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IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT (QBD)

[2019] EWHC 515 (TCC)



No. HT-2018-000207

Rolls Building

Fetter Lane

London EC4A 1NL

Thursday, 28 February 2019

Before:

MR JUSTICE FRASER

B E T W E E N :

SERCO LIMITED

Claimant

- and -

SECRETARY OF STATE FOR DEFENCE

Defendant

MR J. BARRETT (instructed by DWF LLP) appeared on behalf of the Claimant.

MS L. OSEPCIU (instructed by The Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE FRASER:

- 1 This is a procurement case whereby Serco challenge the outcome of a procurement conducted by the Ministry of Defence for what could loosely be described as fire and rescue services. These are predominantly in the UK but also for some UK Forces overseas who are on operations, although not aircraft, or ships whilst they are at sea, or US Forces whilst they are within the United Kingdom. It is a very sizable procurement. Today is the second of three hearings that is taking place over a six-day period. Yesterday's hearing concerned an application by the MoD to strike out two separate aspects of the Particulars of Claim; one a reference to breaches of the Public Contract Regulations 2015; and the other a more detailed wide-ranging application to strike out certain RoRs which formed part of the evaluation of the tender. 13 of these were not separately identified in pre-action correspondence. The value of the procurement is £1.1 billion. The contract is to run for 12 years. The tender response was 9,000 pages long, and the procurement process as a whole took 4 years. The evaluation process alone took nine months. The first limb of the strike out application was successful, not least because the procurement was governed by the Defence and Security Public Contracts Regulations 2011, and the Public Contract Regulations 2015 were not in force when the notice was published in the Official Journal or OJEU.
- 2 In June 2018, in a contract award letter, Serco was notified that they had been unsuccessful. That award letter was dated 18 June 2018. Today's application is an application for specific disclosure. It has been compromised substantially by the MoD agreeing to provide almost all the disclosure sought, but that agreement has come only very recently. Today's argument between the parties is only about costs, and in order to put my judgment on costs in context, I am just going to give some background.
- 3 DWF, the solicitors acting for the MoD, on 22 June 2018, in what has been described (in my judgment of yesterday) as the first pre-action letter, wrote to the MoD notifying the MoD of Serco's dissatisfaction with the outcome of the procurement and saying, in paragraph 2:

"At present our client has almost no information in respect of the evaluation that was actually conducted and the decisions made by the MoD. However, even on the basis of the very limited amount of information contained in the MoD letter, our client has serious and legitimate concerns the MoD had acted contrary to two separate regulations within the Defence and Security Public Contracts Regulations 2011".
- 4 Amongst other things in that letter, they sought certain information. The contract award letter had with it a 37-page annex which identified what were said in the letter to be reasons for the evaluation score. There has been an enormous amount of correspondence since then, which predominantly has related to Serco attempting to find and obtain the AWARD evaluation documentation demonstrating the reasons and the evaluation. AWARD is a database used for procurement evaluations. In the agreed order for today, the documents which the MoD has agreed to provide are identified in five separate paragraphs in a schedule to the order. The subject matter of the specific disclosure application which has been compromised is disclosure by the MoD of the contemporaneous evaluation records recording the evaluators' reasoning of both bids, those of Serco and the successful tenderer Capita, and for other decisions taken during the evaluation itself.

5 I turn now to two separate elements. The first is the general way in which litigation should be conducted under the CPR. Under CPR Part 1.3 "Duty of the parties", the parties are required to help the court to further the overriding objective. The overriding objective, which is at Part 1.1, includes at 1.1(2)(b), saving expense; at (c) dealing with the case in ways which are proportionate; at (d) ensuring it is dealt with expeditiously and fairly; and at (e) allocating to it an appropriate share of the court's resources.

6 The second element is, so far as procurement is concerned, there are separate identifiable principles in relation to disclosure. These are most usefully summarised in a decision of Coulson J (as he then was) in 2013 called *Roche Diagnostics Ltd v The Mid Yorkshire Hospitals NHS Trust*, [2013] EWHC 933 (TCC). The judge dealt at [15] through to [19], both with the provisions of the CPR for disclosure under CPR 31.12, and the approach in procurement to disclosure. Different cases had considered this in the context of procurement, which the judge identified and summarised, and then at [20] he said the following:

“[20] In my view, the following broad principles apply to applications for early specific disclosure in procurement cases:

(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.

