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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* 25/03/13

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

IRISH WASTE SERVICES LIMITED

Plaintiff;

-and-

NORTHERN IRELAND WATER LIMITED
MT WASTE LIMITED
ROAD SAFETY CONTRACTS LIMITED
R HEATRICK LIMITED

Defendants.

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TREACY J

Introduction

[1] The background to this action is set out in my first judgment reported at [2010] NIQB 13. In short the plaintiff had sought injunctive relief and damages against the first defendant restraining it from entering into the then proposed contract for sludge management services with the successful tenderer, the second defendant. The tender process for award of the contract in issue was conducted using the Negotiated Procedure provided for in the Utilities Contract Regulations 2006 ("the UCR 2006 Regulations").

[2] At paragraph [33] of its judgment the court concluded that it was satisfied having regard to the nature of the plaintiff's challenge that the grounds of challenge first arose when the ITN was published in February 2009. Accordingly the plaintiff's delay in bringing the proceedings was fatal to their claim given the provisions of Regulation 45(5)(b) of the 2006 Regulations. The court went on to observe that it did not consider it necessary to address the plaintiff's substantive submissions save to record that the court was far from persuaded as to their substantive merit.

[3] At paragraph [34] of its judgment the court accepted the defendant's submission at least in relation to what was referred to as the "Lianakas" point namely that it is barred by operation of Regulation 45(5)(a) since it was not referred to in the letter of 30 April from the plaintiff's solicitors. Consequently the notification requirement in 45(5)(a), which is one of the conditions precedent to bringing a claim, was not satisfied in respect of that ground of challenge. For those reasons the plaintiff's claim was dismissed.

[4] Following the delivery of judgment in that case judgment was delivered in Uniplex (UK) Limited v NHS Business Services Authority which developed the issue of the timing for procurement challenges in a manner which was favourable to the claim being advanced by the plaintiff/appellant. On foot of that judgment, the plaintiff successfully appealed my earlier decision which appeal was unopposed and the Court of Appeal referred the matter back to this court to consider the substantive issues in light of that development on the time point. The matter was thus remitted to this court and the costs of the appeal were reserved with a view, I understand, to being determined by the judge at first instance as it was felt that that court would have a better understanding of all matters. I should add that following the referral back by the Court of Appeal, the matter was listed for mention in court and the parties agreed that they were content for the remaining issues in the case to be decided in light of the arguments that had been previously presented and the written skeletons which had been furnished to the court. Accordingly, there was no need for the court to convene further to address the arguments notwithstanding the success of the appeal.

[5] It is unnecessary to recite the background to the plaintiff's claim which is summarised at paragraphs [2] to [12] of the original judgment.

The plaintiff's challenge

[6] The plaintiff claimed that the defendant failed to conduct the tender process in accordance with the established principles of fairness, non-discrimination and transparency and in breach of the 2006 Regulations governing the contract. In substance, the plaintiff's challenge resolved to the following contentions namely:

(a) That the criteria for the award were not identified with sufficient clarity;

(b) That some of the criteria used by the defendant were linked to ability to perform rather than the most economically advantageous tender;

(c) That the relevant weightings were not stated;

(d) That the tenderers were assessed by reference to a two staged process.

[7] As the parties pointed out in their written and oral arguments, the first three of these challenges have been a feature of successive procurement claims in recent years. For example, in Linakis [2008] All ER (D172), Letting International [2008] EWHC 1583 (QB) and in this jurisdiction, McLaughlin and Harvey v DFP [2008] NIQB 91. A central feature raised in these cases was the need for a contracting authority to publish the criteria by which it is evaluating bids in order to comply with the obligation of transparency. As the defendant pointed out in paragraph [9] of its skeleton argument, the fourth challenge, which takes issue with the treatment of quality and price in the process, represented new ground for which no judicial authority was cited by the plaintiff in support of the proposition advanced. Nor were any of the other parties able to identify case law dealing directly with the issue.

[8] The bid process was intended to ensure that the contract was awarded to the most economically advantageous tenderer in accordance with the 2006 Regulations. The defendant provides an essential public service and it is in the public interest that the services procured by it satisfy rigorous standards both in terms of quality and price.

[9] Section 4.1 of the ITN required bidders to pass a quality threshold. This threshold was plainly intended to guarantee in the public interest that a service of the requisite quality was delivered. No bidder complained about this threshold quality standard during the tender process although all would have had the opportunity to do so had they considered that such a complaint or criticism was merited.

