Neutral Citation Number: [2019] EWHC 2211 (TCC)

Case No: HT-2019-000177

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPRTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

The Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 13/08/2019

Before :

THE HON. MR JUSTICE STUART-SMITH

- -

Between :

Royal Cornwall Hospitals NHS Trust	**Claimant**
- and -	
Cornwall Council	**Defendant**

- -
- -

Ben Rayment (instructed by **Bevan Brittan LLP**) for the Claimant
Joseph Barrett (instructed by **DWF Law LLP**) for the Defendant

Hearing dates: 15 July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE STUART-SMITH

Mr Justice Stuart-Smith:

Introduction

1. These are procurement proceedings governed by the Public Contracts Regulations 2015 ("PCR"). The Defendant applies to strike out the Claimants' allegations of breach of duty as pleaded in the Particulars of Claim. At a hearing on 15 July 2019 I gave my decision, which was that the relevant passages of the Particulars of Claim should be struck out and/or be subject to summary judgment in favour of the Defendant, with reasons to be provided later. This judgment provides my reasons.

Factual Background

2. The Claimant is a National Health Trust and is the incumbent provider of Open Access Reproductive and Sexual Health Services Level 1-3 in Cornwall. It is an economic operator within the definition set out at regulation 2 of the PCR. The current contract is worth £2.88m per annum in income to the Claimant, though it spends £3m in providing the services and therefore operates under current arrangements at a loss of approximately £120,000 per annum. The Defendant is the unitary authority for the county of Cornwall and is a contracting authority within the definition set out at Regulation 2 of the PCR.

3. On 27 February 2019 the Defendant published a Contract Notice in the Official Journal of the European Union by which it invited tenders for three separate contracts to provide sexual health services in Cornwall, including a contract for "Open Access All Age contraception and sexual health service at levels 1, 2 and 3 clinical provision" ("the New Contract"). It is the Claimant's case that the services to be provided under the New Contract are materially the same as those it provides under its current contract and therefore cannot be provided for less than about the £2.88m per annum that it spends in providing those services at present. Both these contentions are challenged by the Defendant. I am not able to make a finding about those factual disputes, but their resolution does not affect the present application.

4. During 2018 and early 2019 the Defendant undertook various market engagement events in the course of which it proposed that there would be a financial cap (referred to by the parties as a "financial envelope") of £2.5m for the New Contract. The Claimant made plain its opposition to that cap, but the parties did not agree. Accordingly, the Contract Notice and tender documents provided that the New Contract would be for 7 years and would have a value of £2,500,000 per annum with the exception of year 1 where an additional £100,000 was available for the implementation of a new digital platform.

5. The relevant tender documents were provided to and accessed by the Claimant on 25 February 2019. It therefore accepts that it knew of the terms of the tender documents, including the £2,500,000 financial envelope, on and from that day. Its evidence is that it undertook a significant amount of work between 25 February and 18 March 2019 to determine whether it would be able to submit a compliant bid, but concluded that it could not satisfy the service specification within the financial envelope without a material deterioration in quality in terms of patient safety, clinical effectiveness, patient experience and safe staffing. It therefore informed the Defendant on 18 March 2019

that it would not submit a bid for the New Contract. True to that decision, it did not do so.

6. On 9 May 2019 the Defendant informed the Claimant that the New Contract was to be awarded to a third-party bidder, Brook. Having taken legal advice the Claimant decided to issue these Part 7 proceedings claiming "(1) a declaration that the Defendant has breached [the PCR] and/or general principles of EU law in its design of the Procurement and/or its evaluation of Brook's bid; (2) an order prohibiting the Defendant from entering into the Contract with Brook; (3) an order requiring the defendant to recommence the Procurement on a lawful basis (with a higher Financial Envelope) and/or different Service Specification; (4) Costs; (5) Further or other relief as the court deems fit." The proceedings were issued on 24 May 2019.

