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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(COMMERCIAL HUB)

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BETWEEN:

RIVERRIDGE RECYCLING (PORTADOWN) LTD

Plaintiff;

and

ARC21
REGEN WASTE LTD

Defendants.

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Mr R Coghlin KC with Ms A Rowan (instructed by Carson McDowell, Solicitors) for the Plaintiff
Lord Banner KC with Mr A Fletcher (instructed by Arthur Cox, Solicitors) for the Defendant Arc21
Mr D Dunlop KC with Mr P Hopkins (instructed by Gately, Solicitors) for the Defendant Regen Waste Ltd

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McBRIDE J

Application

[1] The plaintiff ("Riverridge") seeks specific discovery of 27 classes of documents set out in the schedule attached to the summons dated 25 August 2023.

[2] Since filing the application for specific discovery the parties have engaged in extensive correspondence and negotiations which have resulted in agreement regarding all of the classes of documents save classes numbered 18, 20, 21, 25, 26 and 27.

[3] The parties have also agreed the terms of a confidentiality agreement for sharing these documents and the agreed terms are to be lodged with the court within seven days for approval.

Representation

[4] The plaintiff was represented by Richard Coghlin KC and Anna Rowan instructed by Carson McDowell LLP. Arc21 was represented by Charles Banner KC and Alistair Fletcher of counsel instructed by Arthur Cox, Solicitors. Regen Waste Ltd ("Regen") was represented by David Dunlop KC and Peter Hopkins of counsel instructed by Gateley, Solicitors. I am grateful to all parties for their detailed and well researched oral and written skeleton arguments and submissions.

Evidence

[5] The application is grounded on the affidavit of Lucy Clarke, Solicitor sworn on 25 August 2023. Arc21 has set out its response in the affidavit of Karen Boal, Solicitor dated 22 September 2023.

Proceedings

[6] The action concerns a procurement competition designed and administered by Arc21 for the award of a contract for "the supply of services relating to the treatment and energy recovery/disposal of residual waste arising" ("the contract"). The competition was governed by the Public Contract Regulations 2015 ("PCR").

[7] Riverridge and the second named defendant Regen ("Regen") both tendered for the contract. Riverridge was the unsuccessful tenderer and by writ issued on 24 May 2023 it challenges Arc21's decision to award the tender and contract to Regen.

[8] Riverridge and Regen are both waste management companies. Arc21 is the joint committee of six councils and has responsibility for the procurement and contract management of waste contracts on behalf of its member councils. One of the member councils namely Belfast City Council wished to enter into a contract for waste disposal. Arc21 operated and conducted this procurement competition. It decided to use a dynamic purchasing scheme and thereafter to run competitions for individual contracts pursuant to the dynamic purchasing scheme.

[9] A dynamic purchasing scheme involves a two-stage process. The first stage is an initial set up stage where interested parties are evaluated against the contracting authority's selection criteria and those who qualify are admitted to the dynamic purchasing scheme. The second stage is where individual contracts are awarded based on the individual bids by the members of the dynamic purchasing scheme.

[10] Both the plaintiff and Regen were admitted to the dynamic purchasing scheme. Arc21 then issued a "call for tender" in respect of the contract to the dynamic purchasing scheme members. Both Riverridge and Regen submitted tenders for the contract.

[11] When a dynamic purchasing scheme is used, in accordance with the PCR, and unlike in most procurement competitions, there is no "standstill period" between the award of the tender and entering into the contract.

[12] By letter dated 16 May 2023 Arc21 notified Riverridge that it had been unsuccessful and that the tender had been awarded to Regen and it had entered into contract with Regen as of 12 April 2023. It advised that the contract was due to commence on 1 July 2023.

[13] Riverridge was the incumbent provider. It issued proceedings challenging Arc21's decision and applied for an interlocutory injunction. The application for interlocutory injunction was refused – see *Riverridge Recycling Portadown) Ltd v Arc21 [*2023] NIKB 86.

[14] Following the refusal of the interim injunction the court directed an expedited trial and pleadings were completed by the parties.

