THE HIGH COURT

COMMERCIAL COURT

[2024] IEHC 65

RECORD NUMBER 2024/882JR

BETWEEN

KERRIGAN SHEANON NEWMAN UNLIMITED COMPANY

APPLICANT

AND

SUSTAINABLE ENERGY AUTHORITY OF IRELAND

RESPONDENT

JUDGMENT OF Mr. Justice Twomey delivered on the 6th day of February, 2025

INTRODUCTION

1. This case involves a claim by the applicant ("**KSN**") that the price contained in the notice party's ("**Abtran**") winning tender was too low, or to put it another way, it was too competitive. To support its claim that Abtran's winning tender price is too low, KSN points out that Abtran's bid is 30% lower than KSN, the incumbent provider of the services, is being paid. This is against a background where, as noted below, where the Court of Appeal has observed that there is *'an important public policy in promoting a **competitive** tendering process'* (Emphasis added)).

2. As part of its challenge to the legality of the tender process, the losing tenderer (KSN) wants the respondent ("**SEAI**"), the public body that awarded the contract to the winning tenderer (Abtran), to disclose details of Abtran's lower and confidential pricing structure, which was a key factor in Abtran winning the tender.

3. Accordingly, this case deals with the important issue of whether the confidential pricing structure which was submitted by a successful tenderer should be disclosed to an unsuccessful tenderer, who is inevitably a direct competitor of the successful tenderer. Another way to ask this question is whether one firm can get access to its competitor's pricing structure by simply challenging the tender process to which they were both party and claiming that a court needs access to the pricing structure to resolve the dispute.

4. This case also deals with a related issue of confidentiality rings (i.e. a group of named individuals who are the only ones permitted to view certain confidential documentation produced by way of discovery). The order that is being sought from the Court by the losing tenderer in this regard is that a director of the losing tenderer, and so not just the losing tenderer's lawyers, should be permitted to be part of the confidentiality ring. If this order is granted, the director of the losing tenderer would have access to the winning tenderer's confidential material which is to be disclosed by the SEAI. In considering this novel application, this Court has been advised that no Irish court has to date permitted an employee/officer of a litigant, as distinct from its lawyers, to be part of a confidentiality ring in public procurement proceedings.

5. The two issues (disclosure of the winning tenderer's pricing structure and whether the losing tenderer is allowed to be part of the confidentiality ring) are inter-connected to some degree. This is because what is at stake is not just the entitlement of a litigant to get access to information which s/he believes will support his/her claim. Also at stake is the extent of the trust which tenderers can have in the non-disclosure of their confidential information when they are submitting tenders to a public body as part of a public procurement process. For this reason, the consideration of this issue is also of some general application, beyond the otherwise mundane facts of a discovery application, in which one litigant seeks the disclosure of documents from an opposing litigant on the grounds that they are relevant to the dispute.

BACKGROUND

6. These two issues arose in relation to the award of a contract by the SEAI for the provision of managing agent services in connection with the retrofitting of hundreds of thousands of properties throughout the State, i.e. doing surveys, building energy ratings (BER), inspections *etc* of properties throughout Ireland. The contract is set to last for up to 5 years and is estimated to be worth €75 million.

7. KSN is the current supplier of these services to the SEAI and has been supplying those services to the SEAI since 2012. However, it was unsuccessful in a recent public procurement process, which it is now challenging. At the end of that public procurement process on 14 June 2024, the SEAI decided to award the contract for these services to the notice party, Abtran. KSN's grounds for challenging the procurement process can be summarised as follows.

8. Firstly, KSN claims that the public procurement process was unlawful because it says that the SEAI failed to identify the Abtran bid as being abnormally low. In this regard, KSN claims that the Abtran bid was 49% lower than KSN's bid and that it was 30% below the price which KSN is getting under its existing contract with the SEAI. Counsel for KSN observed that while the existence of a lower bid might appear to be good news for the taxpayer, it is not in fact good news if it is not genuinely performable at the price offered, which KSN appears to believe is the case with the Abtran bid.

9. It is important to note however that the SEAI did in fact identify the Abtran bid as appearing to be *abnormally low* (as well as identifying that the KSN bid appeared to be *abnormally high*). For this reason, it is more accurate to say that what is really in dispute in this regard is whether the SEAI erred manifestly and in law in concluding, *after its enquiries*, that the evidence supplied to it by Abtran satisfactorily accounted for the apparently low level of prices. Therefore the resolution of this dispute will come down primarily to an analysis of the

actions of the SEAI and its dealings with Abtran during the period between the receipt of the initial tender and the decision to award Abtran the contract.

