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Judgment: approved by the Court for handing down | *Delivered:* **17/06/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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FOX BUILDING & ENGINEERING LTD

Plaintiff

v

THE DEPARTMENT OF FINANCE AND PERSONNEL

Defendant

Fox Building & Engineering (No 1) – the early discovery application.

WEATHERUP J

[1] This is the plaintiff's application for early discovery of documents in a procurement action. Mr McCausland appeared for the plaintiff, Mr McMillan QC for the defendant, Mr Humphries QC for the notice party, Lowry Building and Civil Engineering Ltd ("Lowry") and Mr David Dunlop for the second notice party, Whitemountain Quarries Ltd ("Whitemountain").

[2] The plaintiff has served a Statement of Claim and made this application for discovery before delivery of the Defence. Discovery is ordered where necessary to dispose fairly of the proceedings or to save costs. In general, discovery is made at the close of pleadings, although there are exceptions. The reasons for making an exception in procurement cases were explained by Coulson J in Roche Diagnostics v Mid-Yorkshire Hospitals [2013] EWHC 933 at paragraph 20 -

> "(a) An unsuccessful tenderer who wishes to challenge the evaluation process is in a uniquely difficult position. He knows that he has lost, but the reasons for his failure

> are within the peculiar knowledge of the public authority. In general terms, therefore, and always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out so that an informed view can be taken of its fairness and legality.
> ….
> (e) Ultimately, applications such as this must be decided by balancing, on the one hand, the claiming party's lack of knowledge of what actually happened (and thus the importance of the prompt provision of all relevant information and documentation relating to that process) with, on the other hand, a need to guard against such an application being used simply as a fishing exercise designed to shore up a weak case, which would put the defendant to needless and unnecessary cost."

[3] I had occasion to consider this issue in Scott's Electrical v Northern Ireland Water [2012] NIQB 7. The balancing exercise came down against early disclosure on the basis that the application did constitute a fishing exercise and that early disclosure was unnecessary.

[4] The plaintiff is an engineering and construction company based in Omagh. The defendant operated a tender process for what was described as a Pan Government Collaborative Framework for civil engineering works operated in two lots, Lot 1 for the northern area and Lot 2 for the southern area. No one tenderer was permitted to be awarded both Lot 1 and Lot 2.

[5] The tender documents contained a provision in relation to abnormally low bids which provided that if, in the contracting authority's opinion, the overall tendered amount was abnormally low or any tendered percentage or amounts were abnormally low or abnormally high the contracting authority may require the tenderer to provide full written details of the constituent elements of the overall tender amount or the tender rates or any other information which the contracting authority considered relevant. It was provided that any tender price that was more than 15% lower than the adjusted average price and exceeded the proximity margin, that is, was more than 1% lower than the lowest qualifying price, would be deemed to be abnormally low and may be excluded from the competition.

[6] The plaintiff submitted tenders for both lots and was one of eight tenderers. It is the plaintiff's case that two or more of the tenderers, including the notice parties, Lowry and Whitemountain, submitted tenders that did not price all items in the pricing schedule or contained an inordinate number of nominal items so that the overall tenders were abnormally low and were not at sustainable levels. The defendant has confirmed that it conducted a review of the tenders submitted by the

notice parties under the abnormally low tender provisions to determine whether to accept those tenders and the outcome was that the tenders were accepted.

[7] On 20 March 2015 the plaintiff was informed that their submission had been unsuccessful in respect of Lot 1. Lowry was identified as the most economically advantageous tenderer and therefore the defendant gave notice that it intended to award Lot 1 to Lowry. The Lowry tender sum was £18.1m. On the same day the plaintiff was informed that their submission had also been unsuccessful in respect of Lot 2. Lowry had been identified as the most economically advantageous tenderer in respect of Lot 2 but as the competition did not allow both lots to be awarded to the same contractor the defendant awarded Lot 2 to Whitemountain as the second highest scorer. The Whitemountain tender sum was £18.5m.