Riverridge's pleaded case

[15] Insofar as is relevant to this application Riverridge's pleaded case in summary, is that Arc21 in awarding the tender and thereafter by entering into the contract with Regen, acted in breach of the PCR and in particular Regulation 34(23) which states:

> "Contracting authorities shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice …"

[16] The particulars set out in the statement of claim aver that Regen misrepresented to Arc21 its ability to fulfil a number of the mandatory technical requirements of the contract criteria. Riverridge avers that it made Arc21 aware of this issue on or about 24 May 2023 and instead of investigating these concerns Arc21 had:

> "…unminuted conversations in the period between award decision and execution of the contract during which the contract was wrongfully varied to soften penalties in the first 6 weeks following commencement" (paragraph 73 of the statement of claim)

[17] In these circumstances Riverridge avers that Arc21 acted in breach of the PCR. The particulars of the breach are set out at paragraph 74 of the statement of claim. The most pertinent particulars of the breach are as follows:

> "74(iii)The defendant **accepted a bid which did not meet the mandatory technical requirements** within the

tender documentation and therefore **accepted a non-compliant tender …**

(iv) The defendant, in **manifest error**, wrongfully caused and/or permitted the contract to be awarded to Regen.

(v) The defendant **failed to carry out necessary and/or appropriate due diligence** in relation to Regen's bid.

(vi) The defendant failed to make inquiries to examine the issues as raised by the plaintiff …

(ix) Having been made aware of the issue, the defendant failed to examine their decision and/or undertake an assessment of the risk of continuing with the contract …

(xiv) By reason of the above, the defendant **failed to treat tenders, including the plaintiffs in an equal and non-discriminatory manner** contrary to the regulations.

(xxiv) In all the circumstances the defendant failed to award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system, in breach of Regulation 34(23) of the Regulations. …" (emphasis added)

[18] In summary the plaintiff pleads that by accepting a bid which did not conform to the tender criteria Arc21 committed a "manifest error" and breached the principle of equality enshrined in the PCR. The plaintiff seeks a declaration of ineffectiveness and damages.

Specific discovery sought.

[19] The plaintiff seeks documents at numbers 18, 20, 21, 25, 26 and 27 of the schedule.

[20] The documents enumerated at number 18 comprise weighbridge schedules for Dargan Road from July 2023. These reports include details of destination of loads and other material which demonstrates whether Regen was fulfilling the mandatory technical criteria of the contract at that date. These documents therefore

relate to Regen's ability to perform the contract immediately after the contract was awarded.

[21] The documents enumerated at number 20 comprise weekly reports from Regen and again contain details of whether Regen was fulfilling the mandatory technical criteria immediately after the date of the award of contract.

[22] The documents enumerated at number 21 relate to changes to Regen's end of markets since the commencement of the contract and again relate to whether Regen was fulfilling the mandatory technical criteria immediately after the award of the contract.

[23] The documents set out at number 25 are described by the parties as "all documents in relation to any and all due diligence carried out by the defendant in relation to Regen's tender". The documents at number 26 are described as " all documents in relation to any verification carried out by the defendant in relation to Regen's tender to include the verification in relation to all minimum requirements of both pre and post the award contract" and the documents at number 27 are described as, "all documents… in relation to any investigation undertaken in relation to Regen should have failed the minimum requirements, prior to the contract commencing on 1 July 2023. This will therefore include all such documentation which arose/came into being because of the plaintiff's injunction application." The documents at number 27 therefore relate to documentation which was generated between 24 May 2023, i.e. the date Riverridge avers it brought the issue in respect of Regen's ability to fulfil the mandatory criteria to Arc21's attention and the date the contract commenced i.e. 1 July 2023. The documents at numbers 25, 26 and 27 can collectively be referred to as "due diligence/verification documentation". The defendant objects only to the documentation in respect of diligence/verification which came into being after the date of the contract.

Test for discovery

[24] Order 24 rule 3 provides as follows:

> "3-(1) Subject to the provisions of this rule and of rules 4 and 8, the court may order any party to a cause or matter … to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter."

[25] Order 27 rule 7 then provides for specific discovery and states:

> "7-(1) Subject to rule 9, the court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit

> stating whether any document specified or described in the application or any class of documents so specified or described is, or has been at any time deemed, in his possession, custody or power, and if not then his possession, custody or power when he parted with it and what has become of it."

[26] Rule 9 then provides:

> "On the hearing of an application for an order under rule 3, 7 or 8 the court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

[27] Accordingly the court has a discretion to order discovery of specific documents if:

(a) The document is in the possession, custody or power of the other party.

AND

(b) The document is relevant to any matter in question in the cause or matter. The test for relevance is a broad one and was set out by Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Company* [1882] 11 QBD 55 at 62 to 63:

> "It seems to me that every document relating to the matters in question in action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words `either directly or indirectly' because, it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case's adversary if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences …"

AND

(c) Discovery is necessary for "disposing fairly of the cause or matter or for saving costs".

