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Judgment: approved by the Court for handing down | *Delivered:* **17/07/2015**
*(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 AND ENGINEERING LTD

Plaintiff

v

DEPARTMENT OF FINANCE AND PERSONNEL

Defendant

Fox Building and Engineering (No 2) – the set aside application.

WEATHERUP J

[1] This is the defendant's application for an Order pursuant to Article 47H(1)(a) of the Public Contracts Regulations 2006 to bring to an end the requirement that the defendant refrains from entering contracts with Lowry Building and Civil Engineering Ltd ("Lowry") and Whitemountain Quarries Ltd ("Whitemountain"). Mr McMillan QC appeared for the defendant, Ms Danes QC and Mr McCausland for the plaintiff and Mr David Dunlop for the notice parties Lowry and Whitemountain.

[2] The plaintiff is an engineering and construction company and engaged in a tender process operated by the defendant for two framework agreements for civil engineering works, Lot 1 for the northern area and Lot 2 for the southern area. No one tenderer was permitted to be awarded both Lots 1 and Lots 2.

[3] On 20 March 2015 the plaintiff was informed that the tender had been unsuccessful for Lot 1. Lowry had received the highest score for Lot 1. The evaluation resulted in the plaintiff's tender being ranked seventh. The winning tender price was some £18.1m. On the same day the plaintiff was also informed that the tender had been unsuccessful in Lot 2. Lowry had received the highest score for Lot 2 but as no tenderer could be awarded both lots the winner was Whitemountain with the second highest score for Lot 2. The evaluation resulted in the plaintiff's

tender being ranked seventh. The Whitemountain tender price was some £18.5m. The plaintiff's tender price for each lot was some £24.6m.

[4] The plaintiff complained that Lowry and Whitemountain must have included extensive nominal prices in the pricing schedules and that their tenders were not at a sustainable level and therefore were not the most economically advantageous tenders. Further the plaintiff complained that the tender process had not been transparent as the defendant had not disclosed that tenders would be accepted in such circumstances.

[5] The plaintiff made an application for early discovery of documents directed at disclosure of the extent of nominal bidding undertaken by the successful tenderers. On 17 June 2015 I directed disclosure of information about the nature and extent of nominal bidding as set out in Fox Building and Engineering Ltd v DFP [2015] NIQB. Further discovery directions were issued to the defendant on 1 July 2015. The relevant disclosure was made by the defendant in advance of the hearing of this application and it was confirmed that extensive nominal bidding by the successful tenderers had occurred.

[6] The plaintiff's application for early discovery also gave rise to argument about the grounds on which the plaintiff was entitled to advance the challenge to the defendant's decision to award the contracts. The defendant objected that the plaintiff's challenge was concerned with allegations about abnormally low tenders by other tenderers when it was established that duties owed by a contracting authority in respect of abnormally low tenders were owed to the tenderer submitting that tender and not to other tenderers. On the other hand the plaintiff contended that the complaint related to the assessment of tenders generally and to a structural flaw in the tender process, being matters arising from the defendant's review of the successful tenders, and in particular the lack of transparency as to how the process would operate.

[7] Regulation 30(6) provides that if an offer is abnormally low the contracting authority may reject that offer but only if it has -

> (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;
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> (b) taken account of the evidence provided in response to the request in writing; and
>
> (c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator.

[8] The tender documents 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.

