable claims which, if correct, would undermine both the quality evaluation and the price evaluation of its tender.

31. It is submitted that there is evidence that MSA's warranty offer was non-compliant and the price too low. Further, Mr Hesler, Draeger's consultant, suggests in his witness statement that MSA's equipment exceeds the maximum weight specified in the EN137 standard. That is contested by MSA, in a letter dated 13 July 2021 from Bird & Bird. It is also contested by Group Commander Tawney, who explains that the MSA equipment is within the essential requirements of the Specification and has achieved accreditation. He suggests that Mr Hesler appears to have misunderstood the technical datasheet provided by MSA, which shows the M1 Twin-pack within the specified weight but also shows an alternative potential configuration using two separate cylinders connected to the breathing apparatus using a T-connector, which would increase the overall weight.

32. As to the accreditation issue, Mr Bedford of Draeger explains in his first witness statement that Mr Tawney sent an email to Draeger on 28 November 2019 that stated:

> "You raised the question about letters of intent versus certified product and I have spoken to our procurement advisor and the

> answer is that as long as the products are certified by contract stage, they will be accepted".

33. Mr Coppel submits that, on the basis of that email, full certification was not an essential requirement to be satisfied at the tender evaluation stage; indeed, Draeger's tender was evaluated despite stating in its response that the accreditation process was ongoing. He accepts that full certification was required to be achieved by the successful bidder before the contract could be signed. However, the accreditation process for Draeger's equipment is almost complete and, Mr Bedford explains, could have been accelerated if necessary:

> "Had these accreditations been required earlier in order for Draeger to enter into the contract with LFB, Draeger could and would have committed additional resource to accelerate the internal approvals process and liaised with the relevant external testing bodies to expedite their processes. This is standard practice where an urgent issue arises. If Draeger had been successful in the Procurement, this matter would have been resolved prior to contract signature, as we had been led to believe was permissible."

34. The Court is not in a position to evaluate the competing arguments of the parties on the merits of the case or the counterfactual argument as to whether accreditation could have been achieved prior to contract award. The issues require the Court to consider the arguments against a detailed analysis of the technical documents and factual evidence. For the purposes of the applications, the Court is satisfied that there is a serious issue to be tried.

Adequacy of damages for Draeger

35. Draeger's position is that damages would not be an adequate remedy if the suspension were to be lifted and it succeeded at trial. Mr Coppel submits that there is a substantial risk that Draeger's reputation will be damaged by loss of the contract, given that it is the incumbent supplier to LFB and that such losses will be very difficult to calculate. As explained in Mr Bedford's statement, this is a significant contract, LFB has a very high profile as a fire service, in the UK and internationally, and the UK market for such equipment is limited. Reliance is placed on the LFB report dated 16 February 2021, seeking authority to enter into this contract, which stated that other fire and rescue services throughout the UK were watching this procurement with a view to following LFB's lead. In a letter from Bird & Bird, for MSA, dated 12 July 2021, the procurement was described as strategically important within the UK market.

36. LFB's position is that damages would be an adequate remedy for Draeger. Mr Moser submits that Mr Bedford's evidence indicates that LFB is only one of the most significant customers for a provider of RPE in the UK; Draeger supplies RPE to Scotland pursuant to a long-term contract and holds a significant market share for fire and rescue breathing apparatus at 82.3%, supplying 36 out of the 52 fire services in the UK, as well as overseas. Mr Tawney's evidence is that there are other potential customers in the UK for RPE, including the military, police and private organisations which operate their own emergency services, offering additional procurement opportunities.

37. The Court rejects Draeger's concern at the possibility that damages would not be available if it could not establish that LFB's breaches were *"sufficiently serious"* to satisfy the *Francovich* test. As stated in *Alstom Transport UK Ltd v Network Rail Infrastructure Ltd v Siemens Mobility Ltd* [2019] EWHC 3585 (TCC), at [37]:

> "… in the context of a procurement challenge, although each case must be examined on its merits, if a breach of EU-based law is not sufficiently serious to satisfy the Francovich conditions for an award of damages, it is unlikely to be sufficiently serious to justify setting aside the contract under challenge …"

38. In any event, in his skeleton and in oral submissions, Mr Moser accepts on behalf of LFB that if Draeger succeeds in establishing that LFB awarded the contract to the wrong bidder (which would include a finding that Draeger would have been in a position to meet LFB's mandatory requirements prior to contract award), that breach would be sufficiently serious to justify an award of damages.

39. Further, the Court rejects Mr Coppel's submission that damages would be inadequate simply because there might be difficulty in assessing damages based on the loss of a chance. As Mr Moser notes, the Court will quantify relevant loss despite forensic difficulties, including by reference to a hypothetical or counterfactual state of affairs where necessary: *Merricks v Mastercard Inc* [2020] UKSC 51 per Lord Briggs at [45]-[49]. Draeger has not identified any particular complexity in this procurement that would impede an assessment of damages based on loss of a chance and there are only two bidders in contention.

