Neutral Citation No. [2014] NIQB 123 | *Ref:* **BUR9175**

Judgment: approved by the Court for handing down | *Delivered:* **18/02/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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2013/121528

BETWEEN:

JOHN SISK & SON (HOLDINGS) LTD

Plaintiff;

and

WESTERN HEALTH & SOCIAL CARE TRUST

First Named Defendant;

and

THE DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

Second Named Defendant.

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BURGESS J

[1] This action concerns the procurement of a contract known as "Omagh Enhanced Local Hospital" ("the Contract") and in particular the decision of the defendants as the contracting authorities to appoint McLaughlin and Harvey Limited as the defendant's preferred bidder.

[2] Notification to all who tendered was given by letter from the defendants dated 28 October 2013 ("the October Letter"). It advised the plaintiff company that:

> "Our evaluation resulted in your Contractor Proposal Submission receiving a score of 92.69 compared with the Preferred Bidder's Submission which scored 92.70. Your submission was ranked second out of seven."

[3] The October Letter went on to state that the evaluations had been conducted against the criteria and weighting detailed in the Tender Documentation. Amongst this documentation was a Memorandum of Information in which were broken down

the essential criteria marked on a pass/fail basis following a series of quality criteria as defined in Clause 6.2. These were:

(i) Whole life costs cycle benefits (2.5%).

(ii) Personnel assigned by the contractor to the Initial Project (10%).

(iii) Programme and delivery of the Initial Project (2.5%).

(iv) Sustainability measures to the procurement and construction process including site practices for the Initial Project (5%).

(v) The overall weighting for price was specified at (80%).

[4] Attached to the letter was a schedule (Appendix A) detailing the plaintiff company's weighted score against those criteria, together with comments of the evaluation panel. Also included were the weighted scores of the Preferred Bidder, again against each of the criteria.

[5] Unless there was any intervening step, further work would be undertaken by the defendants with the Preferred Bidder, details of which are set out in the October Letter. However, even though that work would be undertaken, the decision to appoint McLaughlin and Harvey as preferred bidder was described as "non-binding" and the defendants could discontinue, modify or postpone the procurement process and/or withdraw the Preferred Bidder Status at any time. Assuming no such step was taken, once that process was carried out a decision would be made by the defendants to enter into a Performance Related Partnership (PRP) Framework Agreement and a construction contract for the project. However, before entering into that Agreement a Contract Award Notice would be given to the plaintiffs (and presumably other tenderers). In that Notice would be given written explanations of the defendant's reasons, explanations which the October Letter states would be "identical to Appendix A". Other details would be included. There would then follow what is stated to be a 'Mandatory Standstill Period' before the expiration of which no PRP Framework Agreement or construction contract would be entered with the Preferred Bidder.

[6] It is therefore clear that even as late in the procurement process as the expiration of the Mandatory Standstill Period it was envisaged that the plaintiff company could take steps in relation to their not having been appointed, and the reasons given for that decision would be identical to those given by the October Letter.

[7] However, instead of waiting for the issue of a Contract Award Notice the plaintiff company raised objections at the much earlier stage by letter dated 14 November 2013 (the November Letter), a decision no doubt influenced by the

possible adverse effect the passage of time might have had, either in terms of limitation periods on any later action that might be taken, or the nature of the remedy which might be open to the plaintiff company at a later stage.

[8] In the event that decision has had the benefit of:

(a) allowing the defendants to decide if they wished to proceed with the work that was envisaged would be undertaken between the appointment of McLaughlin and Harvey as Preferred Bidder any the later Contract Award Notice - avoiding potential costs incurred in that process; and

(b) the public interest in ensuring that building the hospital facility could commence at the earliest date.

[9] During a hearing on 10 February 2013 I was advised that in the event no further steps had been taken following the appointment of McLaughlin and Harvey as Preferred Bidder. There was a suggestion that this might be because it could have given rise to legal repercussions for the defendants in their relationship with McLaughlin and Harvey, given the objections from the plaintiff company to which I will shortly come. However, given the absolute discretion of the defendant to withdraw at any time from that process the concern seems to have little, if any, substance.

[10] In the November Letter the plaintiff company identified a number of specific scores in Appendix A to which it took objection. Those objections were either:

(a) The reasons given for the score were expressed in terms too general to allow the plaintiff company to understand the score that had been given; and/or

(b) A score was manifestly wrong; and/or

(c) That in reaching a decision on a particular score the defendants used criteria outwith those in the Tender Documentation.

[11] To the above is to be added a further objection raised by them as a result of a letter from the defendants dated 13 December 2013 which the plaintiffs say evidences that the defendants had gone outside the tendering evaluation process in respect of the contract price by seeking to clarify McLaughlin and Harvey's Bill of Quantities after the date of closing of the process. That was in the context, as stated, that the overall weighting for price was specified at 80%.