10. Secondly, KSN claims that the procurement process was unlawful because Abtran's bid did not comply with the SEAI's Statement of Requirements. This is because KSN claims that Abtran's bid provides for its surveys, BER reports, inspections *etc* to be done *at the one time*, even though this is not permitted by the Statement of Requirements. This is because KSN claims that the Statement of Requirements means that the services must be carried out separately, and it seems priced separately. The SEAI takes the contrary view, namely that the Statement of Requirements does in fact permit these services to be carried out in the manner in which Abtran tendered for the contract and so for them to be priced as a combination of services, as was done by Abtran. Accordingly, the resolution of this aspect of the dispute is primarily one of interpretation of the Statement of Requirements: does it, or does it not, permit the various services (surveys, BER, inspections *etc*) to be delivered at the one time and to be priced as a combination?

11. These two arguments (i.e. the allegedly abnormally low price and the legality of combining services) are interconnected in the sense that KSN claims that the provision of the BER, inspection, survey services *etc* during the one site visit, rather than separately, will lead to considerable savings and so might explain why Abtran's tender price was apparently abnormally low. This is because a significant part of the costs under the contract is the time and expense taken to visit individual properties. For example, KSN claims that a saving of €9 million could be made if pre-BER assessments and surveys *could* be combined, which of course they say is not the case under their interpretation of the Statement of Requirements.

<u>The documents being sought</u>

12. Against this background KSN is seeking discovery of various categories of documents.

<u>Category 1 – Disclosure of pricing structure of the winning tenderer</u>

"Those parts of the successful tenderer, Abtran Unlimited Company (Abtran's) tender containing its response to the Cost Criterion, comprised of sub-criteria C1 (Cost of Core Services) and C2 (Cost of Value Added Services)".

13. It is clear that if discovery is ordered in these terms this will disclose to Abtran's competitor, KSN, the price per unit in Abtran's tender and the manner in which Abtran has combined the various services (BER assessments, surveys, inspections *etc*) and how it has priced them.

14. The disclosure of a firm's pricing structure to a competitor firm is undoubtedly a major issue, even if it is relevant to the dispute to which they are both a party. However, as detailed below, KSN argues that the disclosure of Abtran's pricing structure is nonetheless necessary for the resolution of the dispute.

Category 6 – Disclosure of extent of combination of services of winning tenderer

15. The next category of documents is also related to the pricing structure, since it concerns the extent that Abtran's tender was predicated on the combination of the services to be provided by Abtran and thus how those combinations were priced by Abtran. It is as follows:

"All documents evidencing and/or recording:

The SEAI's and the ICPA's [Independent Chair and Process Auditor] consideration of Abtran's proposal to combine the delivery of certain services under the Contract, in such a way that staff would be deployed to carry out a combination of pre-BER assessments, surveys, inspections, and other items outlined in the pricing schedule, across single or multiple schemes, simultaneously; and

The relevant parts of the Abtran tender setting out its methodology for delivering the services the subject of the Contract, its methodology for satisfying the minimum qualifying threshold under Criterion AM1 (Core

Services) and R3 (Resourcing Strategy for Field Service Resources), and its proposed methodology for combining the delivery of the services mentioned above."

16. This category is alleged to be relevant because KSN claims that the Statement of Requirements does not permit any combination of services and so, on its case, any documentary evidence of such combination would be relevant to its claim that Abtran's bid is outside the terms of the Statement of Requirements.

Category 4 – Communications of SEAI with adviser relating to Abtran's bid

17. The final category of documents sought is:

"All documents evidencing and/or recording communications between Kroll and the SEAI and/or advice given by Kroll to the SEAI concerning the issue of whether or not the tender price submitted by Abtran was abnormally low, including advice given by Kroll concerning the matters which should be raised by the SEAI with Abtran and what methodology should be adopted by the SEAI in assessing Abtran's pricing and, in particular, whether the Abtran tender price was abnormally low, and any document evidencing or recording the SEAI's consideration of this advice."

18. This category concerns advice obtained from Kroll, which firm was engaged to assist the SEAI in determining whether Abtran had supplied evidence which satisfactorily accounted for the price proposed, after the SEAI had determined that it appeared to be abnormally low.

THE RELEVANT LAW

19. The general principles applicable to the discovery of documents does not need to be restated, since it is well established that for a document to be discoverable it should be relevant and necessary to the resolution of the dispute between the parties. (*Tobin v Minister for Defence* [2020] 1 IR 211 at para 25 *et seq*).

Discovery of confidential information

20. One of the reasons it might not be *necessary* to discover a document, that is relevant, is if that document is confidential. This is because it is clear that confidentiality should be respected unless:

> *'the production of confidential documentation proves* ***truly*** *necessary for the just resolution of proceedings*' (Emphasis added) (per Clarke C.J. in *Tobin* at para 44).

21. It seems to this Court, that in light of Clarke C.J.'s emphasis on production being *'truly'* necessary, that when one is dealing with a document containing confidential information it is not just a case of it being discoverable if, on balance, its disclosure is necessary. Rather, because of the importance which the courts attach to confidentiality, it must be very clear that the confidential document is necessary for the just resolution of the dispute, before it will be disclosed (or in the words of Clarke C.J., it must be *'truly'* necessary).