AND

(d) It is proportionate having regard to the overriding objectives set out in Order 1 rule 1(a).

[28] The only ground upon which the defendants object to discovery of all the documents is relevance. The defendants submit that the documents were created after the contract was awarded to Regen and therefore, they cannot have any bearing on whether Arc21 breached its obligations during the procurement competition as by the time the contract was executed the procurement competition was over.

"Relevance" - Issues at Trial

"Manifest Error" – Submissions of the parties

[29] The central issue at trial will be whether Arc21 acted in breach of its duties under the PCR in awarding the tender and contract to Regen. The parties however fundamentally disagree about the legal principles which apply when a procurement competition is challenged and specifically disagree about whether the court has a purely supervisory role in deciding whether the PCR were breached.

[30] In *Lion Apparel Systems Limited v Firebuy Limited* [2007] EWHC 2179 (Ch) Morgan J set out the relevant legal principles in respect of procurement challenges at paragraphs 26 -39 as follows:

> "THE RELEVANT LEGAL PRINCIPLES
>
> 26 The procurement process must comply with Council Directive 92/50/EEC, the 1993 Regulations and any relevant enforceable Community obligation.
>
> 27 The principally relevant enforceable Community obligations are obligations on the part of the Authority to treat bidders equally and in a non-discriminatory way and to act in a transparent way.
>
> 28 The purpose of the Directive and the Regulations is to ensure that the Authority is guided only by economic considerations.

29 The criteria used by the Authority must be transparent, objective and related to the proposed contract.

30 When the Authority publishes its criteria, which conform to the above requirements, it must then apply those criteria. The published criteria may contain express provision for their amendment. If those provisions are complied with, then the criteria may be amended and the Authority may, and must, then comply with the amended criteria.

31 In relation to equality of treatment, speaking generally, this involves treating equal cases equally and different cases differently.

32 Council Directive 89/655/EEC (the remedies directive) requires Member States to take measures necessary to ensure that decisions taken by an Authority in this context may be reviewed effectively and as rapidly as possible on the grounds that such a decision may have infringed Community law in the field of public procurement or national rules implementing that law.

33 Regulation 32 of the 1993 Regulations (which I consider below) gives effect to the remedies directive.

34 When the court is asked to review a decision taken, or a step taken, in a procurement process, it will apply the above principles.

35 The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.

36 If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a "margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.

37 In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that

> the court should only disturb the Authority's decision where it has committed a "manifest error."
>
> 38 When referring to "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made.
>
> 39 I take the above principles from the decision of the Supreme Court of Ireland in *SIAC CONSTRUCTION V MAYO COUNTY COUNCIL* [2003] EuLR 1, and the decision of the Court of First Instance in *EVROPAIKI DYNAMIKI V COMMISSION 12th* July 2007 at [89]."

[31] In *Woods Building Services v Milton Keynes Council [2015] EWHC 2011* Coulson J applied Morgan J's principles and stated at paragraph 11 as follows:

> "The relevant regulation of the Public Contracts Regulations 2006 allows redress where the contracting authority has made a manifest error in its evaluation. As Morgan J makes plain in paragraph 37 of his judgment in *Lion Apparel*, this is a matter of judgment or assessment, so in this respect the contracting authority does have a margin of appreciation. The court can only disturb the authority's decision in circumstances where it has committed a manifest error. Morgan J went on at paragraph 38 to say:
>
> > 'When referring to a 'manifest' error, the word 'manifest' does not require any exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made.'"

[32] Arc21 and Regen both submit that the court's only role is to determine whether Arc21 in awarding the contract to Regen committed a "manifest error." They further submit that the test for "manifest error" is a high one and is simply another way of expressing the test of irrationality set out in judicial review and accordingly the role of the court is a supervisory one only. In support of this submission, they rely on *Bechtel Ltd v High Speed Two Ltd* [2021] EWHC 458 where Fraser J stated as follows at para 23:

> "The test for 'manifest error' is a high one in the field of public law generally and is simply another way of expressing irrationality. Stuart-Smith J in *Stagecoach East Midlands Trains Ltd and others v Secretary of State for*

Transport [2020] EWHC 1568 at [64], cited with approval Coulson J in *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 to the following effect:

> ''Manifest error' is broadly equivalent to the domestic law concept of irrationality: see *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) at [14]; *Energy Solutions v Nuclear Decommissioning Authority* [2016] EWHC 1988 at [312].'"

