

OUTER HOUSE, COURT OF SESSION

[2014] CSOH 21
OPINION OF LORD TYRE

in the cause

PATERSONS OF GREENOAKHILL LIMITED

Pursuers:

against

SOUTH LANARKSHIRE COUNCIL

Defenders:

Pursuers: Sandison QC; Maclay Murray & Spens LLP

Defenders: Lake QC; Simpson & Marwick WS

7 February 2014

Introduction

[1] This is an application for an interim order under regulation 48(1) of the Public Contracts (Scotland) Regulations 2012. If the order were made, it would bring to an end the prohibition contained in regulation 47(9) that prevents the defenders, because of service of these proceedings, from entering into a contract following a tender process for receipt, separation, recycling and disposal of unsorted municipal waste ("the contract"). The matter has had to be dealt with urgently because the period for which the successful tenderers have agreed to hold open their tenders for acceptance expires on 7 February. That being so, I do not intend to set out the factual circumstances, including the relevant provisions of the Invitation to Tender ("ITT") as fully as I might otherwise have done.

The challenge to the tender process

[2] The pursuers were invited to tender for the contract by means of the ITT which was published in the Official Journal on 16 July 2013. The contract is for a two-year duration and is divided into two Lots covering different geographical areas. The estimated value of the contract is £9.5 million per annum for both Lots combined. The target commencement date for the provision of the service is 1 April 2014.

[3] The pursuers submitted their tender timeously on 22 August 2013. On 3 December 2013 the defenders advised the pursuers by letter ("the first debrief letter") that their tender had not been successful. Their bid for both Lots had been rejected at the quality threshold stage, leaving only one tenderer to proceed to the price evaluation stage for Lot 1 and two tenderers to proceed to that stage for Lot 2. The first debrief letter stated that the evaluation of the tenders had been completed in accordance with the award criteria detailed in the ITT. The names of the successful bidders in respect of each Lot were disclosed. The letter included tables showing individual scores allocated against the award criteria in respect of the pursuers' submission and compared them with the scores of the successful bidder in each case.

[4] It is accepted by the defenders that the tables contained certain erroneous figures. The pursuers' agents also complained to the defenders that the letter of 3 December 2013 did not comply with regulation 32(2) of

the 2012 Regulations in that it did not contain (i) a summary of reasons why the bid was unsuccessful or (ii) an explanation of the characteristics and relative advantages of the successful tenderers. It was also asserted that a full breakdown of the scores against each criterion and sub-criterion had to be provided together with a narrative explanation of why the winner scored more heavily in the relevant areas.

[5] On 13 December 2013 the defenders sent a second debrief letter to the pursuers. This was an expanded version of the first debrief letter. It now included a breakdown of scores for each sub-criterion together with a 31/2 page "Quality Bid Evaluation Summary". Erroneous figures in the tables were corrected; this was said not to make any difference to the final outcome. The "standstill period" required by regulation 32(3) was extended to 27 December 2013.

[6] The pursuers' agents replied on 19 December 2013 expressing the view that the second debrief letter still failed to comply with regulation 32(2). The pursuers' complaints were set out in detail and a compliant debrief letter was requested, albeit doubt was expressed that it could address the issues that had been raised. The defenders undertook not to award the contract before midnight on 3 January 2014 and, on 27 December 2013, sent a detailed response to the letter of 19 December 2013, rejecting the assertion that they had failed to comply with their obligations under the 2012 Regulations. Further errors in the table of scores were, however, intimated and corrected.

[7] On 31 December 2013 the pursuers raised the present action, in which they seek (1) declarator that the tender process was unlawful in respect that it was conducted in breach of the defenders' duties to them in terms of the 2012 Regulations, and (2) an order in terms of regulation 48(1)(b)(i) of the 2012 Regulations setting aside the decision taken by the defenders to award the contract in respect of Lots 1 and 2 respectively to other operators.

Grounds of challenge

[8] The pursuers' grounds of challenge are set out in the summons with reference, for further detail, to their agents' letter of 19 December 2013. I shall not set out all of the grounds in detail here because at the hearing of the motion with which this opinion is concerned, senior counsel for the pursuers presented some of the points made with different emphasis and did not argue some of the points at all (although he did not formally depart from any of them). In summary, the pursuers' grounds of challenge, as set out in the summons, are:

- (i) that the debrief letters do not comply with regulation 32;
- (ii) that the defenders accepted an offer that was unsustainable with regard to the Guaranteed Recycling Percentage;
- (iii) that the defenders took into account irrelevant and non-transparent evaluation criteria;
- (iv) that the defenders failed to take into account considerations relevant to the quality evaluation; and
- (v) that by adopting a two-stage process in which tenderers could be eliminated at the quality evaluation stage the defenders failed to identify the most economically advantageous tender, and thereby breached regulation 30(1).