7. Section IV of the Particulars of Claim is headed "Breach of Duty" and states:

> "19. The best particulars of breach that Claimant is currently able to provide, pending receipt of further information, disclosure and evidence, are as follows:
>
> PARTICULARS OF BREACH
>
> a. Breach of the principles of proportionality and/or good administration and/or in manifest error of assessment in specifying tender requirements that are impossible to satisfy and/or irrational and/or unreasonably risked patient safety and/or clinical effectiveness of the services to be provided under the Contract – namely, the requirement that tender comply with the Service Specification within the Financial Envelope;
>
> b. Breach of the principle of transparency by refusing to provide the Claimant with the information necessary to enable it to take an informed view of whether the Defendant had properly followed it(s) published process, in particular with respect to the enforcement of the Financial Envelope and the Service Specification.
>
> 20. Pending receipt of further information and disclosure, the Claimant apprehends, based on its own modelling and consultation with other sexual health services providers …, that Brook's tender for the Contract could not have complied with the Service Specification within the Financial envelope; alternatively, could only have done so by bidding a level of resource that is abnormally low relative to the Service Specification. The Defendant's acceptance of a tender that did not comply with both the Financial Envelope and the Service Specification would amount to a breach of the principle of transparency. The Defendant's acceptance of a tender that is abnormally low would breach the principles of equal treatment and/or good administration and/or would be irrational and/or

> manifestly erroneous, having regard in particular to the importance of the services to be provided under the Contract."

The Legal Framework

The Test on an Application to Strike Out or for Summary Judgment

8. The Defendant's application to strike out is brought pursuant to CPR Rule 3.4 which, so far as material, provides:

> "The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing …the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

9. The application for summary judgment is brought pursuant to CPR Rule 24.2 which, so far as material provides:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) …; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

10. The principles that are applicable to an application for summary judgment under CPR Rule 24.2(a) are similar to those that apply to an application to strike out under CPR Rule 3.4(a). They are conveniently summarised by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. I bear them in mind throughout; but it is not necessary to set them out again here. For present purposes it is sufficient to note that "no real prospect of succeeding" means that the Court must consider whether the Claimant has a realistic as opposed to a fanciful prospect of success.

11. As convenient shorthand I will refer to the Defendant's applications to strikeout and for summary judgment collectively as applications to strikeout.

The PCR

12. Regulation 2(1) of the PCR defines the following terms (except where the context otherwise requires):

> *"candidate"* means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership;
>
> …
>
> *"economic operator"* means any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market;
>
> …
>
> *"tenderer"* means an economic operator that has submitted a tender;
>
> …"

13. The time limits for claims brought pursuant to the PCR such as the present are laid down by Regulation 92, which provides:

> "(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.
>
> (2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
>
> (3) …
>
> (4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation … where the Court considers that there is a good reason for doing so.
>
> (5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
>
> (6) … ."

14. Regulations 88, 89, and 91 make provision for who may bring an action based upon a breach of duty owed under the PCR as follows:

> "**Interpretation of Chapter 6**
>
> 88(2) In regulations 89 and 90, "*economic operator*" has its usual meaning (in accordance with regulation 2(1)), but in the other provisions of this Chapter "economic operator" has the narrower meaning of an economic operator (as defined by regulation 2(1)) to which a duty is owed in accordance with regulation 89 or 90
>
> **Duty owed to economic operators from EEA states**
>
> 89 (1) This regulation applies to the obligation on a contracting authority to comply with—
>
> (a) the provisions of Parts 2 and 3; and
>
> (b) any enforceable EU obligation in the field of public procurement in respect of a contract or design contest falling within the scope of Part 2.
>
> (2) That obligation is a duty owed to an economic operator from the United Kingdom or from another EEA state.
>
> …
>
> **Enforcement of duties through the Court**
>
> 91 (1) A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.
>
> (2) Proceedings for that purpose must be started in the High Court, … ."

15. The obligations owed under Part 2 of the PCR include the duty under regulation 18(1), which requires contracting authorities to "treat economic operators equally and without discrimination" and to "act in a transparent and proportionate manner."

16. The Regulations impose obligations upon contracting authorities to provide information by Regulations 55 and 86, which provide:

> "**Informing candidates and tenderers**
>
> 55 (1) Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of a contract or

admittance to a dynamic purchasing system, including the grounds for any decision—

(a) not to conclude a framework agreement,

(b) not to award a contract for which there has been a call for competition,

(c) to recommence the procedure, or

(d) not to implement a dynamic purchasing system.

