Neutral Citation: [2016] NIQB 65 | *Ref:* **TRE10024**

Judgment: approved by the Court for handing down | *Delivered:* 1/7/2016
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

NORTHSTONE (NI) LIMITED

Plaintiff;

-and-

DEPARTMENT FOR REGIONAL DEVELOPMENT (TRANSPORT NI)

Defendant.

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TREACY J

Introduction

The Issue

[1] The Defendant has applied, pursuant to Regulation 47H(1)(a) of the Public Contracts Regulations 2006 ('the 2006 Regulations'), for an Order bringing to an end the requirement imposed by regulation 47G(1) of the 2006 Regulations that it refrain from entering into the contracts which are the subject matter of these proceedings.

[2] The Defendant conducted a procurement process to identify contractors to carry out asphalt resurfacing of roads in 8 geographical areas of Northern Ireland for limited periods of time. These contracts are known as the 'Term Contracts for Asphalt Resurfacing 2015' ['term contracts']. Contractors were identified and contracts awarded for all 8 areas. The procurement process is governed by *Public Contracts Regulations 2006* (as amended by the Public Contracts (Amendments) Regulations 2009 and the Public

Procurement (Miscellaneous Amendments) Regulations 2011). The Plaintiff has commenced these proceedings alleging that the Defendant has breached these regulations. In accordance with reg. 47G(1), the effect of this is to require the Defendant "*to refrain from entering into the contract*". By this application the Defendant asks this court to bring this requirement to an end pursuant to reg. 47H(1)(a).

Background

[3] On 5 November 2014, the Department commenced a procurement process for the term contracts. Following a pre-qualification stage 11 contractors referred to in the Regulations as "*economic operators*" were invited to apply for the contracts they sought. The rules governing the conduct of the competition and the award of the contracts were set out in the Instructions for Tendering ("IFT") document which was provided to contractors at the outset of the process. The competitions for the award of all 8 contracts were run in parallel. There was no restriction upon the number of tenders that contractors could submit.

[4] Each contract was to be awarded on the basis of the most economically advantageous tender ("MEAT") in each competition. The award criteria were weighted 30% quality and 70% price. Contractors were required to return a quality submission and a price submission. The quality element contained some pass/fail questions and questions that were marked on a scale 0-5. The price submission consisted of a Schedule of Rates and Prices for items which were likely to be required during the term of the contract. The overall price mark was obtained using a formula set out in the IFT. Quality Submissions were assessed by a panel which carried out separate evaluations for each competition.

[5] Questions [2-01] and [2-03] of the Quality Submission are at the centre of the Plaintiff's case. These invited contractors to state the personnel and the resources that they proposed to deploy in the delivery of the contract. Question [2-01] requested details of the personnel the contractor proposed to use, together with their roles, responsibilities, experience and the percentage of time allocated to the contract. Subcontractors were also to be identified. Question [2-03] requested details of the plant, equipment and other resources that the contractor proposed to use.

[6] It was open to contractors to submit tenders in more than one competition and several did so including the plaintiff which tendered for all 8 contracts, and, John McQuillan (Contracts) Limited ("McQuillan") which tendered for 7 of the 8 contracts. While the Plaintiff submitted a separate organisational chart with each tender it made, McQuillan submitted identical organisational charts with all 7 of the tenders it put forward. These charts identified specific staff members and the percentages of time they would

spend on each contract. In some cases the same staff members were shown as spending 100% of their time on *each* of the 7 contracts McQuillan was bidding for.

The Plaintiff's case

[7] This is an interlocutory application therefore I will not set out the Plaintiff's case in full detail. Suffice to say that the complaint centres upon the marking of the Quality Submissions presented by the successful contractor in several of the impugned competitions. The IFT document required bidders to set out their responses to certain questions that were marked either as passes or fails or on a scale from 0-5 in which 5 was excellent, 2 was the minimum acceptable score and anything below 2 was 'unacceptable' or a 'fail'. The competition rules also required contractors to "[p]rovide an organizational chart including names, highlighting the key roles and percentage of time allocated for all personnel whom you propose would be directly responsible for the management and delivery of this Term Contract. The chart should include the line of command and communication links between parties. Sub-contractors if used shall be clearly identified."