40. As this court stated in *Bombardier Transportation UK Limited v London Underground Limited* [2018] EWHC 2926 TCC at [58]:

> "In most cases, unsuccessful bids are part of the normal commercial risks taken by a business and will not have any adverse impact apart from potential wasted costs of the tender and lost profits. Not every failed bid will result in damage to reputation causing uncompensatable loss. There must be cogent evidence showing that the loss of reputation alleged would lead to financial losses that would be significant and irrecoverable as damages or very difficult to quantify fairly."

41. The evidence before the Court does not indicate that this procurement is unique or high value. However, it is being closely watched by a number of other fire and rescue services and is likely to be perceived as setting the standard for improved protective equipment in this sector. On that basis, it is arguable that, if the automatic suspension is lifted and Draeger is ousted from its position as the incumbent provider of breathing apparatus for LFB, it will suffer a loss for which damages are not an adequate remedy.

Adequacy of damages for LFB

42. Mr Bedford of Draeger has confirmed that the usual undertakings in damages would be given to LFB, namely, that if the suspension were maintained and the Court were to find that Draeger should compensate LFB for any losses, Draeger would comply with any order the Court might make. Draeger has also confirmed that any cross-undertaking

in damages would be extended to include MSA, as set out in the letter dated 13 July 2021 from Bird & Bird.

43. Mr Moser submits that damages would not be an adequate remedy for LFB if the automatic suspension were lifted and it succeeded at trial. This procurement arises against the backdrop of the inquiry into the Grenfell fire disaster. Mr Tawney explains that the chance of another catastrophic Grenfell-type incident occurring is a very real and foreseeable possibility and the number of identified "at risk" buildings continues to rise. Those risks give rise to particularly difficult firefighting conditions and risks to firefighters. Delaying the replacement of outdated RPE and therefore the associated significant improvements to LFB's operations, cannot be quantified properly, or be fairly compensated for, by way of damages.

44. The provision of RPE is of considerable importance to public safety and there have been great advancements in RPE technology in recent years with newer models being both lighter and smaller than LFB's existing equipment which includes elements whose design is 20 years old. In particular, the weight of the equipment is significant because it is a contributing factor to dangerous heat strain and has a detrimental effect on weight-bearing joints of firefighters. Mr Tawney explains, by reference to the Building Disaster Assessment Group report, that there is a significant body of evidence to support the position that the more weight carried into a fire, the more it affects a person's ability to function, make decisions and carry out rescue.

45. In October 2019, the Grenfell Tower Inquiry, chaired by Sir Martin Moore-Bick, issued its phase 1 report. The recommendations in the Report include recommendations that: (i) LFB should develop policies and training to ensure better control of deployments and the use of resources; and (ii) LFB should take urgent steps to obtain equipment that enables firefighters wearing helmets and breathing apparatus to communicate with the bridgehead effectively, including when operating in high rise buildings. LFB is carrying out a separate process to procure new radio equipment to improve communications and the recommendations do not directly require LFB to replace its RPE but, in meeting the recommendation to improve communications equipment, LFB intends to take the prudent step of upgrading both the RPE and telemetery. Therefore, the new equipment will include communication modules which enable the breathing apparatus to interact with the radio equipment. The improved telemetry systems will ensure better data analysis and in turn better control of deployments and use of resources. Any delay to upgrading the existing RPE stock will delay the achievement of the improved communication strategy.

46. Mr Coppel submits that LFB's evidence is over-stated and inconsistent with its conduct prior to the making of the application. Whilst it is clear that new equipment would be an improvement, the evidence does not show that the existing RPE is in any sense inadequate or a risk to firefighters or the public, or that LFB would be unable to deal effectively with serious fires or other incidents in London if the suspension were maintained.

47. Mr Moser has been careful to clarify for the Court that LFB does not suggest that the current RPE is unsafe but rather, that it is sub-optimal and its replacement will result in significant operational benefits. The Court accepts the evidence from LFB that the continuation of the suspension would delay the introduction of those operational

benefits. On that basis, it is likely that damages would not be an adequate remedy for LFB if it were to succeed at trial.

Balance of convenience

48. The balance of convenience test requires the Court to consider all the circumstances of the case to determine which course of action is likely to carry the least risk of injustice to either party if it is subsequently established to be wrong. As set out by this court in *Alstom Transport UK Limited v Network Rail Infrastructure Limited* [2019] EWHC 3585 (TCC) at [51], when determining where the balance of convenience lies:

    i) the Court should consider how long the suspension might have to be kept in force if an expedited trial could be ordered: *DWF LLP v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900 per Sir Robin Jacob at [50];

    ii) the Court may have regard to the public interest: *Alstom Transport v Eurostar International Limited* [2010] EWHC 2727 per Vos J at [80];

    iii) the Court should consider the interests of MSA, as the successful bidder, alongside the interests of the other parties: *Openview Security Solutions Limited v The London Borough of Merton Council* [2015] EWHC 2694 per Stuart-Smith J at [14];

    iv) if the factors relevant to the balance of convenience do not point in favour of one side or the other, then the prudent course will usually be to preserve the status quo (or, perhaps more accurately, the status quo ante), that is to say to lift the suspension and allow the contract to be entered into: *Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC) at [16].