[33] The defendants therefore submit that as "manifest error" is akin to the Wednesbury unreasonableness test in judicial review proceedings the task of the court at hearing will be to review Arc21's decision to award the contract to Regen in light of the facts as they were known at the date of the award namely 12 May 2023. It therefore follows that facts which arose after that date could not have been known by Arc21 when it made its decision to award the contract to Regen and accordingly any documentation generated after 12 May 2023 is irrelevant to the court's assessment of Arc21's decision-making and is accordingly not discoverable.

[34] In contrast Mr Coghlin KC submits that Riverridge's claim is based on both "manifest error" and breach of the principle of equality. In respect of "manifest error" he accepts that when the contracting authority is making an evaluative assessment the court can only intervene if it acted irrationally. He submits however that the concept of "manifest error" is a wider concept and covers factual errors made by the contracting authority. The court can therefore intervene when it is established that the contracting authority has made a material or manifest error of fact.

[35] Mr Coghlin submits that Arc21 made a manifest or material error in awarding the contract to Regen because Regen did not meet the mandatory criteria and therefore Arc21 granted the contract to a non-compliant bidder. The fact the error arose because of false and misleading information being provided by Regen does not detract from the fact the mistake constituted a "manifest error" as it was a material error going to a central issue namely whether the bid conformed with the contract criteria.

[36] In support of his contention Mr Coghlin relied on dicta in *Easycoach Ltd v DRD* [2012] NIQB 10. In *Easycoach* the unsuccessful bidder advised the Department that the successful bidder had submitted false information. In the "standstill period" between the award of tender and award of contract the Department agreed to carry out due diligence and after considering the documentation affirmed its original decision. McCloskey J held that the Department accepted the tender as being "fully supported" when this was not accurate, and the court concluded that this was a manifest error. At paragraph 88 McCloskey J stated as follows:

> "[88] Having regard to the unusual matrix and evolution of these proceedings, I record my view that the doctrine of manifest error in EU public procurement law, properly analysed by reference to the overarching principles, is not concerned with whether the relevant act or omission on the part of a contracting authority has some benign or innocent explanation. Thus, the **existence of a manifest error is not dependent on the authority's state of knowledge or any blameworthiness in its behaviour.** Rather, I consider liability to be of the no fault variety. Accordingly, where an authority asserts – or demonstrates – that the relevant error has occurred without any fault on its part, I consider this legally irrelevant. The exercise conducted by the court is of a clinical, detached and objective nature. The only question for the court is whether a manifest error has been established. A manifest error can occur with or without fault on the part of the contracting authority. To hold otherwise would be inimical to the overarching principle of fair, equal and open access to the market concerned and the related principles of non-discrimination and equality of treatment. **If a contract award decision clearly influenced, and contaminated, by false or misleading information contained in a bidder's tender were to escape censure by the court on the ground that the authority acted blamelessly, the aims and objectives of the Directive would plainly be thwarted."**

[37] Mr Fletcher submits that McCloskey J in paragraph 88 was not going so far as to say the concept of "manifest error" extends beyond the parallel with *Wednesbury* unreasonableness and accordingly it remains open to a court to conclude that the fact a bid may contain false information does not in and of itself establish that the contracting authority is acting irrationally in awarding the contract to that bidder – ie the contracting authority can be wrong but so long as not irrationally wrong the court will not find a manifest error.

[38] The facts of *Easycoach* are very different to the facts in this case not least because there was no "standstill period." Nonetheless, I am satisfied that McCloskey J was of the view that the court should intervene if a contracting authority committed a manifest or material error of fact even in circumstances where the contracting authority was not at fault.

Consideration – Meaning of "manifest error".

[39] The precise meaning of "manifest error" is a matter which will have to be determined at trial. At this stage I am satisfied that that there is a credible argument that "manifest error" is not limited to irrationality. I do so for several reasons.

Firstly, the jurisprudence I was referred to which stated the court could only find "manifest error" when the contracting authority acted irrationally was limited to situations where the contracting authority was exercising an evaluative judgment.