Discovery of confidential information which relates to pricing

22. In this case, one is dealing with a particular category of confidential information, namely Abtran's pricing structure. Thus, one is dealing with a disclosure of commercially sensitive information that is likely to be damaging to Abtran's business. Indeed, this is vividly illustrated by the approach of KSN when it came to disclosing its own pricing information, and in particular its decision to redact, in these proceedings, its tender submission from 14 years ago (in 2011) when it was first awarded the contract by the SEAI. In refusing to disclose that information, Mr. Michael Slevin, a director of KSN, swears that it would be *'damaging'* to KSN if the *'commercially sensitive'* information contained in that tender was disclosed to Abtran. Thus, one can conclude that KSN's request that Abtran's pricing information be disclosed to it relates to the disclosure of commercially sensitive information that would be damaging to Abtran.

Discovery of confidential pricing information in procurement proceedings

23. Furthermore, one is dealing with the discovery of this confidential pricing information in the context of a public procurement challenge. Thus, one is *not* dealing with a person (who is seeking the discovery) who is *not* a competitor and so might have no use for the information apart from the proceedings. This is because in procurement proceedings, the person (seeking the discovery of the confidential information) is inevitably *the competitor* of the party whose confidential information is sought to be disclosed.

24. It is not surprising therefore that Mr. Justin Travers ("**Mr. Travers**"), who is a director of KSN, does not dispute Abtran's claim that disclosure of its pricing would have the very gravest implications. This is clear from Mr. Travers' affidavit in which he states that:

> "[…] I note that in his affidavit on behalf of Abtran, the successful tenderer, Mr. Fitzgerald strongly emphasises the highly confidential and commercially sensitive nature of Abtran's tender and any documents concerning its tender, and at paragraph 25 of his replying affidavit, he avers that **pricing is one of the most commercially sensitive aspects of any tenderer's tender and that disclosure of Abtran's pricing to a competitor would have the *'the very gravest implications'***". (Emphasis added)

25. Thus, Mr. Travers does not dispute this drastic characterisation of the disclosure of the pricing structure. Yet if a tenderer's confidential pricing structures were to be disclosed to a competitor when a tender is challenged (simply because the challenger claims it is necessary to resolve the dispute), this would put the very *raison d'être* for the whole procurement process operated by the State in jeopardy. This is because when a tenderer is putting forward its best price and its pricing structure and the basis for that pricing structure in the tender, the tenderer is putting considerable trust in the procurement process and in particular that it will not be disclosed to competitors unless absolutely necessary. This is because confidentiality is an indispensable part of the procurement process. As noted by Hogan J. in *Word Perfect*

Translation Services Ltd v Minister for Public Expenditure and Reform [2018] IECA 35 at para 17:

> *'Confidentiality and the legitimate protection of business secrets are indispensable features of a tender process because this calls upon potential business rivals to advance their best case in the tender, often revealing their business plans, methods and pricing strategies in the process. There is, of course, an important public policy in promoting a competitive tendering process. That public policy would be impaired – perhaps even jeopardised – if highly sensitive tender documentation could readily be disclosed via a subsequent discovery process to business rivals because this would inevitably tend to inhibit potential tenderers advancing their best case.'*

On this basis, at para 22, the Court of Appeal went on to hold that in that case that:

> *'...access to a rival's tender documentation via the discovery process is not just governed simply by the standard requirements of relevance and necessity. Rather, the case for discovery of this documentation must be convincingly established as indispensable for the fair disposal of the procurement challenge.'*

26. Accordingly, when one is dealing with an application for the disclosure of confidential pricing information by a losing tenderer, it must be *'convincingly'* established that it is *'indispensable'* for the fair resolution of the dispute.

27. More generally regarding discovery in procurement cases, O'Donnell J. (as he then was) noted in *Word Perfect Translation v Minister for Public Expenditure & Reform* [2019] IESC 38 at para 11 noted that a court has to be careful and rigorous in relation to any application for discovery. In that instance he was dealing with the disclosure of marks awarded to a winning tenderer (which could not, in this Court's view, be considered as confidential to the winning tenderer as its own pricing structure):

"An unsuccessful party cannot be permitted to gain access to the full tender of the successful party simply by alleging that the marks awarded to the latter were too high and constituted a manifest error. But as long as that is a viable ground for challenge, it is difficult to see how it can be advanced without sight of the tender, particularly where the reasons given are limited. It may be that if more detail is given in the reasons letter, that would mean that discovery would not require to be ordered unless the challenger could make a convincing case from the reasons that a manifest error could be in principle identified from the existing material. Even then, however, the question of the correctness of the marks, or at least the absence of manifest error in that regard, may require some consideration of the marks and the tenders submitted. There is no perfect solution to this problem, and ***there may be no other course than to proceed carefully and rigorously,*** *as the Court of Appeal did in this case, in attempting to balance the different public interests involved." (Emphasis added)*

<u>Discovery of confidential 'low' pricing information in procurement proceedings</u>

28. It is also worth noting that in this case we are dealing with an application for discovery of details, not just of a winning tender's pricing structure, but of their *very low* or *very competitive* pricing structure that was key to their winning the tender. This is because Abtran scored 360 out of 360 marks available in respect of Cost of Core Services, while KSN scored 177.1 out of 360 marks.

