

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
[2022] EWHC 2893 (TCC)

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

Friday, 28 October 2022

BEFORE:

MRS JUSTICE JEFFORD

BETWEEN:

BROMCOM COMPUTERS PLC

Claimant

- and -

ACADEMIES ENTERPRISE TRUST

Defendant

MR R PAINES (instructed by Bevan Brittan) appeared on behalf of the Claimant
MR J KNIBBE (instructed by PHP Law) appeared on behalf of the Defendant

JUDGMENT

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1. MRS JUSTICE JEFFORD: This is an application for further information made pursuant to Part 18 by the defendant, Academies Enterprise Trust, whom I shall refer to as AET.
2. The application arises out of proceedings commenced by the claimant, Bromcom Computers Plc (“Bromcom”) challenging the award of a contract, under a call-off arrangement, to a company called Arbor Education Partners.
3. The background is a framework agreement, the G-C 12 Framework Agreement, established in 2020 for the purpose of permitting contracting authorities, including AET, to award contracts for cloud-based IT solutions to appointed suppliers, including Bromcom, in accordance with the Public Contracts Regulations 2015 (“the PCR”).
4. The call-off process under the Framework Agreement, as explained briefly in Mr Knibbe's skeleton argument for this application, can be divided into three broad stages: first, the creation of a shortlist of solutions using information made available by appointed suppliers via the Government's digital marketplace website; second, the evaluation of the shortlisted solutions; and third, the award of the contract to the successful provider and conclusion of the contract.
5. AET is a multi-academy trust operating 57 state-funded academy schools. It carried out a call-off process under the G-C 12 Framework in September 2021 in respect of a management information system for its schools, and announced its decision to award that contract to Arbor Education Partners on 6 October 2021.
6. In these proceedings, Bromcom challenged that procurement on two broad bases. The first was that it was alleged that the Framework Agreement could not be operated in a manner which was compliant with the PCR, and in particular with Regulation 33(8). The second was that, in this particular instance, or for this particular procurement, AET had failed to operate the call-off process lawfully and in accordance with the PCR.
7. It is the position that Bromcom now makes an application, which I have not thus far heard today, to delete the first of those challenges from its Particulars of Claim. That is consented to in principle by AET, although the terms on which that amendment is to be

made have not yet been agreed and the amendment has not yet formally been made. It is relevant to this application that part of Bromcom's claim will fall away and what will be left is that part of the procurement challenge which addresses the lawfulness of the process undertaken by AET on this occasion. In particular, it is part of Bromcom's case that AET undertook its evaluation purely on the basis of price, and that a price alone evaluation is not lawful and in accordance with the framework agreement.

8. In the course of the pleadings in this matter, the following issue arose. In their Defence, AET pleaded, at both paragraphs 3 and 69 of the Defence, that even if there had been, as Bromcom said there should have been, a weighted evaluation against multiple criteria and not a price only evaluation, Bromcom would not be and could never have been successful in this bid.
9. In response to that, in the Reply at paragraph 9, Bromcom pleaded its case that it could and would have been successful, and in particular Bromcom said this:

"If AET had evaluated by reference to weighted criteria other than just by reference to price, Bromcom could have been identified as providing the economically most advantageous offer. Indeed, as AET accepts, Bromcom has been successful in obtaining contracts under the G-Cloud 12 Framework Agreement. In those cases, the relevant contracting authority, unlike AET in this instance, has followed a lawful award process in which prices weighted against the evaluation of other criteria as identified at clause 3.20 of the G-Cloud 12 Framework Agreement."

10. That pleading triggered a request in correspondence for further information, because on the face of it there was a contradiction between the claim made in the Particulars of Claim for a declaration that the Framework Agreement did not provide for a lawful process for procurement, and the contention in that paragraph of the Reply that Bromcom had been successful on previous occasions and with other bodies in obtaining contracts under the Framework Agreement through lawful processes. The request centred on, and was made specifically in relation to, that paragraph 9 and the last two of the sentences.

