Neutral Citation No: [2024] NIKB 98	*Ref:* **HUM12663**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **06/12/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(COMMERCIAL HUB)

_____

Between:

DOWN DEVELOPMENTS LIMITED

Plaintiff

and

DEPARTMENT OF FINANCE
AND
CONSTRUCTION & PROCUREMENT DELIVERY

Defendants

_____

Robert McCausland (instructed by McIldowies) for the Plaintiff
David McMillen KC & David Reid (instructed by the Departmental Solicitor's Office) for the Defendants

_____

HUMPHREYS J

Introduction

[1] Before the court is an application for early discovery in a procurement challenge arising out of the Pan Government Small Works Framework Agreement 2024 competition ("the competition"). The plaintiff was an unsuccessful bidder in the competition and has issued proceedings seeking to have the award decisions set aside and/or an award of damages.

[2] The writ of summons was issued on 29 April 2024 but, to date, no statement of claim has been served. The plaintiff says that it cannot plead its claim with the necessary particularity unless and until it has sight of the documents which are the subject matter of the application, nor can it obtain detailed legal advice on the merits of its challenge.

The competition

[3] The competition was operated by the second defendant and the first defendant was the relevant contracting authority. It sought to appoint four economic operators, one to each of four lots, for a period up to four years, to provide the delivery of small new and refurbishment construction works. The competition was subject to the Public Contracts Regulations 2015 ("PCR 2015").

[4] The lots were described as:

- Lot 1 – North
- Lot 2 - South
- Lot 3 – West
- Lot 4 – All NI (reserve)

[5] The plaintiff submitted its tender on 6 February 2024, along with 10 others. Each was subject to minimum standards assessment and 3 were eliminated at this stage. The other tenders were assessed on the basis of price, quality and social value with the percentage ratio being:

- Quality 50%
- Price 40%
- Social Value 10%

[6] The plaintiff's weighted quality score (out of 50%) for each of the lots was 46%. Its social value marking (out of 10%) was 10%. Its weighted price score (out of 40%) across the various lots was:

- Lot 1 39.23
- Lot 2 39.66
- Lot 3 40
- Lot 4 39.64

[7] The overall scores of each of the economic operators were very close. In lot 1, the plaintiff was ranked 6th but was only 3.31% behind the winner. Had the plaintiff scored full marks for quality, as four of its competitors did, it would have been ranked first and been awarded lot 1. Had it scored 48 out of 50 for its quality submission, it would have been awarded lot 3. In the event the following economic operators were successful:

(i) Lot 1 GF Wilson Limited
(ii) Lot 2 CHC Group Limited
(iii) Lot 3 Irwin M&E Limited
(iv) Lot 4 Lowry Building and Civil Engineering Limited.

[8] On 19 April 2024 the plaintiff received notice of the award of the framework agreement, setting out its weighted scores and its ranking in each lot. Annex A to this communication set out the same information for each of the successful tenderers across the lots whilst Annex B detailed the comments of the evaluation panel in respect of the plaintiff's answers to the quality assessment. Annex C contained the panel's comments in respect of the winning tenderer in each lot. The purpose of this information was said to be:

> "In order to demonstrate the characteristics and relative advantages of the winning tender for each lot"

[9] The plaintiff scored full marks for its answers to questions B-01, B-02 and B-05. However, it scored 4/5 for its answer to both questions B-03 and B-04 which resulted in the ultimate weighted score of 46/50.

The questions

[10] Question B-03 asked tenderers to:

> "Describe in detail the processes and procedures that you will put in place to ensure progress is monitored and managed to deliver high quality works in line with the accepted programme.
>
> Your response should include:
>
> i. The processes you will utilise to establish a comprehensive and realistic NEC4 compliant programme for acceptance within two weeks of the starting date of each contract;
>
> ii. How you will monitor progress against the accepted programme and provide the Authority/Client with an updated programme for acceptance at least every four weeks;
>
> iii. How you will monitor and evaluate your own performance;
>
> iv. How you will monitor and evaluate the performance of your Key Subcontractors named in TP1-MSS1 and your wider supply chain; and
>
> v. How you will correct performance issues promptly so that any delay in the provision of the works is minimised, this should include:

a. How you would correct poor performance by your own team; and

b. How you would correct poor performance by a Key Subcontractor or members of your wider supply chain."

[11] The scoring matrix for this question provides that an "excellent" answer is awarded full marks, five out of five, on the basis of these indicators:

> "The Economic Operator's response includes excellent detail of the processes and procedures that they will put in place to ensure progress is monitored and managed to deliver high quality works in line with the accepted programme.
>
> Fully supported with a comprehensive explanation of how the matters identified at points (i) to (v) would be addressed."