49. The public interest in the timely introduction of new protective equipment to implement operational improvements would be a very strong factor in favour of lifting the suspension. However, in this case, a significant factor is that the Court is able to offer the parties an expedited trial. When the matter was before the Court at the hearing on 14 July 2021, the Court could not accommodate a trial in October 2021, although it could have heard the case in December 2021. However, since the hearing, there have been settlements of other cases in the list and the Court can now offer a trial in October 2021 with the agreed estimate of 5 days.

50. It is recognised that this will cause some delay to the proposed procurement but the impact on LFB's overall strategy will be limited. As Mr Tawney sets out in his evidence, in order to satisfy the Grenfell recommendations, LFB is procuring radios as part of a three-stage communication strategy. Under phase one, new radios will be provided by September 2021; under phase two, new radio repeaters will be provided by July 2021. These parts of the strategy are unaffected by the suspension.

51. Phase 3 comprises the new breathing apparatus with new communications interface. This is inextricably linked to the RPE procurement and cannot be fully implemented until the new RPE has been provided. However, Mr Tawney accepts that the new radios and radio repeaters can be used in conjunction with the existing equipment interface until the new breathing apparatus is implemented.

52. The Court appreciates that MSA's interest would be served by lifting the suspension but that has to be balanced against the interest of the parties in achieving a fair resolution of the dispute. If, as LFB maintains, there is no merit in the procurement challenge, it can be disposed of speedily, enabling the new programme to continue without the prospect of a claim for damages. If, as Draeger maintains, the procurement exercise was flawed, the Court will have all remedial options available.

53. LFB's estimate is that the lead-in time between contract award and operational commencement of the new RPE equipment will be 9-12 months, currently by May 2022. The introduction of the equipment will be phased in as the LFB firefighters are trained to use the new equipment. Against that timescale, a short delay until the Autumn, to resolve the procurement challenge by Draeger, will not have any significant impact on the progress of the improvements.

54. For those reasons, in this case, the least risk of injustice is to maintain the automatic suspension pending an expedited trial of the dispute.

Conclusion

55. For the reasons set out above, the balance of convenience lies in maintaining the automatic suspension and giving directions for an expedited trial in October 2021.

56. The directions ordered are as follows:

    i) Expedited Trial date: 21 October 2021 with an estimated length of trial of 5 days (sitting days: Thursday 21 October 2021 and Monday 25 to Thursday 28 October 2021).

    ii) For the purposes of payment of the trial fee, but for no other purposes, this trial date is provisional. This date will cease to be provisional and the trial fee will become payable on 23 August 2021.

    iii) The scope of the trial will be liability, including causation and the issue of sufficiently serious breach but not quantum (if required).

    iv) Disclosure shall be given by the parties as follows:

        a) The parties shall exchange lists of their initial disclosure of the documents relied on and any known adverse documents (i.e. those that undermine a party's own case or provide support for the other side's case), together with copies of the documents, by 5pm on 23 August 2021.

        b) The parties shall request by list any specific documents or categories of document, together with the grounds on which disclosure of such documents are necessary and proportionate for a fair disposal of the dispute within an expedited timetable, by 5pm on 27 August 2021.

        c) The parties shall provide the documents requested, or respond to the list of requests, setting out any grounds on which disclosure is resisted, by 5pm on 1 September 2021.

d) If there is any dispute in respect of disclosure, the parties shall co-operate with each other and liaise with the Court to fix a date for hearing of the matter.

v) Signed statements of witnesses of fact to be served by 5pm on 30 September 2021.

vi) Costs management:

a) Costs budgets are to be filed and exchanged by the parties by 5pm on 9 August 2021.

b) Budget discussion reports are to be filed and exchanged no later than 5pm on 16 August 2021.

c) Any dispute as to costs budgets will be dealt with in writing by the Court. The parties have permission to file short written submissions in respect of the disputed items by 5pm on 20 August 2021.

vii) The pre-trial review shall be held on 7 October 2021 at 10.30 am. Time allowed 1 hour and 30 minutes.

viii) The above dates and time limits may be extended by agreement between the parties, save that:

a) The dates and time limits specified in paragraphs (iv) (disclosure) and (v) (witnesses of fact) may not be extended by more than 7 days without the permission of the Court; and

b) The dates specified in paragraph (i) (trial), and paragraph (vii) (pre-trial review), cannot be varied without the permission of the Court.

ix) Costs in the case.

x) Liberty to apply.

57. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for permission to appeal, and any time limits are extended until such hearing or further order.