11. Since September, Bromcom has indicated in correspondence that it intends also to delete by amendment those last two sentences. In other words Bromcom intends to withdraw the contention that on previous occasions it had been successful in obtaining contracts from other relevant contracting authorities who had followed a lawful award process in which price was weighted against the evaluation of other criteria, in contrast to the price only evaluation which Bromcom says has been undertaken in this case and which is the subject matter of the present dispute.
12. A formal application to amend was made last week only, but as Mr Paines has explained, the purpose of not previously making an application to amend the Reply was to enable the indicated amendment to be made as part of an orderly process in which the Particulars of Claim would be amended, the Defence and Counterclaim would be amended, and then the Reply amended in all necessary respects in one go. I accept that that was a sensible approach to take, and I proceed therefore on the basis that the amendment to the Reply has in effect been on the table since the end of September this year.
13. In light of the indicated amendments to the Particulars of Claim, the formal request for further information pursuant to Part 18 is only presently pursued in a limited respect, which I shall come to in a moment. Certain other requests Mr Knibbe asked me to adjourn until after the determination of the application to amend, and again I propose to proceed on precisely that basis.
14. The further information that is sought therefore now comprises the following, and I take this from the request question 1. All of these requests are made in respect of a lawful award process as referred to in paragraph 9 of the Reply (in the sentences which it is sought to delete by amendment). Question 1.1 asks for the identity of the relevant contracting authority, and questions 1.2 and 1.3 for the date of the contract and the services that Bromcom provides pursuant to that contract. Question 1.8 asks for the criteria as identified in clause 3.2 of the G-C 12 Framework that were used by the contracting authority for the purposes of its evaluation. Questions 1.9, 1.10 and 1.11 then ask for the weightings given by the contracting authority to those criteria, whether any were scored on a pass/fail basis, and what scores Bromcom achieved.

15. There is a further question 2 which I will refer to in due course and which has been described as a mop-up request in respect of any information not given in response to the question 1 requests.
16. It is submitted, firstly, that the matters raised by that request do not pass the threshold test under Part 18 because they do not relate to any matters in dispute. If I address the matter as if paragraph 9 of the Reply remains in its unamended form, that is not a submission that I could accept. In defence, quite clearly AET says that Bromcom would not have been successful in any event. Bromcom's response to that was to positively assert previous success as a bidder in a lawful award process, and a lawful award process in which price was weighted against the evaluation of other criteria in accordance with the terms of the Framework Agreement. That squarely put Bromcom's previous success into issue as a relevant matter going to causation in these proceedings.
17. In other circumstances, further information about other call-off processes would not be material or relevant to a matter in dispute. But in the circumstances in which Bromcom has itself put that matter in issue in relation to causation, and this request has arisen, it is not in my view a fishing expedition to ask for further information. It is the product of Bromcom's own case. Albeit it is a case which they now intend to withdraw by amendment, it seems to me that those matters remain in issue whether the amendments are permitted or not. That is because Part 18 requests are not limited to matters in dispute on the pleadings and can encompass broader matters in dispute. What is in dispute here is causation and what Bromcom itself has raised by the reference in the Reply, whether or not that remains on the face of the Reply, is its own success in previous lawful tenders. That remains relevant to causation.
18. Mr Paines argues that the fact that the issue has been raised on the pleadings does not itself make the matter something in dispute, because each evaluation is distinct and what may have been done on a previous evaluation, and what weightings may have been applied to criteria in a previous evaluation, is simply not evidentially relevant. There is considerable force in that argument, but it remains, in my view, the position that the claimant has asserted, supported by a statement of truth, that in previous lawful awards it has been successful on the basis of weighted criteria; that contention was

advanced specifically to support its case on causation; and the claimant has, therefore, brought this into play on causation.

