

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 19/10/2012

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

A Limited Company's Application [2012] NIQB 113

IN THE MATTER OF AN APPLICATION BY A LIMITED COMPANY FOR
JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND
HOUSING EXECUTIVE

TREACY J

[1] The applicant is a construction company registered in Northern Ireland. The applicant seeks, inter alia, an order quashing the decision of the Northern Ireland Housing Executive made on 11 June 2012, but communicated to the applicant on 3 July 2012, that it would not presently consider the applicant company for the award of any contract and would not accept the applicant's tenders in respect of a number of contract awards even if they meet or have met all other tender requirements.

[2] There a number of letters on 3 July including a letter to the Director of the applicant company, from Mr P A Craig the Contracts Manager Claims which states:

"..... AND COMMERCIAL RELATIONSHIPS
WITH THE HOUSING EXECUTIVE

At the Chief Executive's Business Committee Meeting on 11 June 2012 consideration was given to the matter of on-going commercial relationships with the above firm of which you are a Director and I have been instructed to write to advise you of the outcome. Following an investigation by the Housing Executive's Counter Fraud Department sufficient evidence of fraud has been uncovered in the

methods by which your firm has sought to establish its entitlement to loss and expense in respect of an environmental improvement scheme contract at [.....], Belfast. As you will be aware this has resulted in the matter having been referred to the PSNI and those investigations are continuing. Because of the on-going police investigation the Housing Executive has been advised that it would not be appropriate to continue with their own internal investigations until the PSNI inquiries have been concluded or determined. It is recognised that as internal investigations are incomplete you have not had an opportunity to properly respond to the evidence uncovered within that context. Nevertheless having carefully weighed all the present circumstances the Housing Executive has concluded that it would be inappropriate to consider your firm for the award of any other contract during the currency of on-going police investigations. It is believed that there is sufficient prima facie evidence to fully justify this conclusion. In making this assessment the senior management team have been advised by senior counsel and are satisfied that if fraud is discovered in a process it is right to reject a bid. Although the alleged fraud relates to a different contract from those in which your firm's bid are currently under consideration the view of the Housing Executive, having regard to the legal advice and information available is that fraud vitiates and affects all dealings between the parties. Consequently it would not be possible to introduce an artificial dichotomy between various contracts. In those circumstances and for those reasons the Housing Executive has concluded that the evidence of fraud it has collated constitutes sufficient and proper grounds on which to determine that it cannot accept your firm's tenders in the following even if they meet or have met all other tender requirements."

[3] The grounds on which relief is claimed are set out in para3 of the Order 53 statement and they include the following:

- (i) That the applicant was not informed of the decision until after it had been taken and was given no effective opportunity to engage in the decision-making process.

- (ii) Failing to provide the applicant with any details or particulars of precisely what is alleged against it, including details of the invoices in respect of which the Housing Executive purports to have concern in order to permit the applicant any effective opportunity of making representations.
- (iii) That the decision is tainted with actual or apparent bias given that the alleged fraud relates to claims for payment due from the Housing Executive itself, which has a financial interest, and it has a clear motive to suggest the claim was invalid or that fraud has occurred.
- (iv) That the decision is irrational, conspicuously unfair and disproportionate.
- (v) That the decision is in breach of the applicant's rights under Art6 and/or at common law to be presumed innocent until proven guilty.
- (vi) That the decision is further irrational in that in respect of larger contracts where the Public Contracts Regulations 2006 apply an economic operator may be excluded where it or a director or other relevant person in relation to it has a conviction for fraud under Reg 23(1)(d) and that the Housing Executive decision is much more severe than that applied for much larger contracts.
- (vii) That the Housing Executive is in breach of directly effective EU law including the general principles of EU law insofar as the decision relates to tenders with a cross-border interest.
- (viii) That the decision is in breach of the principle of proportionality in breach of the principles of transparency and in breach of the principles of equal treatment.
- (ix) That the decision is in breach of the applicant's Convention rights and in particular Article 1 of the First Protocol it being asserted that the applicant had a legitimate expectation of being entitled, or that its legitimate expectation of being entitled to tender for NIHE contracts was a possession within the meaning of Article 1 of the First Protocol.
- (x) That there has been a breach of the applicant's legitimate expectation.