[9] The defendant carried out reviews of the tenders of both Lowry and Whitemountain. The defendant's grounding affidavit explained that process. Further analysis of Lowry's tender was undertaken. This identified that Lowry's price was 1% below that which could be considered to be potentially abnormally low, that is 15.94% below the adjusted average and therefore was within the scrutiny trigger set at -15%. The rates offered by Lowry in their main schedule of rates were scrutinised and a number of low rates were identified. Lowry were asked to provide a full justification for each of their potentially low rates. Each of their low rates was considered and either accepted or categorised as a contractor's risk. Lowry's justification was accepted for some of the risks and no further analysis was carried out. However, in the case of other items where justification resulted in the contractor accepting a risk the risks were aggregated to establish an estimated overall level of risk. Thus the potential maximum risk was calculated to be £2.4m which included £1.15m which Lowry's attributed to errors they had made in completing its tender but which they were prepared to stand over. This represented approximately £600,000 per year. However Lowry were said to have highlighted that they could reduce this risk by for example utilising the existing management systems and structures in place, reducing waste by salvaging and recycling materials. Lowry's Managing Director ultimately signed a declaration confirming that the company would deliver all orders for the tendered rates and accepting that should it fail to deliver it would mean they would accept that this would be treated as poor performance and would mean that they would not be eligible to tender for government contracts in the immediate future. The defendant concluded that there was no justification to exclude Lowry.

[10] In relation to Lot 2 the Whitemountain tender was 1% higher than that which could be considered to be a potentially abnormally low bid, that is 14.1% below the adjusted average where the scrutiny trigger was set at -15%. However a similar analysis was undertaken for the Whitemountain tender. It was concluded that Whitemountain's potential maximum risk was £1.3m which represented about £325,000 per annum. Whitemountain highlighted that it could reduce the risk by for example treating consultancy costs as a global overhead across their business and as such limit the need to recover management overheads in the schedule of rates. Whitemountain's Managing Director ultimately signed a declaration in the same terms as that signed by Lowry. The defendant concluded that there was no justification to exclude Whitemountain. The defendant received further assurance from the fact that on the previous frameworks Whitemountain had delivered both Lots 1 and Lots 2 successfully for a total period of 4 years.

[11] The plaintiff pleads that the defendant's process was fundamentally flawed, arbitrary and manifestly wrong. The plaintiff therefore claims that to allow the process to conclude with the contract awards in the circumstances would be manifestly anti-competitive and result in no tenderer having an opportunity to

tender for the contracts on a fair basis. It is claimed that the plaintiff was entitled to seek to have the tender documentation amended to correct ambiguity and unfairness inherent in the process. One such ambiguity is said to be the permissibility of a tenderer failing to price sustainably a significant amount of the pricing schedule. The plaintiff's case is therefore stated to be that this ambiguity and uncertainty is such as to render the procurement exercise untenable and should be withdrawn and begun anew so as to place each tenderer in equal position with a transparent view as to how the contracts are to be priced and evaluated.

[12] Regulation 47G provides that –

> "(1) Where –
>
> (a) proceedings are started in respect of a contracting authority's decision to award the contract; and
>
> (b) the contract has not been entered into,
>
> the starting of the proceedings requires the contracting authority to refrain from entering into the contract"

Regulation 47H(1) provides that -

> "(1) In proceedings, the Court may, where relevant, make an interim order –
>
> (a) bringing to an end the requirement imposed by Regulation 47G(1)."

[13] In First4Skills v Department of Employment and Learning [2011] NIQB 59 McCloskey J held that such applications are to be determined by applying the principles that relate to interim injunctions as set out in American Cyanamid v Ethicon [1973] AC 396. This approach has been followed in this jurisdiction in Gillen J in Resource v University of Ulster [2013 NIQB 64, Stephens in J John Sisk v WHSCT [2014] NIQB 56 and Horner J in Allpay v NIHE [2015] NIQB 54,.

[14] A question has arisen as to whether the American Cyanamid approach is compatible with the Article 2(1)(v) of the Remedies Directive which provides that –

> "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 the benefits."

I am satisfied that the American Cyanamid approach is consistent with the requirements of the Remedies Directive.

[15] A threefold inquiry has to be made under the American Cyanamid approach. The first question is whether there is a serious issue to be tried. The hurdle of persuading a court that there is a serious issue to be tried is generally characterised as a modest one.

[16] The second question is whether damages are an adequate remedy for the plaintiff. The approach to interim injunctions is that if damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's case appeared to be at that stage. The corollary is that if damages would not be adequate to compensate the plaintiff and if the plaintiff would be in a financial position to give a satisfactory undertaking as to damages and an award of damages pursuant to the undertaking would adequately compensate the defendant, an interim injunction may be granted.

