

Neutral Citation no. [2008] NIQB 63

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*Judgment: approved by the Court for handing
(subject to editorial corrections)*

<i>Delivered:</i>	28/05/2008
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION FOR JUDICIAL REVIEW BY
LEONARD PERSONNEL LIMITED

WEATHERUP J

[1] This is an application for leave to apply for judicial review of decisions of the Central Procurement Directorate of the Department of Finance and Personnel on 27 February 2008 and 12 March 2008 refusing to include Leonard Personnel Limited on a list of companies selected to act as suppliers of services under the Northern Ireland Court Service Framework Agreement for the Provision of Temporary/Short-term Workers. Dr McGleenan appeared for the applicant and Mr McMillan for the proposed respondent.

[2] The Terms of Reference in the Instructions to Tenderers stated that the Central Procurement Directorate intended to establish a Framework Agreement for the provision of temporary/short-term workers for those participating bodies listed within the terms and conditions of the Framework Agreement. It was provided that the Framework Agreement would be for two years with effect from 1 January 2008 with options to extend for a further two one-year periods until 31 December 2011. In the event the contracts took effect on 1 March 2008.

[3] The scope of the contract was described as relating to temporary or short-term workers being required in various categories that included category (a) - Administrative and Secretarial, category (c) - Accountancy and Finance and category (f) - Information and Communication Technology. This application is concerned with category (c), Accountancy and Finance, where the applicant tendered for what was described as Accountants Level 1, Accountants Level 2 and Internal Auditors. The Terms of Reference provided that the top six highest scoring tenders would be placed on the Framework for delivery of each job requirement.

[4] In the event the applicant was unsuccessful. The applicant's bid for the supply of Accountancy Level 1 positions scored 60.1 which placed it seventh on the ranking list. The bid for Accountancy Level 2 scored 52.6 which placed it ninth on the ranking list. The bid for Internal Auditors scored 58.1 which placed it seventh on the ranking list.

[5] The issues that have arisen on this application for leave to apply for judicial review concern the assessment by the proposed respondent of the applicant's tender, where the applicant contends that there are three particular respects in which that assessment was irregular.

[6] There are two general issues that arise. First the public law /private law debate as to whether a public law issue arose in this application to warrant proceedings by way of judicial review. Judicial review operates in the arena of public law and not that of private disputes having no element of public law. At one level this is a commercial dispute about the failure to award a contract and at another level it is a dispute about the arrangements for the provision of public services. The proposed respondent contends that the application does not raise a public law issue and refers to a number of authorities including R(Hibbit & Sanders) v The Lord Chancellor[1993] COD 326, Mass Energy v Birmingham City Council[1994] Env.LR 298, R(Menai Collection Limited) v Department for Constitutional Affairs [2006]EWHC 724 and a Northern Ireland case, TSI(Ireland) Limited's Application [2005] NIQB 87. In each of these commercial applications for judicial reviews it was found that there was not a sufficient public law element to proceed by way of judicial review.

[7] In Hibbit & Sanders Waller J stated that the fact that a decision making body was exercising a statutory power would entitle a Court to consider whether there must be an implied obligation, for example, to act fairly and added -

“The point, however, is that to have a right which can be subject to review that right must flow from the statute, if it is to the statute that one must look for providing a public law element. It is not enough to say simply that the governmental authority is acting by reference to certain statutory provisions without the additional factor that it is those statutes which impose the obligation which is said to have been broken.”

[8] Menai Collection Limited was concerned with commercial arrangements for the provision of services for Magistrates' Courts in certain areas of England and Wales. At paragraph 42 McCombe J referred to the classic areas in which judicial review will be available in the context of commercial activities of public bodies, namely cases of fraud, corruption and bad faith etc. and added that whether, in a particular case, the obligation said to have been owed by the decision maker involved suggested breaches of duties or obligations owed as a matter of public law,

depended upon an analysis of the criticism made and the facts upon which the criticism was based.

[9] To introduce the necessary public law element there may be statutory underpinning, but that in itself would not be sufficient, as there must also be some statutory obligation arising from that statutory underpinning which is in issue in the particular proceedings. Whether or not it is of a sufficient public law nature depends upon analysis of the facts and issues.

[10] In the present case the issues arise in the context of public procurement and on the basis of the applicant's contention that EC Regulations and the Public Contract Regulations 2006 apply to the contract/framework agreement there is certainly the element of statutory underpinning. There are said to be statutory obligations in issue arising out of the obligation to act objectively, fairly and transparently and the other general obligations that arise in relation to such public contracts. I do not doubt that in this context there may be public law issues that arise. In a particular case the existence of the necessary public law element depends upon an analysis of the criticisms made and the facts upon which they are based.

[11] The second general matter that was discussed on this application was in relation to the character of the contract that was entered into by the parties. There is distinction to be drawn in the 2006 Regulations between Part A and Part B contracts. Under Regulation 5 of the 2006 Regulations, amended by the 2007 Regulations, it is stated that the Regulations apply to what are called "... Part A services contracts, framework agreements ...". The amendment in 2007 provides that this does not extend to framework agreements connected with Part B services contracts.