[12] A "very good" response would merit four marks out of five on the following indicators:

> "The Economic Operator's response includes very good detail of the processes and procedures that they will put in place to ensure progress is monitored and managed to deliver high quality works in line with the accepted programme.
>
> Very well supported with a very good explanation of how the matters identified at points (i) to (v) would be addressed."

[13] The comments recorded from the evaluation panel in relation to the plaintiff's answer were as follows:

> "The Economic Operator's response includes very good detail of the processes and procedures that they will put in place to ensure progress is monitored and managed to deliver high quality works in line with the accepted programme.
>
> Very well supported with a very good explanation of how the matters identified at points (i) to (v) would be addressed.

> Very good response which would have benefitted with details of the procedures for providing the client/authority with updated programme for acceptance and additional details of correction of poor performance by their own team, subcontractors and members of the wider supply chain."

[14] The plaintiff's deponent, its contracts manager Alistair Verner, takes issue with the evaluation of the answer which was given to question B-03. He maintains that the information sought was provided in full and that by failing to give the plaintiff's answer full marks, the evaluation panel has fallen into manifest error.

[15] Question B-04 related to the quality assurance in the provision of works and required the tenderer to:

> "Describe in detail the processes and procedures that you will use to ensure that the provision of the works is undertaken fully in accordance with all aspects of the Scope.
>
> Your response should include how you will ensure that:
>
> i. Your team fully understands the requirements of the Scope;
>
> ii. Your Key Subcontractors named in this TP1-MSS1 fully understand the requirements of the Scope;
>
> iii. Everyone involved in providing the works has the skills, training and competency to provide high quality works in accordance with the requirements of the Scope;
>
> iv. The works are fully coordinated with the Authority/Client, Premises Officer (person responsible for the Site), and other stakeholders in order to minimise disruption and ensure efficient delivery;
>
> v. Robust quality management procedures are implemented with associated record keeping;
>
> vi. Defects are identified, reported and corrected within the relevant defect correction period; and

vii. There is continuous improvement in the provision of works throughout the duration of the Framework Agreement."

[16] The scoring matrix for question B-04 states that an "excellent" answer should receive five marks on the basis of these indicators:

> "The Economic Operator's response includes excellent detail of the processes and procedures that they will use to ensure that the provision of the works is undertaken fully in accordance with all aspects of the Scope.
>
> Fully supported with a comprehensive explanation of how the matters identified at points (i) to (vii) would be addressed."

[17] A "very good" answer should be scored four out of five on these indicators:

> "The Economic Operator's response includes very good detail of the processes and procedures that they will use to ensure that the provision of the works is undertaken fully in accordance with all aspects of the Scope.
>
> Very well supported with a very good explanation of how the matters identified at points (i) to (vii) would be addressed."

[18] The evaluation panel's comments on the plaintiff's answer to question B-04 were:

> "A very good response, the Economic Operator's response includes very good detail of the processes and procedures that they will use to ensure that the provision of the works is undertaken fully in accordance with all aspects of the Scope.
>
> Very well supported with a very good explanation of how the matters identified at points (i) to (v) would be addressed.
>
> The response would have benefited from further detail on items (i) and (ii) how their team and key subcontractors fully understood the requirement of the Scope and item (iv) full coordination with the Authority/Client, with a recurring reliance on their experience on existing

> frameworks rather than focus on the proposed processes and procedures."

[19] Again, Mr Verner makes the case that the response clearly demonstrated the means by which the plaintiff would satisfy the requirements and the issues at (i) to (vii) were fully detailed. It is the plaintiff's case that by failing to award the response full marks, the evaluation panel fell into manifest error.

[20] At Annex C to the award letter, the evaluation panel's comments in respect of the responses provided by each of the winning tenderers to the two questions in issue were provided. GF Wilson Limited scored full marks for each question. The comments relating to question B-03 are:

> "The Economic Operator's response includes excellent detail of the processes and procedures that they will put in place to ensure progress is monitored and managed to deliver high quality works in line with the accepted programme.
>
> Fully supported with a comprehensive explanation of how the matters identified at points (i) to (v) would be addressed."

[21] For question B-04:

> "An Excellent Response, the Economic Operator's response includes excellent detail of the processes and procedures that they will use to ensure that the provision of the works is undertaken fully in accordance with all aspects of the Scope.
>
> Fully supported with a comprehensive explanation of how the matters identified at points (i) to (vii) would be addressed."

[22] The panel's comments in respect of CHC Group Limited in lot 2, Irwin M&E Limited in lot 3 and Lowry Building and Civil Engineering Limited in lot 4 are identical to those pertaining to GF Wilson.