[8] By contrast the plaintiff's tender sum was £24.6m on each Lot. Of the eight tenderers Lowry were first, Whitemountain were second and the plaintiff was seventh of the eight tenderers.

[9] The plaintiff relies on the general requirement that all economic operators are to be treated equally and in a non-discriminatory and transparent way and that the process is fair and free from manifest error. The contracting authority is obliged to award any contract on the basis of the most economically advantageous tender and to take account of criteria that reflect qualitative technical and sustainable aspects of the tender submission as well as price.

[10] The plaintiff claims that the successful bidders must have included prices for the items in the pricing schedule that were not at a sustainable level or were not priced at all. It is therefore claimed that the reviews carried out by the defendant were fundamentally flawed in that they could not have been based on a full investigation. It is said to be a manifest error that the reviews accepted unsustainable bids. Further it is said that the process lacked transparency in that the wholesale use of nominal bids by a tenderer and approval of such an approach by the contracting authority was not made apparent. The claim is that the defendant owed a duty to the plaintiff to ensure that the reviews complied with the general principles of assessment and the plaintiff claims to be entitled to have the tender documentation amended to correct the ambiguity and unfairness inherent in the process adopted by the defendant. One such ambiguity is said to be the permissibility of a tenderer failing to price sustainably a significant number of items on the pricing schedule. According to the plaintiff this ambiguity is such as to render the procurement exercise untenable and it should be undertaken anew so as to place each tenderer in an equal position and that there should be transparency as to how the tenders are to be assessed.

[11] The discovery application included a schedule of documents sought by the plaintiff. Mr McCausland has modified the application for documents. The plaintiff seeks to establish whether or not there was widespread abnormally low bidding on particular items, penny bids as they were called, so as to produce a low figure which

the plaintiff would say was unsustainable. In order to identify whether or not this happened the plaintiff limits the application for discovery to an exercise that would seek to identify such nominal bidding. The plaintiff seeks to achieve this in two respects, one is to identify the overall extent of nominal bidding or penny bidding on the 1,700 items that make up the priced items or alternatively, as those 1,700 items are comprised within 9 pricing areas, to identify within each of the pricing areas the extent of nominal or penny bidding.

[12] Lowry and Whitemountain, as notice parties on this application for discovery are concerned to protect the confidentiality of their tenders.

[13] The defendant objects that the plaintiff's claim involves a prohibited attempt to impose duties on the defendant in relation to the plaintiff in connection with abnormally low tenders by other tenderers. Such duties on the defendant as arise in relation to abnormally low bids, according to the defendant, are duties owed to the tenderer submitting the abnormally low bid and not to other tenderers.

[14] Article 55(1) of the Directive provides that if a tender appears to be abnormally low –

> "…. the contracting authority shall, before it may reject the tender, request in writing details of the constituent elements of the tender which it considers relevant".

This finds expression in the Public Contracts Regulations at Regulation 30(6) that where a tender is abnormally low the contracting authority may reject that offer but only if it has –

> "…. considered in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low…."

[15] The Directive and the Regulations do not impose expressly any obligation on the contracting authority to reject an abnormally low tender. In Lombardi and Mantovani [2004] 1 CMLR 27 the ECJ stated that it is apparent from the wording of the Directive drafted in imperative terms that the contracting authority is under a duty first to identify suspect tenderers, secondly to allow the undertaking concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly, to assess the merits of the explanations provided by the persons concerned and fourthly to take a decision as to whether to admit or reject those tenderers (paragraph 55).

[16] The defendant relies on NATS (Services) Ltd v Gatwick Airport [2014] EWHC 3728 which was a tendering process of air navigation services at Gatwick Airport. It was alleged that the tender was abnormally low. The defendant denied that the tender was abnormally low but did not explain whether it carried out any

assessment for the purpose of Regulation 30(6). The claimant contended that the defendant was in breach of the Regulations, including the principles of equal treatment, transparency and non-discrimination and manifest error to carry out an investigation adequately or at all into whether the bid was abnormally low and to reject it having carried out such an investigation. It was contended that the result of such an investigation should have been a determination that the price was abnormally low and that the bid should have been rejected.