[40] Secondly, the only case I was referred to where manifest error was considered in the context of an error of fact was *Easycoach* and in that case dicta indicates that manifest error can encompass a material error of fact. Thirdly, I consider that a narrow interpretation of manifest error may thwart the policy of the PCR which is designed to ensure that the best tenderer is awarded the contract. I agree with the comments of McCloskey J in *Easycoach*, when he stated:

> "…if a contract award clearly influenced and contaminated by false or misleading information contained in a bidder's tender were to escape censure by the court …the aims and objectives of the Directive would plainly be thwarted."

[41] Mr Dunlop, on behalf of Regen argued that Arc21 had remedies available to it if Regen made any misrepresentations. If that, however, is the limit of the remedies available when there has been misrepresentation by a successful bidder, this would mean that an unsuccessful tenderer has no remedy open to it. I consider that failure to provide a remedy to an unsuccessful bidder in such circumstances could amount to a breach of the general principles of EU procurement.

Consideration – Are the documents sought relevant to establishing "manifest error"?

[42] At this stage therefore the court's role is to determine the relevance of the documentation sought on the basis that "manifest error" can include a material error of fact on the part of Arc21. Therefore, any documents which contain information which may assist Riverridge to advance its case that Regen misrepresented its ability to meet the mandatory technical criteria of the tender are discoverable documents.

[43] I consider all the documents sought contain information which relates to Regen's ability to fulfil the contract criteria immediately after the contract was entered into. Accordingly, they may assist the plaintiff in advancing its case that Regen misrepresented its ability to fulfil the mandatory criteria and that Arc21 made a material factual error in awarding the contract to Regen a non-compliant bidder. Accordingly, they are relevant documents and as relevance was the only ground of objection, I consider all the documents sought are discoverable.

[44] If I am wrong in accepting that "manifest error" may include situations where the contracting authority made a material factual error(s) and in fact "manifest error" can only be established when the contracting authority acts irrationality, I consider that that does not mean that documents generated after the contract was concluded are irrelevant to consideration of the question of irrationally. Documents

generated immediately after a decision is made may still be capable of demonstrating that at the time the decision was made the maker acted irrationally.

[45] The documents generated immediately after the contract was entered contain information indicating whether Regen could perform the contract criteria at that date and also the extent to which they could perform the contract as the documents also disclose the extent to which Arc21 had to vary the contract terms. I consider that these documents are relevant to the question whether Arc21 acted rationally in accepting Regen met the contract criteria at the date of the award which was only a short time earlier. Whether Arc21 acted irrationally or not is an issue for the trial judge and the decision will depend on the actual content of these documents. At this stage I only must be satisfied the documents are relevant to the plaintiff's pleaded case. I am so satisfied as these documents speak to the question whether Arc21 acted rationally in accepting Regen was a conforming bidder in circumstances where immediately after the contract the documents provide information about Regen's ability to conform to the contract criteria and they also show what variations were made to the contract terms.

Principle of Equality – Submissions of the parties

[46] Mr Coghlin submits that the court's intervention is not limited to situations of "manifest error" as the court must also intervene when it is established that there has been unequal treatment of tenderers.

[47] The principle of equality means that comparable situations must not be treated differently, and different situations must not be treated in the same way unless objectively justified – see *Fabricon SA v Belgium* [2005] 2 CMLR 25 at 27. This principle is enshrined within the PCR.

[48] Riverridge's pleaded case is that Regen misrepresented its ability to fulfil the mandatory technical criteria set out in the tender and Arc21 therefore accepted a non-conforming bid. In *Commission v Denmark (Storebaelt)* [1993] ECR 1-03353, the Court of Justice ruled that it violates the principle of equal treatment to accept a tender that does not comply with the fundamental conditions laid down by the contracting authority and Riverridge therefore submits that Arc21 thereby breached the principle of equal treatment.

[49] Riverridge further submits that Arc21 failed to carry out due diligence at the time of considering the bids and or failed to investigate when the issue was brought to its attention by Riverridge and as a result treated the plaintiff in an unfair and unequal manner in breach of the principle of equal treatment. Riverridge again relies upon dicta in *Easycoach* when McCloskey J ruled the Department had failed to carry out adequate due diligence in awarding the contract to a bidder who had not provided sufficient material to vouch its ability to fulfil the contract criteria.

[50] Riverridge contends that when there is a breach of the principle of equality there is no scope for any margin of appreciation on the part of Arc21. In support of this submission, they rely on *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 and dicta in *Woods*. In *Lion Apparel* at para 36 Morgan J stated:

> "36. If the authority has not complied with its obligations as to equality … then there is no scope for the authority to have a `margin of appreciation' as to the extent to which it will, or will not, comply with its obligations."