[10] When notified that its bid had been unsuccessful, the plaintiff's solicitors made representations to the defendant as to the manner in which the bid had been evaluated but notably not about the particular procedure which had been adopted. There was an exchange of correspondence between the defendant and the plaintiff and a meeting with the plaintiff on 29 April 2009. At that meeting, the defendant agreed to postpone the award of the contract until 6 May so as to allow the plaintiff time to reflect on the outcome of the meeting. Following this process the plaintiff discarded any claim in relation to the way in which the tender was marked but introduced a novel point not raised before and which now forms its primary challenge.

Challenge (i)

The criteria for the award were not identified with sufficient clarity.

[11] The decided case make clear that if a contracting authority wishes to rely on criteria or sub-criteria in evaluating tenders that it must inform potential tenderers of these criteria and the relevant weightings attaching to them in the contract notice or contract documents e.g. Linakis v Municipality of Alexandroupolis [2008] All ER (D172), Letting International v Newham LVC [2008] EWHC 1583 (QB) and McLaughlin and Harvey v DFP [2008] NIQB 91. I accept the defendant's submission

that in this case they set out in detail at Annex 5.5 the criteria involved and the weightings attaching to each. The plaintiff complains the award criteria were not set out "as such" but rather consist of a number of questions under each of five sub-headings. It does not appear to me that the absence of the word "criteria" is of any significance since it should have been manifest to the tenderers what was being assessed and the marking scheme. At paragraph [42] of his decision in McLaughlin and Harvey v DFP, Deeny J stated:

> "The defendant's reference to this as a valuation guidance is almost an admission that these or some of these are indeed criteria. They are being used to evaluate the tender bids i.e. to judge them."

[12] I agree with the defendant that no tenderer considering the documents could be in any serious doubt as to the nature of what was being evaluated and the methodology. Annex 5.5.1 to the ITN sets out specific questions which directs the bidder's attention to those elements of implementation which are to be the subject of assessment. At paragraph [48] of McLaughlin and Harvey, Deeny J stated:

> "A separate important issue is whether the 186 items to be found under these various 39 sub criteria or elements or sub elements are permissible. … I consider there is force in the evidence …. to have provided these in such detail to the bidders would have in fact undermined the efficacy of the process. … If you provided all 186 items even an incompetent tenderer might manage to and quite possibly would manage to put together a bid which referred to all 186 leaving the panel uncertain as to which the preferable bidder was."

[13] I therefore reject this ground of challenge and consider that the criteria were sufficiently disclosed by the nature of the questions in the ITN.

Challenge (ii)

Criteria used by the defendant were linked to ability to perform rather than the most economically advantageous tender.

[14] Paragraph [34] of my previous judgment dealt with the "Lianakis" point namely that that this aspect of the complaint is barred by operation of Regulation 45(5)(a) since it was not referred to in the letter of 30 April from the plaintiff's solicitors. Consequently the notification requirement in 45(5)(a), which is one of the condition precedents to bringing a claim, was not satisfied in respect of that ground of challenge.

[15] If not withstanding this conclusion the court is required to address in detail the plaintiff's submission said to be derived from Lianakis the challenge must be rejected for the following reasons.

[16] The plaintiff submitted that the ECJ drew a distinction between, on the one hand, criteria which are aimed at identifying the tender that is the most economically advantageous and, on the other hand, those "instead essentially linked to the evaluation of the tenderers ability to perform the contract in question". Only the former were permitted award criteria. The plaintiff submitted that if the various questions contained in the annex are to be regarded as manifestations of award criteria (which was disputed) they submitted that many of them are essentially linked to the evaluation of the tender's ability to perform the contract rather than at identifying the tender that is the most economically advantageous. Many of these questions the plaintiff submitted are simply directed towards the tenderer's experience, manpower and equipment, and their ability to perform the contract.

[17] I accept the defendant's submission that Lianakis is not applicable to utilities procurement and that it is based on the premise that there are certain matters which are to be assessed at the first stage of the process when identifying which entities are to be invited to bid and that those matters ought not to be considered again at the second stage. As the defendant has submitted, this point is inapplicable in the utilities legislation. Article 54 of the Directive relevant to procurement by Utilities (Directive 2004/17/EC) is significantly different from the text of the earlier Directive set out in paragraphs [6] and [7] of the judgment. Article 54 of the Directive places no such constraint upon the matters which can be considered at this stage. As the defendant has pointed out, it is difficult to see what sensible criteria could be left to the bid evaluation stage if one were to apply the logic of Linakis to the utilities procurement regime.

[18] At the bid evaluation stage the utility must be entitled to have regard to any relevant matters concerning performance of the contract. I agree that to the extent that the quality of the bidders likely performance can be best or appropriately evaluated by reference to the qualities or past performance of the bidder that it would be passing strange if the utility were prevented from considering such material.