[12] It would be necessary to establish whether this is a Part A contract/framework agreement, to which the Regulations apply, or a Part B contract/framework agreement. In Schedule 3 of the Regulations at Part A, paragraph 9 refers to Accounting, Auditing and Bookkeeping Services and the applicant says that this covers the present contract. On the other hand the proposed respondent refers to Part B, paragraph 22, which deals with Personnel Placement and Supply Services, as covering the present contract. It is arguable that the present case falls within Part A and I proceed on the assumption that it is a Part A contract/framework agreement and that it is covered by the Regulations.

[13] I turn then to look at the factual matters that are relied on by the applicant. The essence of the dispute is connected to the assessment of the applicant's tender. The proposed respondent's tender documents set out various criteria and the applicant was expected to describe how those criteria would be met. There are three disputed assessments of the applicant's tender.

[14] The first requirement that is in dispute arises under the heading "Service Delivery Proposal - Selection Procedures and How the Right Person is Allocated to Meet Job Requirements". In the tender submitted by the applicant that criterion is

addressed in two phases, one being the selection process and the other concerned with matching people to job requirements. In relation to the second phase, the applicant made reference to the fact that the client organisation would be presented with a CV for the persons deemed to be the most suitable candidates. At that point the client was to decide if they wished to interview the persons concerned or accept them on the basis of the stated skills and experience.

[15] The proposed respondent's assessment of that part of the applicant's tender appears in an assessment document for which a score out of ten may be awarded. The applicant was awarded five and the comment that is made is -

"No indication of service providers interviewing candidates and no monitoring of the 51 week. Lacking in detail of how they carry out their processes, no face-to-face interview of candidates."

[16] The proposed respondent's criticisms of the applicant's tender are that the applicant provides that the client organisation would interview the candidates rather than the applicant as the service provider undertaking the interviewing. The applicant responds that the applicant will have interviewed the candidates and supports that by reference to the comments that appear in the applicant's tender relating to the file for candidates that includes their interview, CV and interview notes. It is apparent, of course, that the applicant would have interviewed whoever was on their panel in the first place in order to place them on the panel. The issue that arises relates to the placing of the people on the panel with the client. It is at this point that the applicant's tender specifies that it is the client who will conduct the interviews rather than the applicant as service provider. The proposed respondent prefers that the service provider complete the interviewing and they have marked the applicant accordingly. It seems to me that this is a matter for the proposed respondent and if they award higher marks for tenderers who will undertake all the interviewing, rather than expecting the client to undertake interviewing, that must be something they are quite entitled to do. I am not satisfied that there are any arguable judicial review grounds for setting aside such an approach.

[17] The second requirement that is in dispute concerns the heading "Service Delivery Proposal - "Contingency Planning if Person is Deemed Unsuitable or Fails to Turn Up". The applicant's tender specifies that, if there should be an absent or unsuitable person supplied, the applicant would immediately establish the reason; if they failed to turn up the client should contact the contract manager immediately; the applicant would undertake to remove staff immediately if it was clear that they were not performing properly; the applicant would anticipate any staff replacements would take place within seventy-two hours or earlier depending upon the client's requirements.

[18] The proposed respondent awarded five marks out of ten and commented:

“Dedicated point of contact, no first day contact and 72 hour replacement - too long.”

[19] The proposed respondent’s criticisms are two-fold. The first is that the process should not involve the client contacting the contract manager. Rather, the proposed respondent’s preference would be that the applicant should make first day contact and make sure the staff are present and not rely on the client to report an absence. The second limb is in relation to the response to someone who is absent or not suitable where the applicant anticipates replacements within seventy-two hours. The criticisms relate to the statement that the applicant “anticipates” a response as well as to replacements taking seventy two hours. The requirements involved the replacement of persons within three working days. Thus the proposed respondent considered that a replacement within seventy-two hours may in some instances not meet the requirement and in any event was considered to be too long. The proposed respondent preferred that the applicant would identify any problem with absent or unsuitable staff and provide a more definite commitment to remedial action and a shorter response time. Once again these are matters of assessment which the proposed respondent is entitled to make. A mark has been accorded to reflect the proposed respondent’s view of the applicant’s tender. I have not been satisfied that there are any arguable judicial review grounds for setting aside the approach of the proposed respondent.

[20] The third requirement that is in dispute concerns the heading “Contract Management and Monitoring - How do you ensure that contractual obligations are being fulfilled?” The applicant’s tender in relation to “Complaints Process” states that the applicant will respond as soon as practicable to complaints; that they guarantee a response time; that they will report back to the client within an agreed timeframe on progress; that they will make reports for each month on the twelfth day of the following month.

[21] The proposed respondent awarded the applicant seven marks out of ten and commented -

“Addressed all issues but no definite timescales were identified for complaints.”

[22] The proposed respondent’s criticisms concern the vagueness of the responses, namely as soon as practicable, guarantees a response time, agreed timeframe on progress. Nowhere, says the proposed respondent, does it state that the applicant will act within a specific time. Once again it is a matter of assessment on behalf of the proposed respondent and they have awarded seven out of ten which is a judgment that they have made and which they were entitled to make. I am not satisfied that there are any arguable judicial review grounds for setting aside the approach of the proposed respondent.

[23] The overall marking might have been a close call because under two categories of tender the applicant was seventh and within a very small margin of securing a successful sixth place. However on the factual issues I am not satisfied that arguable grounds for judicial review have been made out, even if I make the assumptions about a public law issue and this being a Part A case. As I am against the applicant on the facts of the case giving rise to an arguable basis for judicial review I refuse leave to apply for judicial review.