(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 the potential infringement. As Ramsey J said in *Mears Ltd v Leeds City Council* [2011] EWHC 40 (QB), "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".

(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 focused. 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 shore up a weak claim, which will put the defendant to needless and unnecessary cost."

7 I would emphasise the passage in sub-paragraph (a) which says,

"The challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process".

That is the documentation that was sought as long ago as June 2018, that is the documentation which is the subject matter of the agreed order in the schedule, and that is the documentation which, in my judgment, there can be no sensible grounds for the defendant not to have disclosed. This applies not only in respect of this application, which was issued on 15 November 2018, but at some stage in July, if not earlier, in late June 2018. This is because it goes to the specific evaluation records of the two bids. It is plainly, in my judgment, correctly described as essential information and documentation relating to the evaluation process. It is within the MoD's custody and there is a mountain of other authority which makes clear that the reasons for evaluation are important documents, and must be disclosed.

8 It is obvious to me the MoD has not begun to grapple with its obligations in terms of disclosure, either generally or in the context of this application, until an extraordinarily late stage. I should also say that until yesterday, the MoD, having accepted that it needed to provide this documentation, was still maintaining that the correct order for costs should be costs in case. That is not a sensible position and it was helpfully abandoned yesterday afternoon. However, this application should never have been required. The MoD should have voluntarily provided this documentation months ago.

9 Ms Osepciu has helpfully summarised the MoD's current position as at today, which is in respect of a summary assessment. Such an assessment plainly has to be performed because this application was less than a day. She has explained three grounds for opposing what could be described as quite, on the face of it, if one does not look at the background, a sizeable figure claimed by Serco of £79,274.68. Her three grounds were as follows. On yesterday's contested application, Serco was awarded its costs of £50,000. As she points out, that was a much more difficult and lengthy application, set down for a day, compared to this one, and she uses that as an example of why the overall figure of £79,000 is too high. She uses as her second ground the MoD's costs of today as a comparator: they are very modest, they are £15,876. Her third point is a more detailed one, relating to the amount of time it was realistic that such activity should have taken.

10 I am afraid, with the greatest of respect to Ms Osepciu's submissions, which have been very well put, I reject all those three points. Firstly, yesterday, the sum of £50,000 in Serco's costs which were awarded was reached after an exercise done by me, whereby there was a 20 per cent reduction to Serco's costs to reflect the MoD's success on one of the two limbs of its strikeout application. This was removing the reference to the Public Contracts Regulations 2015. Also, yesterday's application was an entirely arguable and sensible one, as reflected by the comparative success and failure of each of the parties on each of the two separate issues. Secondly, the MoD appears, and if properly advised, should always have realised, that it could not possibly to argue before the High Court with any degree of

seriousness that Serco is not entitled to these documents. The fact that the MoD devoted rather fewer resources to an application which they probably never intended to contest with any seriousness, is probably a point against the MoD in this respect.

- 11 So far as realistic time is concerned in the analysis of the summary assessment, it seems to me that a party such as Serco, which is bringing what on the face of it, given the success of yesterday, is at least a prima facie credible challenge in a very sizeable, expensive procurement of enormous detail, was entitled, and is entitled, to seek these documents. It was also entitled to take all necessary and proportionate steps to ensure that an application for specific disclosure, which should not have been necessary in the first place, actually succeeded. I am going to award, on a summary assessment basis, the following sum to Serco in respect of today: £79,274.68. The astute will notice that that is the exact figure on the summary assessment schedule that Serco are seeking by way of its costs. It should therefore sensibly be concluded that my award on costs is made on an indemnity basis against the MoD, and I am doing that because, as far as I am concerned, its conduct in respect of the disclosure has fallen well outside the norm and is entirely suitable for, and justifies, an award of indemnity costs.

CERTIFICATE

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