Neutral Citation No: [2024] NIKB 50 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McB12537** *ICOS No:* **24/22878** *Delivered:* **07/06/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(COMMERCIAL COURT)

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BETWEEN:

TULLYRAINE QUARRIES LTD

Plaintiff

and

DEPARTMENT FOR INFRASTRUCTURE

Defendant

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Mr Dunlop KC and Mr McCausland (instructed by McIldowies Solicitors) on behalf of the Plaintiff
Mr McMillan KC and Ms Gillen (instructed by the Departmental Solicitor's Office) for the Defendant
Mr Hopkins KC (instructed by Eversheds Sutherland NI Solicitors) for the Notice Party

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McBRIDE J

Application

[1] Tullyraine Quarries Ltd, the plaintiff, has issued a writ challenging a procurement competition conducted by the defendant. The plaintiff now applies for early discovery and by notice of motion seeks discovery of the following items:

(i) A copy of the quality submissions by the successful tenderers in respect of question 1-01 and 2-02 for MIS 1 and MIS 2.

(ii) Copies of all internal guidance supplied to the assessment panel to assist in the marking of tender submissions.

(iii) Details of the members of the assessment panel with all documents concerning their qualifications and experience.

(iv) Copies of all notes and records of the assessment panel with regard to the panel's assessment of the quality submissions submitted by the plaintiff and each successful tenderer in respect of question 1-01 and 2-02 for MIS 1 and MIS 2.

(v) A copy of any tender report prepared by the defendant to include all emails, documents, notes and records concerning the awards of lots MIS 1 and MIS 2.

[2] Mr Dunlop KC who appeared with Mr McCausland on behalf of the plaintiff, during oral submissions abandoned the application in respect of items (i) and (v).

[3] Mr McMillan KC and Ms Gillen of counsel appeared on behalf of the defendant ("the Department"). Mr Hopkins KC appeared on behalf of the notice party, the successful tenderer. I am grateful to all counsel for their well-researched and presented skeleton arguments and oral submissions.

Background

[4] The plaintiff participated in a competition for "A Term Contract for Minor Improvement Works ("the contract") conducted by the defendant. The competition was subject to the Public Contract Regulations 2015. The contract was divided into lots and relevant to these proceedings the plaintiff was unsuccessful in respect of lots MIS 1 and MIS 2.

[5] On 28 February 2024 the Department sent a "Notice of Award decision" to the plaintiff. This advised the plaintiff that it had been unsuccessful in the competition and identified the successful tenderer. Attached to the Notice of Award decision was an annex (also described as a debrief) which set out the individual scores awarded to the Plaintiff and the successful tenderer in respect of each eligibility criteria relating to the contract and their respective overall score. The annex provided a commentary setting out the reasons for the individual scores awarded.

[6] As appears from the annex the plaintiff scored 12 out of a maximum score of 20 in respect of the quality criteria and 80 out of a maximum score of 80 for the price criteria. The successful tenderer scored 20 out of 20 for quality and 72.41 out of 80 for price thereby giving the successful tenderer an overall assessment score of 92.41. In contrast, the plaintiff's overall assessment score was 92. Accordingly, there was a very small margin between the plaintiff and the successful tenderer.

[7] When the competition was commenced the Department provided generic information and guidance ("instructions to tenderers") to the tenderers in respect of the competition. The documents advised that there were two eligibility criteria for the award of the contract namely quality and price. The quality criteria comprised two elements: technical and professional ability and social value. The documentation set out details of the specific criteria to be met in respect of each limb of the two eligibility criteria.

[8] The instructions to tenderers also set out a scoring table and the methodology to be used to award scores. This stated that the tenderers' responses would be scored from 1 to 5 equating to a range from very poor (0), poor (1), limited (2), adequate (3), good (4) through to excellent (5). An interpretation table explained the factors which would be taken into account in awarding scores. For example, it indicated that for a score of excellent to be awarded the response would have to be:

> "Excellent response that addresses all of the requirements of the question on criteria. It leaves no doubt as to the capability and commitment of the economic operator to deliver what is required. The response addresses how the economic operator will deliver the social value requirements."

In contrast an adequate score would be awarded where:

> "Adequate response refers to the majority of the requirements of the question on criteria. There are no significant areas of concern. The response addresses most aspects of how the economic operator will deliver the social value requirements."