[17] The third question is, where lies the balance of convenience? The Court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice, and to what extent, if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the Court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other (Lord Hoffman in National Commercial Bank v Olint Corp [2009] 1 WLR 1405).

[18] The defendant filed a grounding affidavit setting out the basis on which it sought to have the stay set aside. Stewart Heaney, on behalf of the defendant, set out the structure of the tender price schedule. One part comprised the main schedule of rates of labour and material and there were 1,767 individual items of material and labour. Those items were identified from past experience of orders issued by the CPD and from an assessment of the types of work that clients had indicated that they may require to be completed during the lifetime of the framework. There was a section dealing with quantities of labour and material and included estimated quantities for each item within the schedule of rates identified again from past experience of the operation of the work.

[19] A second part of the structure was a model cost assessment based on 12 orders, a small, medium and large order per year for each of the 4 years of the expected life of the framework. In the case of the small order for example 44 items and their tendered rates were selected from the main schedule of rates and the quantities that might be expected for the small orders were applied. This process was repeated for the medium and large orders and each multiplied by 4 to represent the 4 years of the framework. The three samples orders for the 4 years within the model cost assessment were automatically priced from the main schedule of rates. It was estimated that the items included in the model cost assessment represented approximately 10% of the overall tender price.

[20] Mr Heaney stated that the plaintiff was incorrect to believe that the prices appear either in the main schedule of rates or one of the sample orders within the model cost assessment. All rates of plant and material within the model cost assessment were automatically drawn from the main schedule.

[21] Mr Heaney discussed the need to undertake contract works immediately. He stated that without the commencement of the frameworks the timeline for delivering the projects that were then outstanding would be extended for some 3 months. This in many cases was not acceptable to clients due to budgetary constraints. Further it was not acceptable to delay works in relation to health and safety or emergency remedial works, some of which may pose a risk to the public. Nor was it acceptable to delay works that would hinder economic growth in commercial investment. The defendant had given consideration to individual tenders for particular projects but that would add an additional cost of up to £15,000 per contract and further costs would also be borne by contractors. These costs were said to be disproportionate in many instances, given that it is anticipated that over 85% of the orders issued would be below £15,000 in value. Requests had already been received for over 40 projects with a total estimated value of around £3m to be delivered through the frameworks.

[22] Aidan Mullan, Operations Director of Whitemountain, outlined the impact on Whitemountain. Details were provided of current staff employed. Mr Mullan stated that if the contract awarded to Whitemountain did not proceed a formal redundancy process would have to be undertaken for those staff who could not be maintained in the absence of the work.

[23] It was pointed out by Mr Mullan that the plaintiff had been ranked seventh in the competition and if the set aside application was refused and the case proceeded to a full hearing then the plaintiff could not seriously hope to be awarded a contract given that there were obviously four other contractors between the winners and the plaintiff's seventh place. On behalf of Whitemountain it was said there would be irremediable prejudice suffered should the set aside application not be granted.

[24] The plaintiff filed affidavits sworn by Finbarr Fox, Managing Director of the plaintiff. He referred to the discovery application that ordered the disclosure of information about the extent of the nominal or penny bidding and stated that, eventually, information was provided by the defendant by the identification of items that attracted prices at £10 or below. There was said to have been an inordinate amount of nominal bidding.

[25] Mr Fox referred to a number of grounds to provide a basis for retaining the stay on the award of the contracts, being grounds disputed by the defendant. The first matter concerned the strength of the plaintiff's case. The plaintiff's challenge is based on the process being fundamentally flawed and the plaintiff had been entirely deprived of tendering for the works on an open and fair basis and the award proposed to be made would be anti-competitive. Further it is said to be impossible to have any faith in the conclusion reached in the procurement process for the

purpose of assessing the plaintiff's loss of opportunity given the assessments that have already been made by the defendant.