29. Bearing this in mind, it is relevant to note that in *Word Perfect* [2020] IESC 56 at para 10.56, the Supreme Court specifically noted that a challenge to a procurement process regarding an abnormally low tender price *normally* only arises where a tenderer, with an abnormally low tender price, challenges its *failure* to win the tender.

> "In **normal course**, the question of an excessively low tender arises in the context of an awarding authority declining to award the contract concerned to a tenderer about whom it may be said that the tender is so low as to cast doubt on the ability of the tendering party to perform the contract at that price. On the other hand, disclosing information in regard to the successful party's tender would involve Word Perfect gaining access to **highly sensitive commercial information concerning the pricing structure (and possibly the cost base) of a major competitor** with whom it is in frequent competition." (Emphasis added)

30. Thus, in the *'normal'* situation, the losing tenderer is the one with the lower prices, who is challenging its failure to be awarded the contract as it failed to win the tender, even though its prices were the lowest. In this situation the lower prices of the losing tender are likely to be disclosed by it, as part of its challenge. Accordingly, the issue of a court-ordered disclosure of this low or abnormally low pricing structure is unlikely to arise

31. However, in that *Word Perfect* case, the point being made by the Supreme Court (which can also be made in this case) is that it is unusual that the challenge regarding abnormally low prices is by the tenderer with the *higher* price who lost out on the tender.

32. Having made this distinction (between *an award* to the lowest priced tenderer and *a failure to award* to the lowest price tenderer) the Supreme Court then went on to refuse to disclose details of the winning tenderer's low pricing in that case. The implication, in this Court's view, from the Supreme Court pointing out that it was not *'normal'* to have a challenge to a 'low' price winning a tender, was that, when one is dealing with a challenge to a tender, which led to a competitive process, i.e. low prices (one of the aims of the procurement process), one needs to be *even more careful*, than one otherwise might be, not to undermine that competitive effect, by disclosing the winning tender's *low* prices and the basis for them.

33. To put it another way, it seems to this Court that what the Supreme Court appears to be emphasising is that while disclosing a winning tender's *higher* pricing should only be done if necessary for the just resolution of the proceedings, this requirement is even more acute if one is purporting to disclose a winning tender's *lower* pricing, since that would undermine to a greater extent the aim of tenders (to produce competitive/lower bids).

Conclusion regarding the caselaw relevant to this case

34. All of these observations by the courts are an important background to KSN's request for discovery not only of the Abtran's pricing (Category 1), but also its request for discovery of details of the extent of the combination of Abtran's services and how they are priced by Abtran (Category 6).

35. In summary, one is dealing with the disclosure not just of confidential information, but of confidential information relating to pricing. Furthermore, it relates to the disclosure of this pricing information as part of a challenge to a procurement process and so disclosure to a competitor (the losing tenderer). Not only that, but it relates to the disclosure of the pricing structure of a winning bid that was allegedly too low, i.e. that was arguably *too competitive* (against a backdrop of a public policy of seeking to promote *'competitive'* tendering).

36. It seems clear to this Court that there is a high bar to cross when it comes to disclosing the pricing structure of a winning tenderer who has competitively won a tender, particularly where the losing tenderer alleges that it was underbid by a tender price that was too low/too competitive. This Court concludes that the caselaw makes clear that a court should only disclose this information where it is absolutely necessary to achieve a just resolution of the proceedings.

ANALYSIS

37. As already noted, Categories 1 and 6 are aimed at discovering the pricing structure of Abtran and the combination of services, which impacts on the pricing structure.

Disclosure of Abtran's pricing structure/combination of services

38. In this instance, there can be little doubt that the disclosure of Abtran's pricing structure would have grave implications for competition between KSN and Abtran particularly regarding any re-running of this tender process (which is a likely consequence of KSN's challenge being successful).

39. This is because if KSN is successful, it is likely that Abtran and KSN would have to tender again, but this time KSN would have the 'inside track' regarding how Abtran structures its pricing. It is important to bear in mind that this is the real-life effect of the rather dry language of the discovery orders which KSN is seeking as part of its challenge to the legality of the tender process undertaken by the SEAI.

40. For its part, KSN nonetheless claims that the disclosure of Abtran's pricing structure is necessary for the just resolution of the proceedings. In analysing the 'necessity' of such disclosure, the pleadings are key.