[9] The plaintiff issued a writ on 8 March 2024 challenging the procurement exercise. The writ is drafted in the broadest of terms claiming a breach of the Public Contract Regulations and the principles of common law in respect of competition and procurement. In accordance with the statutory provisions this had the effect of preventing the Department awarding the contract to the successful tenderer. The Department has indicated that it intends in the near future to bring an application to "set aside" the standstill period so that it can award the contract to the notice party and have the works carried out.

[10] The plaintiff has not issued a statement of claim and avers that it is unable to do so without early discovery. The plaintiff further avers that without early discovery it is unable to know whether it has a prima facie case and as this is an essential ingredient for defending the Department's set aside application the plaintiff would be prejudiced if early discovery was not provided.

[11] Following receipt of the Department's decision not to award the contract to the plaintiff, the parties engaged in extensive and lengthy correspondence. The plaintiff sent a letter before action to the Department dated 5 March 2024 which stated:

> "… We are interested in understanding how our submissions were evaluated in relation to the stated requirements as we feel strongly that your written

> feedback is confusing, clearly not accurate or consistent when referenced to the very detailed and substantial submissions we have made.
>
> Our specific concerns relate to the scoring of the quality submission questions. We cannot understand the methodology behind the marking of the quality questions."

The letter went on to express confusion in understanding the scores awarded in circumstances where it had received higher marks in similar competitions for similar responses.

[12] The Department responded by letter dated 14 March 2024. It confirmed that the marking methodology applied was that set out in the instructions to tenderers but also stated that in respect of the assessment of "social value", "The social value assessment model was adopted in this tender competition and the criteria against which the delivery proposals will be judged are those generally used." In respect of scoring the Department stated that the debrief provided "the panel's justification for the scores given." The Department then provided details of the panel members' experience and qualifications but not their names. In addition, the Department explained why the plaintiff erred in believing that scores awarded in one procurement competition had any bearing on the scores to be awarded in a different competition.

[13] The plaintiff responded by letter dated 27 March 2024 and essentially restated in different ways why it believed it should have been given higher scores and again indicated a lack of understanding about how the panel failed to award it higher scores.

[14] The Department replied by letter dated 5 April 2024. This essentially amounts to a detailed justification of the panel's decision by reference to the debrief. The department did not provide any further information or documentation to the plaintiff beyond that already provided in the instructions to tenderers, the award decision letter and the debrief attached to it.

[15] The plaintiff's application is grounded on the affidavit of Mr McCartan, Director of the plaintiff company sworn on 8 March 2024. In his affidavit he contends that the assessment exercise carried out by the panel was flawed either through inaccurate marking or the application of undisclosed criteria. He submits that it is only by sight of the documents sought in the notice of motion that the plaintiff can establish what, if any, breaches of statutory or common law duties occurred.

[16] The defendant has not provided a replying affidavit.

The relevant legal principles

[17] The relevant legal principles applicable to applications for early specific disclosure in procurement cases were set out by Coulson J in *Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC). At para 20 he stated as follows:

> "In my view, the following broad principles apply to applications for early specific disclosure in procurement cases:
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> (a) An unsuccessful tenderer who wishes to challenge the evaluation process is in a uniquely difficult position. He knows that he has lost, but the reasons for his failure are within the peculiar knowledge of the public authority. In general terms, therefore, and always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality.
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> (b) That this should be the general approach is 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 potential infringement. As Ramsey J said in *Mears Ltd v Leeds City Council* [2011] EWHC 40,
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> > '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.'
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> (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 be 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 test 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, the need to guard against such an application being used simply as a fishing exercise, designed to show up a weak claim, which will put the defendant to needless and unnecessary cost."

[18] These principles have been accepted and consistently applied in this and other courts in respect of early disclosure applications in procurement cases.

Submissions

[19] The plaintiff submits that it is completely in the dark why it was unsuccessful in the competition. It avers that it cannot understand the reasons for the marks allocated and in the absence of discovery can only speculate about those reasons. The plaintiff further submits that it is unable to make an informed view as to whether there has been an infringement, without sight of the discovery requested.

[20] The Department has refused to provide any further discovery at this stage on the basis that the plaintiff has failed to set out the nature of the case it is making and accordingly the application for discovery amounts to a fishing expedition.

[21] The notice party submitted that in deciding whether to grant discovery the court must take into account the confidential nature of information contained in the documents. In the event the court ordered discovery Mr Hopkins KC requested that it should do so in a staged manner initially excluding documents which contained confidential material or alternatively provide that the notice party could redact the confidential information contained in the discovered documents.