[8] In its Quality Submission for each of the 7 Contracts for which it submitted a Tender, McQuillan provided an identical organizational chart in response to the request at section 2-01 in which it allocated up to 100% of the time of specified members staff. In assessing McQuillan's Quality Submissions in respect of each of these Contracts the Defendant awarded McQuillan 5 out of 5 for its responses to section 2-01. The plaintiff asserts that 'the Defendant simply made an error when it failed to take into account the total number of Competitions entered' and that this mistake is a 'manifest error' for the purposes of the present application.

[9] As a result of the initial evaluations it made the defendant decided to award 6 of the 8 contracts to McQuillan. The plaintiff alleges that it then noticed the overlaps in the personnel & resources relied upon by McQuillan in all its tenders and called a bilateral meeting with McQuillan at which questions were asked about the spread of these resources around the 6 contracts that it proposed to award to this contractor. Following upon this meeting McQuillan withdrew its tender for 2 contracts. In a decision letter issued to all the bidders on 3rd November 2015, after its bilateral meeting with McQuillan, the defendant awarded 4 of the contracts to McQuillan with the remaining contracts going to three other bidders.

[10] The plaintiff asserts that this way of handling the situation that had arisen amounted to a failure to act in accordance with the core principles of procurement law. It states that:

> "Regulation 4 of the 2006 Regulations and article 2 of the Directive and the principles of EU law imposed an obligation on the Defendant to comply with both the principle of equal treatment of tenderers and the principle of transparency at each stage of the Competitions.' Arranging a bilateral meeting with McQuillan was unfair because:
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> > [i]n effect McQuillan were given the opportunity to make a material alteration to their bid' when no other bidder received any such opportunity, and this the plaintiff alleges, was patently unlawful'."

[11] The above is a brief summary of the case the plaintiff wishes to make. The issuing of these proceedings have triggered regulation 47G(1) of the 2006 Regulations the effect of this is to require the Defendant "*to refrain from entering into the contract*" which is the subject matter of the proceedings. At present all 8 contracts are impugned in these proceedings so the defendant is prevented by the operation of the regulations from proceeding with its road maintenance plans. This interlocutory application seeks to disapply that statutory restriction.

The Law on the Making of the Interim Order Sought

[12] In Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust [2010] EWHC 3332 (TCC) the court noted that in the past the American Cyanamid v Ethicon [1975] AC 396 principles were applied in cases where a Plaintiff claimed interlocutory relief. The court held (see paragraph 28 et seq) that the provision of the 2006 Regulations and the underlying European Directive had not changed this situation.

[13] In Alstom Transport v Eurostar International Ltd and another Vos J, summarised the American Cyanamid principles at [76] as:

(a) Is there a serious question to be tried?

(b) If so, would damages be an adequate remedy for a party injured by the court's grant, or its failure to grant, an injunction?

(c) If not, where does the balance of convenience lie?

[14] A useful overview of the principles was set out by Laddie J in Series Five Software v Clarke [1996] 1 All ER 853 -he said at [865]:

> "Accordingly, it appears to me that in deciding whether to grant interlocutory relief, the court should bear the following matters in mind. (1) The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt to resolve complex issues of disputed fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases."

[15] Applying these principles to the present case I am satisfied that there is a serious question to be tried in the present case. There are clear questions related to the integrity of the process used and, especially, the different treatment accorded to different bidders within the process. These questions require to be examined in due course.

[16] In relation to the adequacy of damages as a remedy in this case I am satisfied that damages will be sufficient to compensate the plaintiff for any injury it is found to have suffered as a result of the impugned process. While it may suffer a financial loss a result of the outcome of the impugned competition, that loss is not of a scale likely to threaten the plaintiff's continued existence as a successful company. Any loss it suffers is amenable to calculation in terms of damages and indeed the commercial court regularly conducts such calculations.

[17] In terms of the balance of convenience I am persuaded that this lies with the defendant in the present case. The defendant has an obligation to provide a good standard of roads throughout Northern Ireland and there is no good reason why this court should stand in the way of its delivery of that obligation when there is no pressing reason to do so. Also it is in the public interest that the department should be able to deliver its program of road maintenance without undue impediment.

[18] For all these reasons I grant this application.