[23] The following observations can readily be drawn from the information provided in the letter dated 19 April 2024:

(i) The comments of the evaluation panel in respect of each winning tenderer's answer to each of the questions in issue is a verbatim copy of the indicators section of the scoring matrix;

(ii) The reader would be aware, by reference to the scoring matrix, that a tenderer who scored full marks had provided an "excellent" response, being one which was "fully supported by a comprehensive explanation" of how the matters identified would be addressed;

(iii) The panel's comments therefore provide the reader with no additional information at all in respect of the evaluation of the winning tenderers' bids; and

(iv) The first two paragraphs of the panel's comments in relation to the plaintiff's responses are similarly just verbatim lifts from the scoring matrix. However, the third paragraph does give some information as to the areas where it is said that the answers could have been improved.

The application for early discovery

[24] The plaintiff's solicitors wrote to the first defendant on 20 May 2024, making its case that the evaluation panel had fallen into error in its assessment of the plaintiff's bid, and seeking disclosure of certain documents, including copies of the winning tenderers' quality submissions in respect of questions B-03 and B-04. On 18 June, the defendants' solicitors rejected any claim that the tender process was unlawful or flawed. Some documentation was provided, including the tender report and details relating to the personnel who carried out the evaluation, and the notes of the assessment panel relating to the assessment of the plaintiff's bid. However, it was stated:

> "You will appreciate, given the commercial nature of the other tenderers' quality submissions, these cannot be provided. Further, neither I nor CPD see the relevance of same. You have been provided with the panel comments on the winning tenders. It is not appropriate to disclose the assessment panel comments for all tenderers' quality submissions as these are irrelevant."

[25] The plaintiff then brought this application, pursuant to Order 24 rule 7 of the Rules of the Court of Judicature (NI) 1980, seeking specific discovery of:

(i) The winning tenderers' quality submissions in respect of questions B-03 and B-04 in lots 1, 2, 3 and 4; and

(ii) Copies of all notes and records of the Assessment Panel with regard to its assessment of the quality submissions submitted by the plaintiff and the successful tenderers and only in respect of questions B-03 and B-04.

The legal principles

(i) Early discovery

[26] The principles governing such applications in the procurement field are, by now, well-established. As a result of the "uniquely difficult position" identified by Coulson J in *Roche Diagnostics v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC), a procedure has developed whereby unsuccessful tenderers are provided with essential information and documentation in order that they can assess whether the process has been carried out lawfully and within the rules of the competition.

[27] In each case, an application for early discovery will be considered on its individual merits. A distinction can validly be drawn between those cases where a prima facie challenge has been established and those where an aggrieved tenderer is simply fishing for a basis to bring such a claim. Courts will always be attracted by focussed applications rather than diffuse requests for all relevant documentation.

[28] It is often submitted by contracting authorities that there has been a 'creep' in early discovery applications in that the courts have sanctioned impermissible fishing expeditions. This was addressed by Coulson J in *Bombardier Transportation v Merseytravel* [2017] EWHC 726 (TCC):

> "This concern can be taken too far. The reported cases show that a procurement challenge may often be successful because of the failures on the part of the contracting authority to ensure equal treatment…Experience shows that this is something which not infrequently happens and a claimant in the position of Bombardier is entitled to investigate fully the comparative treatment of the tenders, either to confirm criticisms it has already made or to found freestanding allegations."

(ii) The PCR 2015

[29] The PCR 2015 themselves lend weight to the proposition that unsuccessful tenderers ought to be provided with sufficient information to understand why they have failed to be awarded a contract or a place on a framework. Regulation 18 sets out the fundamental principles of procurement law, including the obligation on contracting authorities to act in a transparent manner.

[30] Regulation 86 provides:

> "(1) Subject to paragraphs (5) and (6), a contracting authority shall send to each candidate and tenderer a

notice communicating its decision to award the contract or conclude the framework agreement.

Content of notices

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

(a) the criteria for the award of the contract;

(b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—

(i) the tenderer which is to receive the notice; and

(ii) the tenderer—

(aa) to be awarded the contract, or

(bb) to become a party to the framework agreement,

and anything required by paragraph (3);

(c) the name of the tenderer—

(i) to be awarded the contract, or

(ii) to become a party to the framework agreement; and

(d) a precise statement of either—

(i) when, in accordance with regulation 87, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies, or

(ii) the date before which the contracting authority will not, in conformity with regulation 87 enter into the contract or conclude the framework agreement."

[31] The purpose of the requirement was explained by the CJEU in Case 272/06, *Evropaiki Dynamiki* [2008] ECR-II 00169 at [27]:

> "In accordance with settled case-law, the statement of the reasons on which a decision adversely affecting a person is based must allow the community court to exercise its power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded."