[12] By the November Letter the plaintiff company sought a revaluation of their score, and if that was not undertaken, a comprehensive explanation of the reasons, including details of the characteristics and relative advantages of the successful tender. This therefore involved information not just as to the approach of the

defendants to the scores of the plaintiff company, but also the approach of the defendants to the scores of the Preferred Bidder. Conscious of time issues the plaintiff company sought a reply by 18 November 2013.

[13] On 18 November 2013 the defendants wrote to the plaintiff company's solicitors to say they were unable to supply a reply to the November Letter but would do so "as soon as possible". On 22 November they wrote indicating they hoped a response would be available by 6 December 2013.

[14] However, the plaintiff company, considering the process fell to be considered under Article 32 of the Public Contracts Regulations 2006/5 (the Regulations), which inter alia imposed time limitations in the process, issued the present Writ of Summons on 27 November 2013. The Writ seeks:

(a) An order setting aside the decision contained in the October Letter.

(b) A declaration that the procurement process was unlawful.

(c) A declaration that the defendants' evaluation of the plaintiff company's bid was infected with manifest errors.

(d) A decision that if the defendants had acted lawfully, the PRP Agreement and Construction Contract should have been awarded to the plaintiff company.

(e) An order restraining the defendants from proceeding with the procurement process.

(f) Damages.

(g) Interest and other consequential orders.

[15] An appearance was entered dated 9 December 2013 and the next step required to be undertaken by the plaintiff company was to deliver its Statement of Claim.

[16] Under Regulation 47(H)(1)(a) of the Regulations, the issue of the Writ imposed a restraint on the defendants proceeding to enter into the PRP Framework Agreement. On 17 January 2014 the defendants issued a Notice seeking an Order bringing that restraint to an end. The return date on that Notice was 31 January 2014.

[17] By Notice of Motion dated 30 January 2014 the plaintiff company sought an Order for Discovery of Documents scheduled to the Notice either:

(i) prior to delivery of their Statement of Claim; and/or

(ii) prior to determination of the defendants' application to set aside the suspension of the contract process under the provisions of Regulation 47G of the Regulations.

[18] Mr Dunlop BL on behalf of the defendants submitted that since the October Letter was not a Contract Award Notice, rather than it conferred Preferred Bidder status on McLaughlin and Harvey, the Regulations did not apply. The relevance of this in the context of the plaintiff company's present application is that under Regulation 32 of the Regulations the defendants would be under an obligation to make disclosure of information relating to the evaluation of tenders as detailed in the Regulations – and whether the defendant had discharged those obligations.

[19] However, I do not believe anything turns on this issue since the information sought in the application of the plaintiff company in order to allow it to formulate its Statement of Claim effectively mirrors the information which it seeks under the Regulations. In addition I am satisfied that the test set out in *Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933, to which I will now come, would act as a template in my determination under either of the processes.

[20] In *Roche* Coulson J. that an order for specification disclosure can be made in advance of the standard disclosure of documents if the court is persuaded that the documents sought are important and should be provided early on in the proceedings. He acknowledged that this was often necessary in procurement disputes. At paragraph [20] he states:

> "[20] In my view, the following broad principles apply to applications for early specific disclosure in procurement cases:
>
> (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 all the subject of issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentations relating to the evaluation process actually carried out so that an informed view can be taken of its fairness and legality.
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> (b) That this should be the general approach as confirmed by the short time limits imposed by the Regulations on those who wish to challenge the

award of public contracts. The start of the relevant period is triggered by the knowledge which the claimant has (or should have) of the potential infringement. As Ramsey J said in Mears Ltd v Leeds City Council [2011] EWHC 40(QB), "the requirement of knowledge is based on the principle that a tenderer should be in a position to make an informed view as to whether there has been an infringement for which it is appropriate to bring proceedings".

(c) However, notwithstanding that general approach, the court must always consider applications for specific disclosure in procurement cases on their individual merits. In particular, a clear distinction may often by made between those cases where a prima facie case has been made out by the claimant, but further information or documentation is required, and those cases where the unsuccessful tenderer is aggrieved at the result but appears to have little or no grounds for disputing it.

(d) In addition, any request for specific disclosure must be tightly drawn and properly focussed. The information/documentation likely to be the subject of a successful application for early specific disclosure in procurement cases is that which demonstrates how the evaluation was actually performed, and therefore why the claiming party lost. Other material, even if caught by the tests of standard disclosure is unlikely to be so fundamental that it should form the subject of a separate and early disclosure exercise.

(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, the need to guard against such an application being used simply as a fishing exercise, designed to shore up a weak claim, which will put the defendant to needless and unnecessary cost."