[26] The second ground is the absence of other work that would be available to the plaintiff. It is said that opportunities for obtaining contracts of this size and scope are extremely rare and because this contract covers all government departments the possibility of a new contract becoming available is extremely small and the plaintiff is effectively barred from tendering for such a contract again. A further affidavit from Mr Fox stated that the nature of the works to be performed under these two frameworks was all encompassing and effectively represented all civil engineering works under £400,000.

[27] The third ground concerns the plaintiff's employment arrangements. It is said that if the plaintiff were to be awarded the contract it would employ the vast bulk of employees directly and not use sub-contractors, as was largely the case with Whitemountain. The contract works would be performed in-house and the plaintiff had invested many millions of pounds in specialist employees and machinery. He stated by further affidavit that it would be necessary to make a number of staff redundant as there would be insufficient work to sustain their continued employment

[28] Fourthly, Mr Fox disputed any need for immediate work to be undertaken under the frameworks. There was said to be a total lack of risk in relation to the lack of progress with works orders and the potential costs of tendering each contract were described as nonsensical. Reference was made to the incumbent contractor, Whitemountain, which had been performing all the works for the past 4 years, as a viable alternative for the completion of works pending the outcome of this challenge.

[29] The plaintiff asserts that the Court should be reticent to reward abnormally low bidding simply out of a contracting authority's desire to enter into the frameworks immediately.

[30] As to the balance of convenience Mr Fox disputed that Whitemountain would suffer irremediable prejudice if the contracts were not awarded. It is said that Whitemountain as the incumbent contractor could be granted an interim extension of the contract. Further, reference was made to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and it was noted that the appendix to the bids referred to three proposed employees of Whitemountain in contrast to the content of the affidavit setting out the staff employed in the contract works, many of whom were sub-contractors. Further, the cost of all the employees of Whitemountain over the 4 year contract was said to amount to some £16.7m, being the total amount of their bid, and therefore says the plaintiff all the other items of the bid must be at no cost, which is not sustainable.

[31] An exercise has been carried out by the plaintiff on the total model cost assessment. Extracted from the material was a comparison between the plaintiff's

model cost assessment and the Lowry model cost assessment. The former is £2.2m and the latter is £2.3m and therefore it is said that as Lowry's model cost assessment was higher than the plaintiff the Lowry tender could not be the most economically advantageous tender.

[32] Further, the plaintiff referred to the Lowry accounts. Lowry, it is said could not absorb the risk identified by Mr Heaney. Lowry was incorporated in February 2011 and according to its accounts had total net assets of £353,000. Therefore, Mr Fox concluded that for the defendant to suggest that this new company could genuinely carry the risk of £600,000 a year for 4 years was patently untrue when compared with the published accounts.

[33] Gerard Ward, the plaintiff's solicitor, extracted material from the information disclosed by the defendant in the discovery exercise and prepared tables that included all items priced at £10 or under. From this he compiled a comparative schedule of the rates used by the plaintiff and nominal rates used by Whitemountain. This schedule highlighted a wide disparity in many of the prices listed. On 1 July the Court ordered the defendant to provide a schedule of the actual rates submitted by Whitemountain for all items priced at £10 or less. Mr Ward prepared updated comparative schedules. A schedule represented the 150 most profound examples of nominal pricing by Whitemountain. A further schedule highlighted all penny bids submitted by Whitemountain.

[34] In relation to the ability of Lowry to assume the risks, an expert report from FPM Accountants dated 3 July 2015 commented that significant concern existed as to Lowry's ability to service a significant contract over a 4-year period. Lowry would be unable to sustain any losses in excess of approximately £250,000 given the company's net asset position and may be unable to sustain any project risk for a one year period never mind the 4-year period of the proposed project.