[4] Further it can be seen from the letter from the Housing Executive of 3 July that the present application for leave has been submitted in the context of an ongoing and live investigation by the PSNI into an allegation of serious fraud by the applicant in respect of an environmental improvement scheme contract at [.....] in Belfast. As is clear from the letter this matter was initially investigated by the

Housing Executive's Counter Fraud Department and then referred to the PSNI. The Housing Executive indicated that it has been advised that it would not be appropriate for it to continue with its own internal investigations whilst the PSNI enquiries have been concluded or determined.

[5] On 8 October in advance of the leave hearing the Housing Executive made efforts to liaise with the PSNI to ascertain the present position with their on-going criminal investigation and emphasised the urgency of the situation. The PSNI responded that the investigation was being conducted as diligently and expeditiously as possible and that a decision as to whether or not to bring charges would be brought at the conclusion of the investigation by the Public Prosecution Service.

[6] In support of the impugned decision the Court was referred to a passage from the decision of Deeny J in Natural World Products v ARC 21 [2007] NIQB 19 where he stated as follows:

"16. ... Nobody could dispute that if fraud or insolvency was discovered on the part of a bidder in the course of the tender process it would be right to reject the bid. It does not seem to me that the Regulations taken on their own preclude the client from rejecting a tender bid if it fairly and reasonably concludes that that bid is, on examination, fatally flawed in a fundamental way. ..."

[7] The Housing Executive has uncovered evidence of what it believes is fraud by the applicant company in connection with an earlier contract. That matter is the subject of the on-going police investigation. A company representative was interviewed as a voluntary attender under caution in August of this year and a further interview was scheduled for next week. I accept that it is perfectly rational for the Housing Executive to take the view, following the advice of senior counsel, that discovery of alleged fraud by the applicant constitutes sufficient grounds to determine that the applicant's tenders cannot be accepted. A public authority such as the Housing Executive cannot, in these circumstances, be required to continue business in a commercial context as if nothing had happened or changed. The police interviews under caution and the associated processes have led or will inevitably lead to the disclosure of the matters that are causing concern and in that context the applicant should have a full opportunity of dealing with any alleged criminal conduct.

[8] There is no discrete issue in this case which could be usefully determined by this court without giving rise to a risk of prejudicing the PSNI investigation and any future criminal trial should charges be brought. Parallel proceedings in such a context would not be in the public interest. Where, as here, bona fide concerns are raised about alleged substantial fraud on a public body that organisation has a duty

to have the matter investigated. That is not in dispute. Where there is a live police investigation taking place the proper course will usually be to await the outcome thereof rather than instituting a parallel set of proceedings that might imperil such an investigation. Any private law claims arising from the overall context can, if the applicant is so advised, be pursued in the appropriate forum.

[9] I appreciate the applicant's concern that the delay in progressing these matters may inevitably prejudice the applicant. At the moment the applicant is confronted with allegations it denies and asserts are capable of explanation which will result in full exoneration. That is what the thorough police investigation will reveal or not as the case may be and it underscores the undesirability of this court trespassing into such matters.

[10] Given the profound consequences for the applicant of the Housing Executive's decisions, resulting from unproven and contested allegations of fraud, it behoves all the relevant agencies to act with due diligence and expedition. The Housing Executive have already been in contact with the PSNI emphasising the urgency of the situation doubtless in recognition of the deleterious impact that the on-going situation is having on the applicant. The PSNI have said that they were conducting the investigation as diligently and expeditiously as possible. Nonetheless, I consider it appropriate to remind all the relevant agencies to act with the necessary diligence and expedition because of the consequences for the applicant.

[11] The applicant has not persuaded me that it has an arguable case or one that is worthy of further investigation and accordingly leave is refused.