[32] I gratefully adopt the summary of the nature of the obligation set out by McDonald J in *Sanofi Adventis Ireland v HSE* [2018] IEHC 566:

> "Thus, the contracting authority, in order to show the relative advantages of the successful tender, must provide a bespoke statement of reasons that involves a comparison between the tenders of the successful and disappointed candidates respectively…In order to pass muster, the reasons given must be sufficient to enable the disappointed candidate to ascertain the matters of fact and law on the basis of which the contracting authority rejected its offer and accepted that of the successful candidate. In order to show the relative advantages of the successful tender, the statement of reasons must be sufficiently detailed to explain how the preferred tender was advantageous by reference to particular matters, respects, examples or facts. Of course, the detail to be provided will be case – specific. The level of detail will depend on what actually motivated the contracting authority in any particular case. There may be some cases where it is necessary to provide a significant level of detail in order to understand the motivating factors but, in other cases, the motivating factors may well be capable of being stated quite succinctly. It is important to bear in mind that the obligation is not simply to describe the relative advantages of the successful tender – there is an obligation to provide reasons which also include the characteristics of the successful tender. Nonetheless, in many cases, there is likely to be an overlap between these requirements in that the important characteristics of the tender are likely to be those characteristics which were considered to be more advantageous and it is the more advantageous aspects of the tender that are likely to have underpinned the reasons why the contracting authority was minded to award a higher score to the successful tenderer." (para [123])

Consideration

[33] In *OCS Group v Community Health Partnerships* [2023] EWHC 3369 (TCC), HHJ Pearce considered the relationship between the regulation 86 obligation and applications for early discovery. In his analysis, the contracting authority in that case had failed to give adequate reasons for the scores given to another tenderer. The reader of the award letter was able to discern weaknesses in the claimant's bid but was unable to understand the reasons behind the score given to the rival. As a result, he concluded:

> "Without knowing the answer to that question, the reader simply cannot know whether there has been some inadequacy in the process and importantly, to the defendant's criticism of the claimant's pleading, cannot plead a case on the lawfulness of the evaluations and the contract award decision." (para [71])

[34] The court in *OCS* noted that evaluation is always a comparative process. The question is not merely whether one tenderer has been correctly evaluated but whether the winning tenderer has also been correctly evaluated.

[35] In the Irish Supreme Court in *Word Perfect Translation Services v Minister for Public Expenditure and Reform* [2020] IESC 56 Clarke CJ held:

> "…it may be reasonable to expect a party who has been given detailed reasons to go itself into some detail as to how it can be maintained that there is a credible basis for suggesting a manifest error before giving that party access to confidential information. The situation will not be at all the same where the party concerned is not, on whatever basis, given any reasons at all." (para [10.14])

[36] In this case, it will be apparent that there has been a failure on the part of the defendants to comply with the specific obligation imposed by regulation 86(2)(b). There is nothing at all in the award letter or its annexes which speaks to the "characteristics and relative advantages" of the winning tenderers. There is no bespoke statement of reasons as alluded to by McDonald J. There is no basis at present for the plaintiff to understand why the other tenderers were assessed as scoring full marks since the panel comments provided consist exclusively of a recital of the scoring matrix. In particular, there is nothing to satisfy the requirement to explain how the preferred tender was advantageous by reference to particular matters, respects, examples or facts.

[37] I am satisfied, on the evidence of Mr Verner, that a prima facie case has been raised in relation to the evaluation of the plaintiff's tender being erroneous. Whether this case can be sustained to trial will depend upon the provision of information and

documentation to the plaintiff and its advisors. The failure on the part of the defendants to comply with the obligation imposed by regulation 86 has caused this particular plaintiff to be in an even more invidious position than an aggrieved bidder generally will be after the outcome of a procurement competition.

[38] I therefore find that the plaintiff is entitled to early discovery of the documents sought for the following reasons:

(i) It has established a prima facie case that the defendants fell into manifest error in the evaluation of its answers to two of the questions in the quality submission;

(ii) It is unable, on the available material, to determine whether there has been a breach of the obligation of equal treatment and/or any other manifest error in the evaluation of the successful tenderers' bids;

(iii) This has been caused, at least in part, by the abject failure of the defendants to comply with the obligation imposed by regulation 86(2)(b) of the PCR 2015; and

(iv) The discovery request is sufficiently focussed and does not to amount to a fishing expedition.

Confidentiality

[39] In the event that the court determined early specific discovery should be provided, each of the successful tenderers indicated that they would agree to the relevant materials being disclosed into a confidentiality ring, the terms of which had been agreed by the legal representatives.

Conclusion

[40] I, therefore, make an order in the terms of the summons herein requiring the defendants to furnish the following documents into the confidentiality ring:

(i) The winning tenderers' quality submissions in respect of questions B-03 and B-04 in lots 1, 2, 3 and 4; and

(ii) Copies of all notes and records of the Assessment Panel with regard to its assessment of the quality submissions submitted by the plaintiff and the successful tenderers and only in respect of questions B-03 and B-04.

[41] I reserve the issue of costs to the trial judge.