(2) On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform—

(a) …

(b) any unsuccessful tenderer of the reasons for the rejection of its tender, …, the reasons for its decision of nonequivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;

(c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement;

(d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

(3) …

…

Notices of decisions to award a contract or conclude a framework agreement

86 (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.

(3) The reasons referred to in paragraph (2)(b) shall include the reason for any decision by the contracting authority that the economic operator did not meet the technical specifications—

(a) in an equivalent manner as mentioned in regulation 42(14); or

(b) because compliance with a standard, approval, specification or system mentioned in regulation 42(15) does not address the performance or functional requirements laid down by the contracting authority.

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

(a) the reasons why the candidate was unsuccessful; and

(b) the information mentioned in paragraph (2), but as if the words “and relative advantages” were omitted from sub-paragraph (b).

> *Exemptions*
>
> (5) A contracting authority need not comply with paragraph (1) in any of the following cases:—
>
> (a) where the contract or framework agreement is permitted by Part 2 to be awarded or concluded without prior publication of a contract notice;
>
> (b) where the only tenderer is the one who is to be awarded the contract or who is to become a party to the framework agreement, and there are no candidates;
>
> (c) where the contracting authority awards a contract under a framework agreement or a dynamic purchasing system.
>
> (6) A contracting authority may withhold any information to be provided in accordance with the preceding requirements of this regulation where the release of such information—
>
> (a) would impede law enforcement or would otherwise be contrary to the public interest;
>
> (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
>
> (c) might prejudice fair competition between economic operators.
>
> *Meaning of "candidate" and "tenderer"*
>
> (7) In this regulation,—
>
> (a) *"candidate"* means a candidate, as defined in regulation 2(1), which—
>
> (i) is not a tenderer, and
>
> (ii) has not been informed of the rejection of its application and the reasons for it;
>
> (b) *"tenderer"* means a tenderer, as defined in regulation 2(1), which has not been definitively excluded.
>
> (8) …

The Application to Strike Out Particulars 19(a)

17. The Defendant submits that time began to run in relation to the breaches alleged by [19(a)] of the Particulars of Claim on 25 February 2019 and expired on 26 March 2019 at the very latest. The Claimant does not seriously dispute that time began to run on 25 February 2019. It is right not to do so, since it is plain that it had all the information it

needed so that it knew or ought to have known on 25 February 2019 that the grounds for starting the proceedings on which it relies to sustain the claim under [19(a)] of the Particulars of Claim had arisen. Subject to extending the 30-day time limit, therefore, [19(a)] should be struck out as being statute barred.

18. The Claimant's primary submission is that there is good reason to extend the 30-day time limit because it took time to investigate and consult widely with other providers and to validate its conclusions regarding the impact of the financial cap and its ability to comply with the specification. There are two answers to this submission, both of which are fatal to it. First, on the Claimant's own evidence it had completed its investigations and consultations by 18 March 2019 when it informed the Defendant that it would not be submitting a tender. Even if time were extended to start running on 18 March 2019, these proceedings were still brought out of time. Second, even when the Claimant had finished its investigations on 18 March 2019, it had over a week in which to issue proceedings within the 30-day time limit and no reason has been shown why they were not able to do so within that time. Bearing in mind the policy considerations that underpin the 30 day time limit as an integral part of the bundle of rights and obligations contained in the PCR, the Claimant has shown no good reason for extending time: see *Jobsin.co.uk PLC v Department of Health* [2001] EWCA Civ 1241at [33], per Dyson LJ.

19. The Claimant submits as a secondary reason for an extension of time that there is a degree of overlap between the matters raised by [19(a)] and the matters it alleges in [19(b)], which it submits are in time and will have to be considered in any event. I do not consider that this would be a good reason for allowing a statute-barred claim to proceed that could and should (if it was to be pursued) have been brought within time. The submission also loses any force it might otherwise have had because of my decision to strike out [19(b)] and [20] in any event.

20. For these reasons, [19(a)] should be and is struck out.

The Application to Strike Out Particulars 19(b)

21. [19(b)] of the Particulars of Claim is not specific but appears to relate to the Defendant's assessment of the tender that was submitted and the decision to award the New Contract to Brook. On that assumption, proceedings were brought within the 30-day time limit. However, [19(b)] is founded on the proposition that the Defendant was obliged by an obligation of transparency to provide the Claimant with information about its conduct of the procurement and evaluation after the Claimant had decided not to participate in it. This is a question of law that is susceptible to and suitable for a decision on a strike out or summary judgment application.