19. Thus far, therefore, I am with the defendants that the threshold test of a matter in dispute in the proceedings is passed. But the submission that Mr Paines makes in relation to previous evaluations also goes to the question of whether the threshold in the Practice Direction to Part 18 is passed, namely that set out in paragraph 1.2 that a request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the party making the request, to prepare his own case or to understand the case he has to meet.
20. That issue has troubled me more in relation to this application. Is it reasonably necessary for the defendants to know, in relation to their ability to prepare their own case or understand the case they have to meet, what other bids Bromcom has been successful in? And, if these are matters within Bromcom's knowledge, is it reasonably necessary for them to know how Bromcom's bid was evaluated, against what criteria, with what weightings and with what resultant scores in any previous bids and call-offs? I consider that it is reasonably necessary for AET to know those matters, if indeed they are within Bromcom's knowledge, in the particular circumstances of this case where even though they now seek to delete the relevant paragraphs of the reply, it is the claimant itself who has put those previous evaluations in issue.
21. Therefore I consider the threshold test for a Part 18 request to have been passed, and for the reasons I have already given I do not consider AET to be "fishing". I will therefore grant this application in respect of the questions that fall under request number 1, that is 1.1, 1.2, 1.3, 1.8, 1.9, 1.10 and 1.11.
22. I do not grant the application in relation to the questions in the mop-up question number 2. Without setting that question out in full, it seems to me that it goes rather further than simply a mop-up, not least in question 2.4 where it is specifically asked whether it is Bromcom's case that any contract it has entered into was not the subject of a lawful award process, and if so, why. I limit the order that is to be made to the questions I have identified that arise under request number 1.

23. I should add this. There is an alternative basis on which it has been submitted that the requests made are relevant to a matter in dispute between the parties, and that is what in the course of argument I have broadly referred to as the contradiction argument. I observed earlier that the trigger for the request for further information was the apparent contradiction between the claim for declaratory relief in the Particulars of Claim and what was said in the Reply about success pursuant to a lawful process.
24. The defendants, AET, prior to seeing that Reply, had set out a case in Defence which in broad terms was that, since Bromcom had entered into previous contracts following a call-off process under the framework agreement, it could not now assert that the framework agreement itself did not permit of a lawful procurement process. That is the first part of Bromcom's claim, which it is intended to withdraw by amendment.
25. In support of that case, AET said that if Bromcom had entered into contracts which had been achieved or procured through an unlawful process, Bromcom was either estopped from denying that the Framework Agreement allowed for a lawful process, or estopped from asserting that the Framework Agreement did not admit of a lawful process, or that Bromcom had somehow impliedly agreed with all those operating under the Framework Agreement that it would not take any point that the Framework Agreement itself did not allow for a lawful procurement.
26. It would seem to me that those arguments would fall away with the proposed amendment, and all that could conceivably be left is an argument, on a similar legal basis, that Bromcom is estopped from denying that the process the subject matter of this dispute was lawful, or that it had entered into an agreement that it would not challenge this particular process.
27. I have to say, and it is no more than an observation at this stage, that I have considerable difficulty with accepting that either of those arguments is likely to succeed. At one point this application was close to descending into the argument of that point of principle. It would not have been appropriate for it to do so, and for exactly that reason I do no more than make my observation in that respect.

28. The conclusion that I have reached in respect of the application itself does not turn on that alternative ground, and therefore I say no more about it.

(After further submissions)

29. I refuse permission to appeal. I will in due course fill out the appropriate form, but I will say orally that the point does not seem to me to be arguable. The basis of my decision is that at the point when the matter was pleaded it was relevant to causation. Even if that element of the pleading is deleted it remains a matter in issue going to causation, not because it was once pleaded in a formal sense, but because the claimant itself has put in issue, in a document verified by a statement of truth, the fact that on previous occasions it has been successful in lawful procurements. Once that is put in issue it remains relevant to a matter in dispute in respect of causation. It is not an answer to say that it would not normally be relevant to causation, since the claimant has itself raised the issue. I do not see that that is contrary to authority or wrong in principle, and permission to appeal is refused. But Bromcom has 21 days in which to file any Notice of Appeal and may have 28 days to Reply to the Request.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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