[21] Appendix A sets out the outcome of the evaluation process in respect of both the plaintiff company and McLaughlin and Harvey. It is tabulated under the headings of:

(a) The specific criteria being considered by reference to the Tender Documentation.

(b) The weighting given to that particular criterion by reference to the Tender Documentation.

(c) The score awarded in respect of that criterion.

(d) The weighted score in respect of that criterion.

(e) The comments of the evaluation panel in respect of each score.

[22] At the heading of each criterion it is made clear there should be no read across from the scores of the plaintiff company to those of McLaughlin and Harvey. Indeed, it may well be that in different circumstances McLaughlin and Harvey may dispute some of the scores that they were given.

[23] As regards to the score awarded it was confirmed at the hearing that this was a moderated score. By that I understand that each member of the Evaluation Panel would score a particular criterion and give his or her reasons for that score. There would then be a discussion to address any differences between the scores awarded by the individual members and a moderated score given – again as I understand it, and as should be the case, a reason given for any change in that score. In the November Letter the plaintiff company set out a number of scores awarded in respect of certain criteria arguing that these scores should have been higher; and also complaining that the reasons given were so general as not to allow for a reasoned explanation for that score. In one case, the argument was somewhat different in that in relation to the criterion of "Sustainability – proposal to economic – life cycle project tracker" the plaintiff company complained that a new factor was employed by the Evaluation Panel that was not specifically disclosed in the published criterion.

[24] I believe that I can take the contents of the November Letter to be a reasoned response as to the adequacy of all of the scores set out in the letter and, where appropriate, the inadequacy of reasons given in relation to a particular score. All except one comment relates to the scores awarded to the plaintiff company. However towards the end of the letter it states that:

> "Should you not decide to re-evaluate, we will require a comprehensive explanation of the reasons for your award decision, including details of the characteristics and relative advantages of the successful tender, in

> order for us to assess the basis for any contention by you that the decision is well founded."

This introduces the possibility of a request for information relating to the tender of McLaughlin and Harvey.

[25] A Schedule is attached to the plaintiff company's Notice of Motion for specific discovery before delivery of the Statement of Claim. The documents requested are set out in six paragraphs, none of which are cross referenced to the particular issues raised by the November Letter. Instead they seek:

(i) The Tender Response submitted by McLaughlin and Harvey Ltd in respect of the contract known as "Omagh Enhanced Local Hospital" (hereinafter called "the Contract").

(ii) Any documents and instructions provided to the Evaluation Panel or individual evaluators in relation to the defendants' evaluation of the tender responses received in the course of the procurement of the contract.

(iii) Evaluation score sheets of individual evaluators and of the Evaluation Panel (including all drafts of same).

(iv) All contemporaneous documents (including spreadsheets, notes or minutes of meetings, memorandum, evaluation reports, correspondence, emails and advices received) in electronic or handwritten form or otherwise relating to the evaluation of the tenders of McLaughlin and Harvey and/or the plaintiff.

(v) Any documents generated by a review of the evaluation process.

(vi) All correspondence with McLaughlin and Harvey in relation to their tender submission (and including any clarification sought and received from McLaughlin and Harvey) prior to and since 28 October 2013.

[26] The scope of this application is substantially wider that those matters contained in the November Letter in relation to the plaintiff company's scores in Appendix A. Rather it reflects the general comment in the letter to requesting documentation in relation to the tender of McLaughlin and Harvey and wider disclosure of matters relevant to the tender of the plaintiff company - that is:

- Under Heading 1 it seeks the actual tender response of McLaughlin & Harvey;

- Under Heading 2 it seeks documents relating to all the tender responses received by the defendants;

- Under Heading 3 it seeks the evaluation scores presumably in respect of all of the contracts, but certainly those of McLaughlin and Harvey;

[27] Drawn in such a manner the court will require to decide if any or all fall to be considered as "a fishing exercise", and would also have to have regard to the issue of confidentiality, and therefore the right of McLaughlin and Harvey to be represented before this court in relation to matters of commercial sensitivity. I will return to each of the headings separately in due course.

[28] Mr Dunlop on behalf of the defendants argues that none of this information requires to be produced for the purposes of the delivery of the plaintiff company's Statement of Claim. He argues that the November Letter identifies the issues being taken by the plaintiff company. He accepted that a number of documents sought may well be discoverable in due course, and if that led to an amendment to the pleadings that could be undertaken. He also argued that a number of the applications were not focussed; that no score was manifestly wrong (with each individual score being tested against that criterion rather than the fact that the overall result was so close); and that the exercise of providing further documentation would lead to a delay in the hearing of the set aside application, with the adverse impact on the public interest of getting this hospital built.