The test to be applied

[9] Regulation 48(2) provides as follows:

"In any interim proceedings under the Part the Court may decide not to grant an interim order when the negative consequences of such an order are likely to outweigh the benefits, having regard to the following considerations -

- (a) that decisions taken by a contracting authority must be reviewed effectively and, in particular, as rapidly as possible;
- (b) the probable consequences of an interim order for all interests likely to be harmed; and
- (c) the public interest."

Arguments for the parties

[10] Senior counsel for the defenders invited me to adopt the approach set out by Lord Glennie in *Elekta Ltd v Common Services Agency* 2011 SLT 815 at paragraph 26, which has since been adopted by Lord Hodge in *Clinical Solutions International Ltd v NHS 24* [2012] CSOH 10 at paragraph 7 and in *Amey LG Ltd v Scottish Ministers* [2012] CSOH 81 at paragraph 36 and by Lord Malcolm in *Shetland Line (1984) Ltd v Scottish Ministers* [2012] CSOH 99 at paragraph 11:

"It seems to me that what requires to be considered is the strength of the parties' cases, the balance of convenience having regard, but not overwhelming regard, to the question of whether damages might be an adequate remedy, and the public interest."

Lord Glennie's formulation had in turn been based on analysis of English case law. It is fair to say that its adoption in the subsequent Scottish cases to which I have referred generally reflected consensus between counsel. On the basis of this formulation, senior counsel for the defenders submitted that in deciding whether to grant an interim order under regulation 48(2) I should have regard to three criteria, namely (i) the strength of the pursuers' case; (ii) the balance of convenience; and (iii) the public interest.

[11] I understood senior counsel for the pursuers, at the outset of his submission in response, to take issue with the apparent judicial consensus that I should have regard to the first of these criteria. It was contended that the court should instead focus its attention upon the precise terms of regulation 48(2). As the submission was developed, however, I understood it to be that although it was relevant in principle to have regard to the strength of the pursuers' case, as part of the exercise of deciding whether the negative consequences of making an order were likely to outweigh the benefits, and also in relation to sub-paragraph 48(2)(b), it would be inappropriate to do so in the present case because I could not at this stage reach any view as to whether the pursuers' prospects of success were greater or less than 50%. In the end, therefore, there seemed to be little between the parties on the matter of principle and I am content to adopt Lord Glennie's formulation of the test as a starting point, bearing in mind the pursuers' stated position that in the circumstances of this case no weight should be attached to the first of the three criteria.

Strength of the pursuers' case

[12] I therefore begin by considering whether it is possible to make an assessment of the strength of the pursuers' case, under reference to the grounds of challenge as they were argued at the hearing before me. In doing so I emphasise that my view is a preliminary one based upon the documents and other information presently before me.

Ground of challenge 1: Failure to comply with the debrief requirements of regulation 32

[13] In *Strabag Benelux NV v EU Council* [2003] ECR II-138, the Court of First Instance, under reference to previous judgments, described the duty to state reasons that is reproduced in UK domestic law as regulation 32 as a duty on the public authority to disclose its reasoning

"...in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the Court to exercise its supervisory jurisdiction".

Senior counsel for the defenders noted that the reasoning held in the *Strabag* case itself to satisfy this test was not very detailed, and submitted that the purpose thus expressed was a more restricted one than, for example, the familiar duty imposed by domestic administrative law to give proper and adequate reasons; all that regulation 32 required was a summary of reasons for the specific purposes mentioned. For his part, senior counsel for the pursuers referred to *Evropaiki Dynamiki v Court of Justice of the European Union* [2012] EUECJ T-447/10 as an indication that although the test had remained the same since at least *Strabag*, the standard of detail of reasoning required to satisfy the test was now higher. In the present case, the reasons provided by the defenders in the debrief letters did not meet the standard now required. In relation to certain paragraphs, there was a failure to explain how the defenders had come to the view that they had expressed that the submission of the successful bidder was better and therefore merited a higher score. No explanation was provided of the features taken into account. The criterion of "deliverability" was too vague to meet the ECJ's standard. To describe a submission as having "lacked depth" was vague and meaningless. In the case of sub-criteria where the pursuers' tender had been awarded the same score as the successful tenderer, it was not possible to ascertain whether there was an error or a lack of transparency because no details of the characteristics of the other tender were provided.

[14] In response, senior counsel for the defenders submitted that when one read the debrief letters together with the tables of scores and the information and instructions contained in the ITT itself, there was no breach of the defenders' duty under regulation 32. The *Evropaiki Dynamiki* case was distinguishable on its facts because the ITT in the present case provided a greater degree of specification, and left less to tenderers' discretion. The expression "deliverability" was adequately explained in the ITT. So far as the evaluative aspects were concerned, the pursuers were entitled only to sufficient detail to demonstrate that there had been no manifest error (an expression to which I return below). The reasons provided by the defenders, when the two debrief letters and the subsequent letter from their agents were read together, fulfilled this obligation.