22. The Defendant submits that the PCR establish the regime within which people who wish to participate in public procurements may be assured that they will be treated equally, without discrimination, transparently and proportionately. The provision of information is regulated by regulations 55 and 86, each of which requires information to be provided to limited classes of people. Under each regulation, defined categories of information are to be sent to "each candidate and tenderer": see [16] above. No separate obligation is expressly imposed by PCR to provide information to others.

23. The Claimant responds that the duties under Part 2 of the PCR are owed to "economic operators" without qualification and that, since it is common ground that the Claimant satisfies the definition of "economic operator" in regulation 2, those duties are owed to it, with the consequence that it is entitled to be provided with information about the conduct of the procurement after it decided not to participate.

24. The Claimant's submission, if well founded, would mean that anyone who could satisfy the definition of "economic operator" would be owed the specific duties and the duties under EU law that are incorporated by the terms of the PCR: it would not be necessary to show that the economic operator had shown any interest or taken any part in the procurement. All that would be required in order for it to have an actionable claim would be that it could show that it had suffered or risked suffering loss or damage in consequence of a breach of duty.

25. This submission seems to me to be extreme and contrary to the structure of the PCR which, to my mind, provide for the regulation of procurements in relation to those who wish to participate in them. It therefore follows that I would accept the Defendant's submission that it did not owe an enforceable duty of transparency to the Claimant after the Claimant decided not to participate in the current procurement on and from 18 March 2019. I tend to agree with the Defendant that the reason why there appears to be no authority on the point is because the answer to such an extreme submission is obvious.

26. If that conclusion is wrong, and some duty may be owed, the PCR expressly regulate the provision of defined categories of information to candidates and tenderers, as defined. I can see no reason why the Claimant should be entitled to the information it seeks, which includes confidential information and information going well beyond the scope of the information that is required by regulation 86 to be given to candidates and tenderers. I can see no reason of policy or construction that would justify such an expansive approach.

27. However, even if that second approach is wrong, so that a duty of transparency could be owed to an economic operator who does not participate in a procurement, I consider that the Claimant in this case would be unable to show that it had suffered loss or risked suffering loss *in consequence of* any breach of duty because the effective cause of any loss or risk of loss is the Claimant's decision not to participate in the procurement. That decision deprived it of the benefit of regulation 86 and the prospect of arguing that its bid (if unsuccessful) was lawful and should have been accepted. The Claimant argued that it has suffered loss or risks suffering loss because, if it can be shown that Brook's bid was unlawful, "it cannot be excluded that the Claimant may have the chance to participate in a new tender." This double speculation does not seem to me to satisfy the requirement of being an economic operator who has suffered loss or risks suffering loss in consequence of a breach: there is no reason to think that the terms of a new invitation to tender would be one that the Claimant would or might win, even assuming it had the chance to participate, or that (if it won) it would be more beneficial than either running the current contract at an annual loss of £120,000 or not being the provider at all. Stripped to its essentials, this head of claim appears to be a collateral attack upon the lawfulness of the original tender provisions, which could and should have been subjected to a challenge within the time laid down by the PCR if it was to be challenged at all.

28. For these reasons [19(b)] should be and is struck out.

Paragraph 20 of the Particulars of Claim

29. [20] of the Particulars of Claim is not framed as particulars of breach of duty. That is clear both from the fact that it does not appear as [19(c)] and from its terms. If and to the extent that it advances a claim at all, it is a reformulation and development of the Claimant's main complaint that the ITT was unlawful because it could not be complied with both as to the provision of services and as to price. That is a collateral attempt to reformulate the challenge brought by [19(a)] and could and should have been brought (if it was to be brought at all) within the 30-day time limit starting on 25 February 2019. If and to the extent that it is to be regarded as a claim founded on facts and matters arising after 18 March 2019, it would fail for the same reasons as given in relation to [19(b)] of the Particulars of Claim.

30. For these reasons [20] of the Particulars of Claim should be and is struck out.