[17] The Court reiterated that there is no obligation on the part of contracting authorities to determine that bids are abnormally low nor is there any obligation to reject abnormally low bids. Therefore the Court concluded that it would not be necessary to consider whether there was independently some manifest error on the part of the authority in failing to appreciate that there was or might have been an abnormally low tender. However, at best even if the manifest error approach could sensibly be adopted, one would have to be able to determine that it was an error that no reasonable contracting authority or utility could realistically have made (paragraph 27).

[18] Thus, in relation to the review of a bid that is suspected of being abnormally low, there is no basis for a claim of manifest error in respect of a decision by the authority that a bid is suspected of being abnormally low, or a decision as to the manner of the investigation of such a suspected bid, or a decision that the bid is not abnormally low or a decision that an abnormally low bid should be accepted.

[19] The plaintiff relies on Varney & Sons Waste Management Ltd v Hertfordshire County Council [2010] EWHC 1404 where the complaint first of all was that the Council accepted tenders where the site management charge quoted was less than the actual cost of running the relevant site, which it was contended was not permitted by the preamble to the schedule of rates which required the actual cost to be quoted. Secondly it was contended that even if that construction of the preamble was wrong the Council should not have accepted the successful tenderer who had been investigated for an abnormally low bid as the prices quoted were less than the cost of running the site and were not sustainable. Both contentions were rejected.

[20] The Court restated that there is nothing in either the Directive or the Regulations to support the contention that there is a general duty owed by the authority to investigate so called suspect tenders which appear abnormally low (paragraph 157) nor any general duty to investigate so called suspect tenders in circumstances where the authority had no intention of rejecting those tenders. In a case where the authority did consider the tender abnormally low and was contemplating rejecting the tender, at least in part if not totally, there was a duty to the tenderer to investigate the bid (paragraph 158). As the Directive refers to a bid that "appears" to be abnormally low, such duty to investigate arises where the authority knows or suspects that the tender is abnormally low (paragraph 159).

[21] In relation to one tender that was investigated, it was sought to demonstrate that the Council had made a manifest error in making the award as it was contended that the sites concerned were loss making and that this was something the Council should have recognised at the time of evaluation of the tender (paragraph 181). However this contention failed on the facts as there was no evidence that the tender had been unsustainable as it was found that the contracts were making a small profit (paragraph 190).

[22] In general the review of a tender process by the Court concerns itself with compliance with procedural rules, the giving of reasons, the absence of manifest error and with fairness, transparency and equal treatment. It is clear that the duties in relation to abnormally low tenders are limited. The issue in the present case becomes the extent to which, in the conduct of a review of a suspected abnormally low bid, these general obligations apply in addition to the limited obligations in relation to abnormally low tenders. I am satisfied that there are respects in which the plaintiff's case does not seek to rely on obligations concerning abnormally low tenders as such but on the more general obligations imposed on the defendant. In particular the plaintiff's complaints rely on the principle of transparency.

[23] The principle of transparency requires the criteria governing the award of a contract to be clearly defined. Lord Phillips of Worth Matravers CJ in R (Law Society) v Legal Services Commission [2007] EWCA Civ 1264 at paragraph 43 stated the rationale of the principle -