[35] There was then a final affidavit filed from Mr Heaney. In relation to the scope of the frameworks he stated that while frameworks of this nature were established to be accessible by all government departments the frameworks had not been used save for a small number of discrete and very minor works provided for road service. Other than that no NI Water, Road Service, Translink or Housing Executive civil works would have been ordered under the frameworks. That remained the position. Other public bodies will continue to tender separately for their own works and not use these frameworks.

[36] The first question is whether there is a serious issue to be tried. I should emphasise that this challenge cannot proceed on the basis of the defendant being under a duty to the plaintiff in relation to the abnormally low bids submitted by other tenderers. Rather, this challenge has to do with the method of evaluation of the tenders and particularly the review of the Lowry and Whitemountain tenders and the obligations of equality and non-discrimination and fairness and transparency. I have found for the purposes of the discovery application that there is

an issue to be tried, particularly on the principle of transparency. I am satisfied that that is equally the foundation of this application and there is a serious issue to be tried.

[37] The plaintiff characterises the complaints as both an assessment type and a structural type. The complaints relate to the contracting authority's method of evaluation of the tenders and in addition the plaintiff seeks to advance what is described as a structural challenge which focuses attention on the fundamentally flawed scheme devised by the defendant which, as a consequence, the defendant contends, necessarily involves the quashing of the scheme. I consider these two types to be aspects of the same challenge.

[38] The affidavit sworn on behalf of the defendant further explains the steps taken by the defendant in the evaluation of the tenders submitted by Lowry and Whitemountain. The plaintiff's complaint is about the lack of transparency of the process of assessment and the manner in which the review of the tenders was undertaken, the approach to nominal bidding, the adjustments that were made, the undertakings that were accepted and the declarations on which reliance was placed. At the discovery stage the complaint was focussed mainly on the principle of transparency. In light of the defendant's evidence the complaint might also be characterised as relying on breach of the requirement for objective evaluation. The criteria applied in the evaluation of tenders must be sufficiently disclosed to the tenderers. The plaintiff now contends that in view of the defendant's description of the reviews of the successful tenders the evaluation process was not objective as it had not been disclosed to the plaintiff.

[39] It is clear that Lowry's successful tender was an abnormally low tender. The successful Whitemountain tender was not, overall, an abnormally low tender. However the contract terms also provided for the review of a tender where any amounts might be abnormally low. Thus the Whitemountain tender could be regarded as abnormally low where there was reliance on the nominal amounts included in the tender.

[40] In any event Whitemountain was treated in the same manner as Lowry for the purposes of evaluation in that both tenders were called in to be examined and for present purposes the review was equivalent to an abnormally low tender review. There were nominal bids by Lowry and by Whitemountain. There were also nominal bids by the plaintiff and 39 such bids have been identified. However, it is not the existence of nominal bids as such but the scale of such bids and the treatment of the risks created by such bids that is in issue. In light of the evidence now filed on behalf of the defendant I am satisfied that it remains the position that the plaintiff has a reasonably arguable case.

[41] The second question is whether damages are an adequate remedy for the plaintiff. The plaintiff's position is that the plaintiff has suffered and will suffer irredeemable loss by not being awarded a contract. It is said that the scheme is

fundamentally flawed and should be scrapped. The defendant on the other hand says that the plaintiff was seventh in the tendering process and therefore could not conceivably succeed in being awarded a contract. However the plaintiff responds that the seventh place was not a reliable guide to the proper outcome of the competition if the contracts were to be awarded in the transparent and objective manner for which the plaintiff contends. That being so, the chance lost to the plaintiff if the stay is removed would be immeasurable and therefore the loss irredeemable.

[42] There will be an issue as to the measuring of the chance that the plaintiff might have been awarded a contract, if I were to accede to this application. The general character of the work required has a history based on the previous four years when the works were carried out by Whitemountain. I am satisfied that the plaintiff's damages would be assessable. It may be a difficult matter. However it is no more complex than many other similar cases.