41. At para 12.3 of the Amended Statement of Grounds, KSN pleads:

> "The Respondent failed to act in accordance with Regulation 69 of the European Union (Award of Public Authority Contracts) Regulations 2016 (SI 284 of 2016) (the 2016 Regulations) and Section 19 of the ISFT [Invitation to Submit Final Tenders]. Having identified the tender of the Successful Tenderer as appearing to be abnormally low, the Respondent erred manifestly and in law in concluding that that tender was not abnormally low and/or that such evidence as was supplied to it satisfactorily accounted for the low level of price or costs proposed."

42. In its written submission at para 57, KSN claims that the pricing documents are needed in relation to the

"…issue of whether the tender submitted by Abtran was abnormally low and/or whether Abtran submitted sufficient evidence to the SEAI to satisfactorily account for the low level of prices and/or costs contained in its tender."

43. This rationale for the disclosure of the pricing documents is clearly based on Ground 1 of the Amended Statement of Grounds, in which KSN pleads that the SEAI

"…erred manifestly and in law in concluding that that tender was not abnormally law and/or that such evidence as was supplied to it satisfactorily accounted for the low level of price or costs proposed."

44. The first point to note is that the key issue in dispute between the parties is not whether or not the tender was abnormally low, since it is clear that, after reviewing the tenders, the SEAI reached the conclusion that Abtran's tender *appeared* to be abnormally low. For this reason it undertook a process, in which it required Abtran to explain its pricing and in which the SEAI considered whether Abtran satisfactorily accounted for the apparently low pricing. This process undertaken by the SEAI was in purported compliance with Regulation 69 of the European Union (Award of Public Authority Contracts) Regulations 2016 (SI 284 of 2016) and Section 19 of the ISFT, which state, insofar as relevant:

"69. (1) A contracting authority shall require economic operators to explain the price or costs proposed in a tender which appears to be abnormally low in relation to the works, supplies or services.

[…]

(3) The contracting authority shall assess the information provided under this Regulation by consulting the tenderer.

(4) A contracting authority may only reject a tender where the evidence supplied under this Regulation does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2)."

Section 19 of the Invitation to Submit Final Tenders

"19. Abnormal Tenders

19.1 SEAI will notify Tenderers if it considers any element of the proposed cost to be abnormally high or low. Tenderers should note that, if any element of the Tender is deemed by SEAI to be abnormally high or low SEAI will treat the entire Tender as an Abnormal Tender.

19.2 If any element of a Tender is considered to be abnormal by reference to industry norms and prevailing market conditions, SEAI will require the Tenderer to explain the relevant element.

19.3 SEAI will reject any Tender which it considers to be an Abnormal Tender and where it considers that the evidence supplied does not satisfactorily account for the price proposed.

19.4 Nothing in this paragraph shall fetter SEAI's rights under Regulation 69 of the Procurement Regulations."

All of this means that the focus of the trial judge will *not* be on whether Abtran's bid was abnormally low. Rather, the key issue in dispute is whether the *process* adopted by the SEAI complied with the foregoing provisions of Regulation 69 and Section 19. In this regard, as is clear from *BAM PPP PGGM Infrastructure Cooperatie UA v National Treasury Management Agency* [2015] IEHC 246, the focus of a court in a public procurement challenge is not on factual disputes or differences of opinion (such as whether the tender

was abnormally low or not). Instead, it is on the legality of the decision made by the contracting authority, and in this case, it is on the legality of the process which led the SEAI to accept Abtran's tender, notwithstanding it *appearing* to be abnormally low. In this respect, and as noted by Ryan P. in the *BAM* case at para 31, there are *'analogies'* between judicial review and public procurement and it is important, when considering discovery in public procurement cases, to bear this in mind. As a result, discovery is likely to be much more confined in public procurement cases, just as is the case in judicial review cases. Accordingly Geoghegan J.'s comments in *Carlow Kilkenny Radio Ltd v Broadcasting Commission* [2003] IESC 200 at p 531, although given in a judicial review context, are nonetheless relevant to public procurement cases:

> "[I]t is trite law that judicial review is not concerned with the correctness of a decision but rather with the way that the decision is arrived at. It follows that the categories of documents which a court would consider were necessary to be discovered will be much more confined than if the litigation related to the merits the case."

45. Accordingly, there is less likely to be a need for extensive discovery in a public procurement case such as this one. With this in mind, it seems to this Court that information about pricing structure is not *necessary* to be disclosed in a dispute about *how* the SEAI reached its decision, particularly when the SEAI has already agreed to provide the following discovery to KSN:

> "Category 2
>
> All documents evidencing and/or recording SEAI's consideration of the issue of whether the tender submitted by Abtran was abnormally low, including but not limited to:
>
> (a) the final evaluation report;
>
> (b) any and all preceding drafts of the evaluation report;

(c) minutes and/or attendance notes taken during the evaluation by the SEAI's evaluation committees;

(d) emails, notes, memoranda, and diary entries relevant to the evaluation process;

(e) any video or audio recordings of the evaluation meetings;

(f) internal deliberations relating to the evaluation;

(g) calculations relating to the evaluation;

(h) any instructions, advice or communications issued between, to or from any member of the SEAI's evaluation committee, including the ICPA or any person communicating on their behalf prior to and/or during the evaluation process relating to the award of the contract and/or the application or marking of the aforementioned criteria, including any marking schemes.