[19] Furthermore the relevant part of the ITN is focused on how the plaintiff will perform the contract and the resources it will deploy to perform it. As the defendant points out, this is not the same as asking what the resources are of the plaintiff overall.

Challenge (iii)

The relevant weightings were not stated.

[20] There is in my view no substance to this complaint as the ITN is clear. In the quality submission, the elements in the ITN are subject to a detailed breakdown so bidders can identify the responses which will generate greater marks in the overall assessment. Accordingly, the relevant obligations have been satisfied.

Challenge (iv)

Tenders were assessed by reference to a two stage process.

[21] This became the central focus of the plaintiff's challenge. As previously pointed out above, it was only after the exchange of correspondence in April and meeting on 29 April 2009 that the plaintiff abandoned any claim in relation to the way in which the tender was marked and instead focused a novel complaint that a two stage process is, by definition, a breach of the UCR in a case where the award is to be made on the basis of the most economically advantageous tender.

[22] The plaintiff had submitted that a two stage assessment of award criteria, such as that which was adopted in the present case, in which tenders are compared and assessed in relation to some of the criteria, following which some tenderers are liable to eliminated before assessment of the remaining criteria, is not compliant with the directive and/or the regulations. It was submitted that the procedure established by the defendant failed therefore to comply with the principles which the plaintiff summarised at paragraph 22 of its skeleton argument and which were said to derive from the relevant portions of the directive and/or the regulations.

[23] I had previously indicated at paragraph [33] of my first judgment that, whilst I did not then consider it necessary to address the plaintiff's substantive submissions, I did record that I was far from persuaded as to their substantive merit. That remains the position and I am quite satisfied that the defendant was correct to submit that the fact that a bidder is eliminated at the quality stage does not mean that his bid has not been assessed relative to the others. As they point out, all bids were subjected to the same process. I agree that provided a bid was able to meet the quality standard its price would be evaluated in accordance with Section 5.4.3 of the ITN.

[24] I see nothing inconsistent or incompatible with the terms of the relevant directive or the regulations. The plaintiff referred extensively to the 55th Recital to Directive 2004/17/EC contending that it is impermissible to conduct a two stage process of evaluating quality and price. I disagree. The wording does not indicate that quality and price must be considered at the same time but rather as part of the same determination. The relevant portion of the recital provides:

> "… They must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical

> specifications, and the value of money for each tender to be measured."

[25] There is nothing objectionable about a contracting authority setting minimum standards for quality which must be attained prior to an evaluation of the price of the bid. Indeed as it appears to me it is clearly in the public interest that those who do not meet a minimum standard for quality should not be considered. This is particularly so in the case of public utilities such as Northern Ireland Water.

[26] Nor is there anything in the Utilities Contract Regulations 2006 which forbids the setting of minimum standards in relation to quality. I agree that it would be surprising if there were since "most economically advantageous" necessarily involves an inquiry into quality as well as price in contra distinction to the more basic means of award in Regulation 30(1)(b).

[27] The court was referred to SIAC Construction v Mayo County Council [2003] EULR 1 where the ECJ recognised that contracting authorities were free to choose the criteria upon which they based their award since Regulation 30(2) was neither prescriptive nor exhaustive, provided that they were aimed at identifying the most economically advantageous tender. This reasoning was adopted by Coghlin LJ in Henry Brothers (No. 1) [2007] NIQB 116 at paragraph [15].

[28] In Henry Brothers (No. 2) [2008] NIQB 105 Coghlin LJ at paragraph [23] stated:

> "Subject to those qualifications the authority has discretion as to the criteria that it chooses and the list set out in Regulation 30(2) is not exhaustive … it is not necessary for each of the selected criteria to be of a purely economic nature and factors which are not purely economic may influence the value of a tender from the point of view of a contracting authority."

[29] It is of course, as Coghlin LJ held, very difficult to reach any objective determination of what was the most economically advantageous bid without some reasonably reliable indication of price or cost. In the present tender process, price was a very important factor but it was only analysed once a tender reached the minimum quality threshold.

[30] I accept that within the discretion enjoyed by the defendant in fixing its criteria is an ability to eliminate bids which do not comply with threshold quality standards. Given the purpose of Public Procurement Regulation, I also accept that it would indeed be surprising if a contracting entity was not entitled to set a level of quality which had to be attained by bidders and for these reasons I reject this aspect of the challenge.

[31] For the above reasons and those contained in my earlier judgment the plaintiff's claims are dismissed. The parties are invited to agree the final disposition on costs and failing that to submit, in writing within 3 weeks of receipt of this judgment, their submissions as to costs and whether a further hearing is required or whether the parties are content that it can be dealt with on paper.