> "(1) First, it enables the contracting authority to satisfy itself that the principles of equal treatment and of non-discrimination on the grounds of nationality have been complied with: *Telaustria Verlags GmbH v Telekom Austria AG* (Case C-324/98) [2000] ECR 1-10745, para 61; *SIAC Construction Ltd v Mayo County Council* (Case C-19/00) [2001] ECR 1-7725, para 41 and *Commission of the European Communities v French Republic* (Case C-340/02) [2004] ECR 1-9845, para 34.
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> (2) Second, it facilitates competition: *Telaustria Veriags GmbH v Telekom Austria AG* (Case C-324/98) [2000] ECR 1-10745, para 62; *Parking Brixen GmbH v Gemeinde Brixen* (Case C-458/03) [2005] ECR I-88, paras 50, 52 and *Impresa Portuale di Cagliari Sri v Tirrenia di Navagazione SpA* (Case C-174/03) (unreported) 21 April para 75, per Advocate General Jacobs.
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> (3) Third, it enables the impartiality of procurement procedures to be reviewed: *Telaustria Veriags GmbH v Telekom Austria AG* (Case C-324/98) [2000] ECR 1-10745, para 62 and *Impresa Portuale di Cagliari Sri v Tirrenia di Navagazione SpA* (Case C-174/03), para 75, per Advocate General Jacobs.

> (4) Fourth, it precludes any risk of favouritism or arbitrariness on the part of the contracting authority: *Commission of the European Communities v CAS Succhi di Frutta SpA* (Case C-496/99 P) [2004] ECR 1-3801, para iii.
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> (5) Fifth, it promotes a level playing field by enabling all tenderers to know in advance on what criteria their tenders will be judged and those criteria are assessed objectively; *SIAC Construction Ltd v Mayo County Council* (Case C-19/00) [2001] ECR 1-7725, para 38, per Advocate General Jacobs."

[24] At this interlocutory stage I am satisfied that the plaintiff has identified a basis on which a reasonable arguable claim may be advanced against the defendant. The extent of nominal bidding, it is said, may render the contract unsustainable. The widespread penny bidding is alleged to have been permitted by the contracting authority and it is said that the principle of transparency requires that the defendant ought to have disclosed that such an extent of abnormally low biddings would be regarded by the defendant as permissible. I am satisfied that it is reasonably arguable that adopting nominal bidding to an extent that creates unsustainable contracts is a breach of the obligations arising under the procurement scheme and a method of defeating the competitive tendering process which the Directive and the Regulations are designed to protect. Further I am satisfied that it is reasonably arguable that the approach to abnormally low bidding adopted by the defendant was not compatible with the principle of transparency. I should emphasise that the Court is not determining at this stage if the contentions that are being made by the plaintiff can be established.

[25] The information about the assessment of the tenders is uniquely within the province of the defendant. The plaintiff identifies the basis on which they say that their complaint has a legal foundation. The plaintiff also identifies the material that is relevant to the complaint, not by reference to what appears in their schedule, which was much too wide, but in relation to the two matters identified above.

[26] If, by the disclosure of the information which is peculiarly within the knowledge of the defendant, the plaintiff's complaint about extensive nominal pricing can be shown to be incorrect, then the case that the plaintiff makes cannot be sustained. The notice parties raise the issue of confidentiality and that is a legitimate concern. Indeed, Mr Dunlop goes further by indicating bad faith on the part of the plaintiff in seeking to use a challenge to the tendering process to gain commercial advantage for the purposes of future bidding because of course these parties are commercial rivals and will remain so in respect of further tenders. The plaintiff, by reason of the commercial sensitivities has agreed to a confidentiality ring and also to a restriction on the information sought. The plaintiff seeks a record of the overall level of nominal bidding or a record of the level of nominal bidding within the nine bidding categories.

[27] The modification of the plaintiff's application means that it becomes not so much a discovery application but rather a mechanism for addressing the confidentiality aspect by requiring the defendant to produce a statement setting out the extent of the nominal bidding that actually took place rather than the production of the documents making up the bid. That is an appropriate approach to securing disclosure of the required information while addressing the issue of the commercial sensitivities. This becomes a request for information in lieu of discovery. I find this a useful way of dealing with the issue. The proposed disclosure by statement also provides the prospect of putting an end to the plaintiff's challenge if it can be shown that the basis of that challenge grounded in nominal bidding is without foundation. I will direct disclosure of the relevant information. The exercise may require greater definition of the information to be provided by the defendant and the manner in which it is to be provided. In the first place the parties may seek to determine if they can agree a format by which the necessary information could be provided to establish the extent of nominal bidding.