[51] This approach was accepted in *Woods* at paragraph 9 when Coulson J stated:

> "9. The duty of equal treatment requires that the contracting authority must treat both parties in the same way. Thus "comparable situations must not be treated differently" and "different situations must not be treated in the same way unless such treatment is objectively justified": see *Fabricon v Belgium* [2005] ECR1–01559 at paragraph 27. Thus, the contracting authority must adopt the same approach to similar bids unless there is an objective justification for a difference in approach.
>
> 10. Morgan J's observation in *Lion Apparel*, noted above, is equally applicable to the duty of equality: again, when considering whether there has been compliance, there is no scope for any 'margin of appreciation' on the part of the contracting authority."

[52] The defendants submit that failure to conduct due diligence or verification is not a breach of the principle of equality as "self-certification" is sufficient. Mr Dunlop submitted that *Easycoach* was not authority for the proposition that all contracting authorities must carry out due diligence or verification as the facts in *Easycoach* were unusual as in that case the Department voluntarily agreed to carry out due diligence during the standstill period and before the contract was entered into as the unsuccessful bidder had brought concerns about misrepresentations to its attention. In contrast in this case Arc21 has already entered into contract with Regen and has never agreed to voluntarily carry out any due diligence or a verification process.

[53] The defendant further submits that even when the alleged breach is a breach of the principle of equality the task of the court is still a supervisory one.

[54] *R (Rotherham Metropolitan Borough Council) v Secretary of State for BIS* [2015] UKSC 6, was an appeal concerning the allocation of European structured funds. The

appeal however gave rise to arguments about equal treatment under EU law and the role of the court in reviewing decisions when it is alleged this principle is breached. It was a four three split decision with Lord Sumption forming part of the majority. Notwithstanding this all the justices appeared to accept that the general EU principle of equal treatment mirrored the common law position under the irrationality head of judicial review. Lord Mance for the minority at paragraph 162 appears to implicitly accept that this is the correct test.

[55] Although *Rotherham* was not a procurement case it was quoted with approval in *Bechtel Ltd v High Speed two ("HS2") limited [2021] EWHC 458.* Bechtel brought a claim against HS2 for breaches of the duties imposed upon HS2 by Utilities Contracts Regulations 2016. When considering whether there was a breach of the equal treatment principle Fraser J stated at paragraphs 302 and 303 as follows:

> "302. Equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way unless objectively justified; *Fabricom SA v Belgium* (C-21/03 and C-34/03) [2005] 2 CMLR 25 at [27]. There are therefore two separate limbs to the principle of equal treatment. In *R (Rotherham Metropolitan Borough Council) v Secretary of State for BIS* [2015] UKSC 6 the Supreme Court rejected an argument that a margin of discretion applied only to the second limb. Lord Sumption JSC stated at [26] that there was "a single question: is there enough of a relevant difference between X and Y to justify different treatment?" This means that, rather than being "hard-edged", the contracting authority will be granted a margin of discretion in terms of the principle of equal treatment. Lord Sumption JSC also said at [28] that "the nature of the question requires a particularly wide margin of judgment to be allowed to the decision-maker." Given this finding that there is a "wide margin of judgment", applying "hard-edged" obligations as Bechtel seeks would be somewhat problematic.
>
> 303. The mere existence of differential treatment does not lead to a finding of unequal treatment. As stated by Stuart-Smith J (as he then was) in *Stagecoach East Midlands Trains Ltd and others v Secretary of State for Transport* [2020] EWHC 1568 (TCC) at [26]:
>
> > 'The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such

> treatment is objectively justified. There is, however, a wide margin of discretion available to a contracting authority in designing and setting award criteria and the fact that some potential bidders will find it relatively more or less easy than it is for others to comply with those criteria does not establish or even necessarily provide evidence of a breach of the equal treatment principle. What is forbidden is unequal treatment that falls outside the margin of discretion that is open to a contracting authority or that is "arbitrary or excessive.'"
>
> [emphasis added]
>
> 304. I respectfully agree and adopt that statement."

Consideration – Applicable legal principles for establishing Breach of Equality

Is there a margin of appreciation?