[29] Mr Humphries QC on behalf of the plaintiff company argued that it was in everyone's interest to crystallise matters at the earliest possible date, since by doing so rather than prolonging the proceedings it may well shorten them. He also argued that in terms of the passage of time, the defendants had not exercised any alacrity in dealing with this matter, and that in any case there remained the possibility of a later challenge as and when a Contract Award Notice was issued. It was the defendants' decision not to proceed to the next stage of negotiation with McLaughlin and Harvey after their appointment as Preferred Bidder – something which could run in parallel with any proceedings and therefore not give rise to any difficulties or delay should the plaintiff company fails in its action. He accepted that it would be open to the plaintiff company in due course to amend their Statement of Claim, but that would follow a discovery process (in respect of at least some of the documents now sought would be discovered) which would extend the period of the proceedings and which could leave the plaintiff company potentially with a claim in damages but without the right to have the contract awarded to them.

[30] In his affidavit of 17 January 2004 Mr Alan Moore, Director of Strategic Capital Development for the defendants, set out from paragraphs 29 et seq. what he says would be the effect of delay in commencing the project.

At Paragraph 29 he states:

> "The effects of delay in implementing this contract are potentially very serious with significant consequences

> for the local population to be served at a new hospital. In addition the Trust's funding provision is at risk in consequence of a delay in starting the project and there are very substantial cost implications if the project cannot be undertaken and commenced as soon as possible."

He then set out in detail the information informing those matters including "the need for the project"; "the budget issues"; and "the public interest". The defendants therefore want early determination of the application to lift the suspension.

[31] The plaintiff company also wish the matter to be dealt with as quickly as possible, including the opportunity at an early date to consider if indeed they wish to continue with their objections. However, in relation to the urgency claimed by the defendants they point to their request for information in the November Letter to which no substantive answer was received prior to the issue of the Writ on 28 November – within the time limit which the plaintiffs believe required to be met under the Regulations. They also point to the fact that no step was taken by the defendants to set aside the suspension affected by the issue of the Writ between its issue on 28 November 2013 and their Summons on 17 January 2014, more than seven weeks later. They also point to the right of the defendants to continue with the contract negotiations prior to the issue of Contract Award Notice.

[32] I raised with Mr Dunlop whether if the contract was not let before a particular date the funds would be lost. I was advised that that would not be the case, although that may occur due to "political expediency". Such a factor, if it exists, would one might suspect pertain whether these proceedings continued or not.

[33] I believe it is in everyone's interest that this matter is resolved as soon as possible and that a number of documents should be the subject of specific discovery at this stage. Which ones is informed by the public interest on the one hand and the rights of the plaintiff company to crystallise if they wish to proceed with the Writ.

[34] Turning to the plaintiff company's schedule attached to their Summons I have determined as follows.

(i) Heading 1 - I regard this as unfocussed as to the issues involved, and could amount to a fishing expedition to see how the defendants approached the tender of McLaughlin and Harvey. Subject to one issue in relation to Heading 6 no grounds have been laid to satisfy me that the approach of the defendants to the evaluation of the criteria as they related to McLaughlin and Harvey was other than proper. I therefore refuse this application, which in any case would undoubtedly lead to the involvement of McLaughlin and Harvey, the consideration of confidential and commercially sensitive material and the need to ring fence any such material.

(ii) Heading 2 - Disclosure will be confined to those documents and instructions provided to the Evaluation Panel or individual evaluators in relation to the defendants' evaluation of the plaintiff company's tender response as it relates to Criteria 6.2.(d) – sustainability. This is the basis of the company's complaint that it was a factor which was not specifically disclosed in the published criteria.

(iii) Heading 3 - Discovery is allowed in respect of the evaluations of the plaintiff company's tender in respect of the specific matters identified by them in the November Letter, that is under Criteria 6.2.(a) – Proposals 1 and 4; Criteria 6.2(b) - person 1; and Criteria 6.2.(c) – programme and delivery of initial project.

(iv) Heading 4 - This is granted in the same terms as paragraph 3 both solely in relation to the tender of the plaintiff company, and the specific criteria set out under Heading 3 above.

(v) Heading 5 - It was confirmed to the court that no review of the evaluation process had taken place and therefore discovery of any documents in relation to this particular heading does not arise.

(vi) Heading 6 - Discovery is granted in respect of the requests for clarification sought by the defendants from McLaughlin and Harvey in relation to their Bill of Quantities.

[35] The court is mindful that this may give rise to commercial and confidentiality issues. Accordingly, in relation to this particular heading the documents in question should be identified. McLaughlin and Harvey should be put on notice by the defendants of the Order of the Court, advising them of their right to make any submission to the court. It is hoped that discussions could take place between the defendants and McLaughlin and Harvey to be followed by an attempt being made with the plaintiff company's legal representatives to agree a confidentiality ring around any documents agreed as falling within that category - with the court only to be involved in relation to any dispute.