…

Category 3

All communications between the SEAI and Abtran after the submission of tenders up to the date of the notification of the decision to award the Contract with regard to the Cost Criterion, including, but not limited to, the communications referred to at paragraphs 98-109 of the Amended Statement of Opposition.

…

Category 5

All documents evidencing and/or recording the SEAI's and/or ICPA's consideration of whether Abtran complied with the Service Delivery Selection Criterion and, in particular, all documents evidencing and/or recording the SEAI's consideration of Abtran's experience in providing managing agent type services of similar scope, scale, duration and complexity to those under the Contract; and any relevant parts of the

Abtran tender setting out the experience relied upon by Abtran in order to satisfy the Service Delivery Selection Criterion."

46. When one considers the key issue in dispute, it seems to this Court that the documentation caught by these three categories, and in particular the post-tender communication between the SEAI and Abtran, is what is relevant and necessary to its resolution.

47. In addition, it is to be noted that the SEAI, although believing that it was not required to make any discovery under Categories 1 and 6, nonetheless made the following offers in order to avoid the necessity for a court hearing on KSN's discovery application:

"(i) Discovery of Category 1 on an iterated basis;

(ii) Discovery of relevant extracts of the evaluation report in relation to Category 6(a); and

(iii) Discovery of Category 6(b) on an iterated basis."

The *State Litigation Principles* (June 2023) emphasis that the State should endeavour to avoid litigation and/or deal with litigation efficiently, where possible. In this regard, it is important to recognise that a State body, the SEAI, made *bona fide* efforts to avoid the need for there to be a day long court hearing on this issue, by making an offer, which it felt it was not obliged to make, *albeit* that in this case it did not lead to a resolution of the motion brought by KSN.

48. It is also important to bear in mind that it is not in dispute that Abtran's pricing was based on a combination of services, being provided during the course of one site visit. This is because Ms. Marion O'Brien, Director of Corporate Services in the SEAI, stated on affidavit in relation to Abtran's winning tender that:

"[Abtran] noted that post-BERs and inspections can also be carried out by the same contractor. In practice this would mean a significant reduction to the number of site

visits with travel time to site a significant component of the costs of delivering the service"

49. Thus, the fact that Abtran provided for its pricing to be based on a combination of its services during one site visit (with the resulting reduction in pricing) is not in dispute. Accordingly, it is not necessary, in this Court's view, for Abtran to have to disclose details of how the combination of services impacted on its pricing (sought in Category 6). What is in dispute is whether this combination of services, with its downward effect on pricing, is *permitted* by the terms of the Statement of Requirements, which is a question of the interpretation of the Statement of Requirements and any other documents.

50. Accordingly, it seems to this Court that it is the documents, which the SEAI has already agreed to provide, rather than details of Abtran's pricing structure and the combination of its services, which will enable KSN to substantiate its case, or not, against the SEAI.

51. Thus, in this Court's view, when one considers what has been agreed to be provided and one bears in mind that a court should proceed *'carefully and rigorously'* in considering whether to disclose the (pricing) details of a successful tender, and bearing in mind the real dispute between the parties, the disclosure of Abtran's pricing structure (which is effectively being sought in Categories 1 and 6) is not, in this Court's view necessary for the resolution of the dispute between the parties.

52. In addition, if one looks at Category 6 in isolation, the reason KSN claims that its disclosure is necessary is because of its claim that the combination of services is not permitted by the Statement of Requirements. However, as previously noted, this is an issue regarding the interpretation of that document (and related documents). This will be done by the trial judge from the perspective of a reasonably well informed and normally diligent tenderer (a 'RWIND' tenderer). Furthermore, the question of the interpretation of a tender document is a matter for the court (see *Word Perfect Translation v Minister for Public Expenditure & Reform* [2019]

IESC 38 at para 39). As is clear from *BAM* at para 41, there is usually no need for extensive discovery of documentation where a court is being asked to interpret the meaning of words in a contract or statutory provision, as in this case. Hence this is another reason why the disclosure of Category 6 is not necessary.

Disclosure of advice from Kroll

53. The other category of discovery is the communication between the SEAI and Kroll in Category 4.

54. KSN claims that

> "The discovery of these documents is necessary to for the fair resolution of the issue of whether Kroll's advice to the SEAI was correct or incorrect and, hence, whether the approach of the SEAI in relying on this advice in considering whether Abtran had submitted an abnormally low tender was adequate and/or appropriate."