[56] I consider that the role of the court when deciding whether there has been a breach of the principle of equality is to first determine whether as a fact there has been unequal treatment. In light of the Supreme Court decision in *Rotherham,* and contrary to the legal principles set out in *Lion Apparel,* I consider that the court must then secondly go on to consider whether the unequal treatment fails outside the margin of discretion open to the contracting authority or that it cannot be "objectively justified" or is "arbitrary and excessive."

Does principle of equality impose a duty of due diligence/ verification on the contracting authority?

[57] In *Easycoach Ltd v DRD* [2012] NIQB 10 allegations of misrepresentation were raised by the unsuccessful bidder after the award of the tender but before the date of the award of the contract. DRD had not entered into the contract as there was a "standstill period." Upon receipt of this information DRD agreed to carry out due diligence. The DRD undertook this process and confirmed its original decision. The court held that the successful bidder had failed to provide sufficient information to confirm it met the contract criteria and the "due diligence" process conducted by DRD repeated this manifest error. The plaintiff submits this case is authority for the proposition that the contracting authority owes a duty of verification or due diligence. In contrast the defendants submit the duty of due diligence only arose because DRD agreed to undertake such a duty and there is no duty of due diligence under the PCR. I consider that given the very different factual matrix *Easycoach* is not of assistance to the plaintiff as it does not set out a general principle that a contracting authority always owes a duty to conduct due diligence when considering bids.

[58] Arrowsmith, The Law of Public Utilities Procurement Vol 1, 3rd Ed at para 7-210, however, states that:

> "… there is a general requirement that criteria applied in the procurement process must be subject to and capable of verification: failure to verify can involve treating like cases differently (those who do not meet the criteria being treated like those who do") in violation of the principle of equal treatment" – see *EVN Wienstron GmbH v Austria* [2003] ECR 1-14527 para 63.

Arrowsmith goes on to state that it seems likely, in light of the principle of proportionality, that entities enjoy significant discretion in the extent of investigation required taking into account factors such as cost to both contracting authority and economic operators, the importance of verification and whether there is any reason to suspect the information is false. Full verification is not required in every case and in *Public Interest Lawyers v LSC* [2010] EWHC 3277 it was noted that in some cases "self-certification" is sufficient. The level of investigation required therefore depends on the facts of each case.

[59] In light of Arrowsmith's comments I consider the question of what standard of due diligence/verification is necessary will depend on the facts of each case and in particular the factors of cost, knowledge of the falsity or otherwise of the information given by Regen and the importance of verification. These are all trial issues and therefore the court at this stage cannot predict what standard of due diligence/investigation may or may not be considered appropriate.

Consideration – Are the documents sought relevant to establishing breach of the principle of equality?

[60] The plaintiff's pleaded case is that Arc21, in awarding the contract to a non-complying bidder and in failing to carry out due diligence and or investigation after it was advised by Riverridge that Regen misrepresented its ability to fulfil the contract criteria, breached the principle of equality. The defendants have not sought to strike out these pleadings and for the reasons I have set out above I consider the court at trial will have to consider whether there was in fact different treatment of the plaintiff. This will mean the court will have to investigate and determine whether Regen met the contract criteria and also whether Arc21 carried out adequate due diligence/ verification in all the circumstances. Thereafter, the court will have to consider, if there is a difference in treatment, whether this falls within the margin of appreciation.

[61] The plaintiff is therefore entitled to discovery of all the documents which advance its case for breach of principle of equality and, accordingly, the plaintiff is entitled to discovery of documents which may directly or indirectly show the

plaintiff was treated differently to Regen. This means it is entitled to documents which show Regen's bid did not comply with the contract criteria and it is further entitled to all documents which relate to due diligence and or investigation conducted by Arc21.

[62] Accordingly, the Plaintiff is entitled to discovery of all the documents which relate to Regen's performance of the contract immediately after the contract including documents showing variations of the contract as these speak to whether there was acceptance of a non-complaint bid which is a breach of the principle of equality. In addition the plaintiff is entitled to the documents at numbers 25,26 and 27, even though produced after the contract as they may directly or indirectly assist the plaintiff in showing Arc21 failed to carry out adequate due diligence at the time it awarded the contract and or failed to carry out any or any adequate investigation after it was informed by Riverridge that Regen had falsified its bid. These documents are therefore relevant to the question whether the principle of equality was breached and as relevance was the only objection to discovery, I order discovery of all the documents sought.

Conclusion

[63] For the reasons set out above, I consider all the classes of documents requested are relevant to the plaintiff's pleaded case and I order discovery of all the documents.

[64] I will hear the parties in respect of costs.