[43] The second aspect concerns the impact on employment at the plaintiff. I have not been satisfied that the plaintiff is excluded from any significant amount of public works previously undertaken. Some additional items of work are now embraced within the frameworks which were not in the previous frameworks but I am not satisfied that there is a significant extension of the scope of the frameworks. The opportunities for alternative work are largely as they existed before this process and the opportunities for gaining of experience in public works are also largely as before.

[44] A related matter concerns the impact on the plaintiff's employees. If the work that was previously available remains available in large measure then the opportunities for the employees of the plaintiff are largely as before. The plaintiff extends this point into the contention that they have invested in experienced and skilled workers and plant and equipment in anticipation of new contracts. That cannot be a factor that would influence the Court's consideration of the adequacy of damages.

[45] Similarly, the impact of TUPE will not apply to the plaintiff and the impact of redundancies at the plaintiff will not arise as no significant areas of additional work will be incorporated into the new frameworks.

[46] A further ground concerns the need for immediate work to be undertaken. The plaintiff points to an incumbent contractor Whitemountain to undertake such works as are necessary by extension of the Whitemountain contract. On the other hand the defendant says that the contract with Whitemountain has been concluded and cannot be revived and that what is otherwise required to get the work done is individual contracting at disproportionate cost.

[47] There is provision in the Directives and the Regulations for the extension of contracts in exceptional circumstances. The defendant says that this arises during the period of the contract and cannot be applied once the contract has come to an

end, as in the present case. I consider there to be a question mark over the re-letting of the contracts to the previous incumbent. I have not been satisfied that in circumstances where the contract of the incumbent has concluded that it can later be extended. There are prospects for contracts by negotiation but that is likely, if it is undertaken by negotiation with the previous incumbent, to attract objections from others who would also have wished to be treated as the interim contractor pending resolution of this dispute.

[48] There are other matters relied on which I have not found helpful in reaching a decision on whether damages would be an adequate remedy. These are also matters that affect the balance of convenience. First, it is said that the defendant would be rewarding nominal bidding if the stay were to be set aside. Nominal bidding has been undertaken by all parties and it is the method of evaluation that is the disputed area, not the character of the bidding as such. The second matter is that the defendant is said to have delayed this application. Counsel has indicated that there was an understanding about the timing of the application. I do not propose to examine what was or was not understood between the legal representatives on this issue. The third matter was that the Lowry model cost was greater than the plaintiffs' model cost. This exercise is not simply about the model costs but is about the overall evaluation of the tenders.

[49] Overall, as to whether damages are an adequate remedy for the plaintiff, I conclude first of all that this is in essence a challenge to the method of evaluation of the reviews of the successful tenders based on breach of the obligation of equal treatment, in particular the requirement of transparency and objective evaluation, secondly, that the relevant chances of the plaintiff and the damages related to those chances are capable of assessment, thirdly, that the concerns of the plaintiff about the reduced availability of future public works are not well founded in that there will be no significant addition to the scope of the frameworks, fourthly, that the opportunities for the plaintiffs' employees are largely as before and the concerns about gaining experience and qualifying for the next round of tenders for public contract works remain as at present and fifthly, Whitemountain cannot be expected to continue the work as the incumbent contractor.

[50] In light of the conclusions I have reached about the various factors above I am satisfied that this is a case where damages are an adequate remedy for the plaintiff. This leads me to the view that this is a case where the injunction could be lifted.

[51] I look to the balance of convenience and the question is whether greater damage would be done by confirming the stay or by removing the stay. As appears above, I am not satisfied as to the degree of prejudice to the plaintiff relied on by the plaintiff. I am satisfied that there is a public interest in providing for the contract works to be undertaken in the short term and further that that public interest cannot be achieved by extending the contract of Whitemountain as the former contractors. I am satisfied that there would be disproportionate cost in undertaking necessary works by individual tenders. I do recognise that the public interest also relies on

having a proper public procurement process. When I take all the factors into account it seems to me that the balance of convenience lies in favour of lifting the stay.

[52] Accordingly, the conclusion I have reached is that I will grant the defendant's application and remove the stay on the award of the framework contracts.