Consideration

[22] This is an application for early specific disclosure in a procurement case. As noted by Coulson J:

> "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."

[23] In the present case the plaintiff knows that he has lost. The only information he has been provided with to give him some insight into the reason for that is the decision letter and the debrief. The question for the court to determine therefore is whether the information already provided is sufficient to enable the plaintiff to "make an informed view as to whether there has been an infringement."

[24] I have carefully considered the information provided in the debrief. It provides a high-level summary of the reasons for the scores awarded. Coulson J at para 20(a) considers a challenger "ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out." In this case the Department have only provided the plaintiff with a summary sheet giving information. It has failed to provide any documentation relating to the actual evaluation process. Such documentation would normally include the panel members' assessment sheets and the moderation sheet.

[25] Whilst any request for specific disclosure must be tightly drawn and properly focussed Coulson J accepted at para 20(d) that:

> "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."

[26] I am satisfied that the plaintiff requires the documentation in respect of the assessment process carried out by the panel to enable it to make an informed view about whether the process was fair and legal. Without the source documentation in respect of the evaluation process the plaintiff has been left to guess about why it was unsuccessful and why its scores were only adequate in some categories. The Department was critical of the plaintiff because it had failed to state its position in a clear manner. I consider this supports the plaintiff's case that it cannot understand why it lost and why it was given the marks allocated. In those circumstances it can only speculate about the reasons for the scores awarded.

[27] I accept that each case must be assessed on its own individual merits. What is significant in this case is the fact that no documentation has been provided to the plaintiff. It has been given information and there has been lengthy correspondence, but the correspondence has failed to provide any more information or documentation to the plaintiff about how the assessment process was actually conducted. I consider that the only way in which the plaintiff will know how the assessment process was actually conducted is for the documentation requested at class (iv) to be provided. In my experience these documents are routinely provided in cases of this nature, and it is therefore a little surprising that the Department has in this case adopted a stance whereby it has refused to provide any further documentation on a voluntary basis.

[28] Having regard to the issues of proportionality, relevance and the need to ensure specific discovery is tightly drawn and properly focussed, I am satisfied that the plaintiff is entitled to the documentation requested at (iv) of the schedule namely:

> "Copies of all notes and records of the assessment panel with regard to the panel's assessment of the quality submissions submitted by the plaintiff and each successful tenderer in respect of question 1-01 and 2-02 for MIS 1 and MIS 2."

[29] Mr Hopkins on behalf of the notice party made a number of very helpful submissions in respect of the need to protect confidentiality in respect of his client. He submitted that the proper balance to be struck was to engage in an iterative process whereby the notes and records of the assessment panel should only be given in respect of the plaintiff's submission and not the successful tenderer's submission. The plaintiff should then review these documents and if required make a further application to have sight of the successful tenderer's assessment.

[30] Although I accept that there is a need to balance issues of proportionality and confidentiality there is also a need to consider cost implications. Taking all these matters into consideration I consider the balance lies in granting the request to include all the panel members scoring sheets relating to both the plaintiff and the successful tenderer.

[31] It was agreed at the hearing that if an order was made for discovery which included confidential material belonging to the notice party, the notice party in the first instance would carry out necessary redactions before it was discovered. I agree with this suggestion and in the event the parties are not content with the redactions the court can provide further directions about the redactions and/or whether there is a need for a confidentiality ring.

[32] I accept that specific discovery applications at this stage must be tightly drawn and focussed. This is not a case as the Department submitted of "opening the

filing cabinets for the plaintiff to trawl through." For this reason I consider that Mr Dunlop properly conceded that he was no longer seeking the documentation sought at numbers (i) and (v) of the schedule.

[33] In respect of the request for internal guidance I consider that this ought to be provided. I do so because in the Department's letter dated 14 March 2024 it refers to a social value assessment model and states the criteria against which the delivery proposals are to be judged are those which are "generally used." This social value assessment model and other "criteria generally used" were not set out in the instructions to tenderers and accordingly I consider it is necessary for the internal guidance requested at class (ii) of the schedule to be provided as without that the plaintiff cannot make an informed view about whether there has been a breach of the regulations or common law principles.

[34] In respect of class (iii) of the schedule the plaintiff seeks details of the identity of the assessment panel members. The Department agreed to provide this information on a confidential basis. In these circumstances I do not intend to make any order for disclosure of class (iii) documents.

Conclusion

[35] I order discovery of numbers (ii), and (iv) of the schedule attached to the notice of motion. I will hear the parties in respect of costs.