55. However, the question, of whether Kroll's advice was correct or not, is not pleaded and so is not an issue in this case. Furthermore, Kroll's advice might have been incorrect, but the SEAI might not have followed it, so the correctness of Kroll's advice is irrelevant to the core issue of whether the SEAI complied with Regulation 69 and/or Section 19 of the ISFT.

56. This is because the SEAI has provided uncontroverted sworn evidence that Kroll did not verify the information in Abtran's tender and that Kroll did not assess whether the tender was abnormally low. The sworn evidence is that Kroll advised the SEAI on the *'adoption of a robust and appropriate methodology for assessing'* whether Abtran's tender was abnormally low. Since discovery is not available to test this sworn evidence (*Shortt v Dublin City Council* [2003] 2 IR 69 at p 89), it follows that it is not necessary to disclose this category.

57. In addition, the SEAI has agreed in Category 3 to provide all communications regarding the pricing of the tender between the SEAI and Abtran after the submissions of tenders up to time of the decision to award the contract. The core issue regarding an alleged breach of

Regulation 69 and/or Section 19 of the IFST will therefore be determined primarily by the documents in Category 3. Accordingly, this Court does not believe that the documents in Category 4 are necessary.

The Confidentiality Ring

58. A confidentiality ring imposes limitations on who is permitted to view certain confidential documentation produced by way of discovery in litigation. Typically a party's lawyer or lawyers are part of a confidentiality ring and so are permitted to see another party's confidential information. In this regard, uncontroverted submissions were made that there has been no reported instance in this jurisdiction of a court in a public procurement case permitting a representative of an unsuccessful tenderer (as distinct from its lawyers) to be part of a confidentiality ring.

59. Yet in this case, KSN argues that one of its directors (Mr. Travers) should be permitted to be part of the confidentiality ring. In order to persuade the Court to make such an order, Mr. Travers offers to give an undertaking that he would not be involved in any re-running of this tender (if one was ordered), that he would not disclose any confidential information acquired if he was part of the confidentiality ring or use it for any purpose, other than the proceedings.

60. The wide-ranging nature of the undertaking being offered by Mr. Travers illustrates just how fundamental the information is, to which he is seeking access. Yet he believes that this will be ameliorated by, in layman's language, a 'promise' (*albeit* in the form of an undertaking to a court) not to use that information for any purpose (other than to support his claim that the tender was unlawful).

61. As is clear from the judgement of Costello J. in *Goode Concrete v CRH Plc & Ors* [2020] IECA 56 at para 148, an undertaking (not to use/disclose information) is a far from perfect solution to the risks that arise when one firm gains access to a competitor's confidential information. This is because she noted that in that case an undertaking:

"is of little practical use as none of the respondents **would have any way of policing** whether or not the information would be used for commercial advantage." (Emphasis added)

62. Indeed, perhaps, just as significant as the difficulty in policing such an undertaking is the fact that confidential information in relation to pricing or pricing structures, once it is known to Mr. Travers, cannot be unknown. Thus, even with the best will in the world, it will be difficult for a person in receipt of this information to avoid using it *unconsciously*. For this reason, this Court does not believe that the undertaking offered by Mr. Travers is the answer or ameliorates sufficiently the implications of him being in possession of the confidential information of a competitor, such as to permit him to be admitted to the confidentiality ring.

63. However, to support its claim for Mr. Travers to be admitted to the confidentiality ring, KSN claims that the area in which KSN operates of providing BER, survey, inspection services *etc* is very specialised and therefore Mr. Traver's presence is required to give instructions to KSN's lawyers in connection with the discovered documentation.

64. However, before considering this claim, one needs first to consider what Clarke C.J. said about confidentiality rings in *Word Perfect Translation Service Limited v Minister for Public Expenditure and Reform* [2020] IESC 56 at para 8.7:

> "Where a confidentiality ring is in place, the confidential documents and information in question are ordinarily made available in confidence **only to the parties' legal advisors**. In circumstances where the information in question relates to a **scientific or technical matter, the confidentiality ring may be expanded to include experts in that field**. Where a confidentiality ring is established, it is usually provided for in the order for discovery" (Emphasis added)

Thus, the starting point is that confidentiality rings are *'ordinarily'* only open to the lawyers.

65. Indeed, in the *ex-temp* judgment delivered on 26 July 2022, McDonald J. in another procurement case *CHC Ireland DAC v Minister for Transport* (Record No 2023/680/JR) refused to permit a nominated independent expert, let alone a representative of the applicant, to enter the confidentiality ring.

66. In his judgment Clarke C.J. quotes from *SRCL v National Health Service Commissioning Board* [2018] EWHC 1985 where Fraser J., citing from the judgement of Hamblen J. in *Libyan Investment Authority v Société Générale SA and others* [2014] EWHC 550 (Comm)) stated:

> ‘(1) The court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club [must be considered] …
>
> (2) The inherent desirability of including at least one duly appointed representative of each party…
>
> (3) The importance of the confidential information…
>
> (4) The nature of the confidential information…
>
> (5) …the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information.'

67. In light of this caselaw, KSN sought to argue that because Clarke C.J. quoted from Fraser J.'s judgment, which included this reference to the desirability of a representative of a party being in the ring, that Clarke C.J. was, in effect, stating that it is a default rule that a confidentiality ring contains an employee/officer of each party.

68. This Court does not agree with this analysis. Firstly, Clarke C.J. is simply *quoting* a paragraph which contains five sections, one of which refers to the desirability of a duly appointed representative. Secondly, while he quoted this extract, he did not adopt this extract as a statement of the law. Thirdly, from this quotation, it is not clear if this reference to a

‘representative’ of a party is intended (by Clarke C.J.) to be a reference to a lawyer, an independent expert, or some other third party, who would be a ‘representative’ of a litigant *or* whether a ‘representative’ of a party is intended to be an employee/officer of that party. Fourthly, and most importantly, when it comes to Clarke C.J.’s own words, rather than the words of the extract from which he quotes, he makes absolutely clear that the default rule is that the documents in a confidentiality ring are *‘ordinarily made available in confidence only to the parties’ legal advisors’* and he makes no reference to this default rule extending to employees/officers of a party. Fifthly, this extract is clearly *obiter*, since Clarke C.J. did not admit an employee/office of the applicant to a confidentiality ring in that case. Thus, in this Court’s view, it is clear that the default rule is that confidentiality rings are restricted to the lawyers.

69. KSN also relied on the High Court case of *Koger v O’Donnell* [2009] IEHC 385 in which Kelly J. (as he then was) permitted a representative of the plaintiff to have access to the defendant’s computer program in a trade secret dispute. However, that case does not assist KSN in this Court’s view, since firstly, it is not a procurement case and secondly, the law relating to confidentiality rings has, since the *Koger* case, been dealt with by the Supreme Court in *Word Perfect Translation Services Limited v Minister for Public Expenditure and Reform* [2020] IESC 56, which made it clear that confidential documents are *‘ordinarily made available in confidence only’* to the party’s lawyers.

70. Since this is the default rule, this Court can see no basis for extending the confidentiality ring to Mr. Travers. In particular, this Court does not accept that there is any particularly specialised feature of the discovered documentation, dealing as it does with BERs, surveys, inspections etc. Furthermore, this Court does not believe that this is such a specialised area that it cannot be explained by Mr. Travers to his lawyers. Moreover, it could not be said to be scientific or technical information, which was referenced by Clarke C.J., as the only exception

area which might justify the extension of the confidentiality ring (but even then, Clarke C.J. did not see it as justifying the extension of the confidentiality ring to one of the parties to the litigation as sought by KSN, but rather to an independent expert).

CONCLUSION

71. KSN, as a losing tenderer, wants the winning tenderer, Abtran, to disclose its *lower* and confidential pricing structure, which was the key to it winning the tender.

72. In addition, KSN wants one of its own directors, and so not just KSN's lawyers, to be part of a confidential ring which would have sight of the confidential information of Abtran's which is being disclosed as part of the discovery to be provided by the SEAI.

73. For the reasons set out above, this Court has refused KSN's applications. However, looking at the matter more generally, in cases such as these, one has to balance, on the one hand, the interests of a losing tenderer in seeking to discover evidence that will support his/her claim that a *particular* procurement process was unlawful with, on the other hand, the much broader and very serious undermining effect it would have on competition and public procurement generally, if losing tenderers could have access to the highly sensitive pricing information of their competitors (by the simple act of challenging a public procurement process and claiming that the documents are needed to resolve the dispute).

74. It seems to this Court that there would have to be a very compelling set of circumstances for the losing tenderer, when weighing up the these two competing interests, for the balance to fall in favour of the one-off challenge to a procurement process and against the public interest in protecting the integrity of procurement as a whole and in particular the need to encourage participants to be completely open with a State body regarding their most sensitive and confidential information, in order to achieve the most competitive tender.

75. In this case, KSN did not provide compelling arguments to justify the very significant encroachment on the confidentiality of a winning tenderer's bid, which they are seeking. Accordingly, this Court has little hesitation in refusing the application for the disclosure of Abtran's pricing information and in refusing the request that a director of KSN be entitled to be part of the confidentiality ring, and thereby have access to the confidential information of its competitor, Abtran.

76. This case will be provisionally put in for mention at 10.45 a.m. a week from its delivery to deal with any final orders and costs. However, on the assumption that it should not be necessary to expend costs on a further court sitting, and in order to facilitate the parties agreeing all outstanding matters, the parties have liberty to notify the Registrar if such a listing proves to be unnecessary. This is particularly so in light of the clear implication from *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189 at paragraph 94, that there is an onus on lawyers to take a broad-brush approach to costs and not to engage in the inefficient use of court resources and costly *'nit-picking'*.