[15] I agree with senior counsel for the defenders that the *Evropaiki Dynamiki* case is distinguishable on its facts and that the criticisms made by the Court of the statement of reasons provided must be assessed against the circumstances of that case and in particular the "not inconsiderable discretion" which the employer (the Court itself) had reserved to itself. When read with the terms of the ITT, I do not consider, on present information, that there is a strong case for regarding the reasoning provided by the defenders in the present case as vague or incomprehensible. It should be noted in particular that the defenders placed considerable weight, throughout their evaluation, upon their judgment that the successful bidders had provided better and more comprehensive supporting evidence for their submissions. I deal with the provision of such "evidence" in another context below but in the context of the present ground of challenge my impression at this stage of the proceedings is that this affords an adequate and readily understandable reason for awarding higher scores to the successful tenderers than to the pursuers. The criteria required to demonstrate "deliverability" are set out in the ITT. I am not persuaded by the defenders' submission that the standard of reasons required by application of the European case law is lower for regulation 32 than the usual domestic law standard; a summary of reasons which failed to inform a tenderer of the reasons why it had been unsuccessful could hardly be described as containing proper and adequate reasons for the decision. The pursuers were entitled in terms of regulation 32 to be advised, *inter alia*, of the characteristics and relative advantages of the successful tender. It does not seem to me that the pursuers have made out a strong case that that entitlement was not met.

Ground of challenge 2 - Unsustainable proposal for Guaranteed Recycling Percentage

[16] A key aspect of the quality criteria in the ITT was the recycling of contract waste. Tenderers were required to provide a Guaranteed Recycling Percentage ("GRP"), i.e. the minimum percentage of waste delivered by the tenderer that the tenderer undertook to recycle during the relevant contract year, and were also required to provide details of how they proposed to achieve the GRP for each year. The scoring of GRP was explained in Appendix 2 to Section 12 of the ITT. The tenderer submitting the highest GRP would be awarded a maximum mark of 10; every other tenderer would be scored according to the proportion which its GRP bore to the highest GRP. The pursuers assert, and offer to prove, that the GRPs proposed by the

successful bidders must have been too high to be practically sustainable. This assertion is supported by affidavits by the pursuers' managing director and general manager.

[17] Senior counsel for the pursuers submitted that the defenders, by indicating their intention to award contracts on the basis of GRP proposals which are in fact unsustainable, have made a manifest error necessitating the intervention of the court. The reference to "manifest error" appears in the judgment of Morgan J in *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 at paragraphs 35-38, in a passage which has been cited and adopted in a number of Scottish decisions including the *Shetland Line* case to which I have already referred. The passage in question reads as follows:

"35. The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.

- If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a 'margin of appreciation' as to the extent to which it will, or will not, comply with its obligations.
- In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a 'manifest error'.
- When referring to 'manifest' error, the word 'manifest' does not require any exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made."

Morgan J's phrase "manifest error" is derived from European case law which I need not cite.

[18] Senior counsel for the defenders submitted that the phrase "manifest error" referred to errors which were obvious from the terms of the tender itself. It did not cover disputed issues of fact which required to be investigated at a proof. Senior counsel for the pursuers, on the other hand, submitted that it was sufficient for him to aver that an obvious error had been made, even if proof of the error, and of its obviousness, might be complex. It seems to me that the defenders' interpretation of "manifest" is somewhat too narrow. I note, for example, that in *Healthcare at Home Ltd v Common Services Agency* [2012] CSOH 75, 2013 SC 411, Lord Hodge discussed the evidence led before him in the course of his assessment of whether the authority had been guilty of a manifest error of assessment, and there is no suggestion in the Opinion of the Court at paragraphs 66-67 that this was not the correct approach. I do not think that it would be wise for me to attempt to define the limits of "manifest error" in the present context. I am, however, satisfied that the pursuers have not, as matters stand, made out a strong case that the defenders have committed a manifest error of assessment in relation to sustainable GRP. The ITT required provision of a considerable amount of detail of tenderers' proposed arrangements in order that the defenders might satisfy themselves as to the "deliverability" of the proposed GRP. All tenderers would be aware of the contractual penalties, including termination of the contract, that could be imposed for failure to achieve the GRP. The pursuers' challenge depends solely upon the opinions of its own senior managers that whatever percentages were proposed by the successful bidders were not achievable. In a matter which might require lengthy proof, that is not enough to persuade me that this challenge is more likely than not to succeed.

Grounds of challenge 3 and 4: account taken of irrelevant and non-transparent evaluation criteria; failure to take relevant considerations into account

[19] Parties addressed these grounds of challenge together and I shall do likewise. Senior counsel for the pursuers noted that so far as transparency and relevancy of criteria were concerned, the defenders had no margin of appreciation. The principal complaint in relation to transparency was that the defenders had consistently differentiated between the pursuers' tender on the one hand and the successful bidders' tenders on the other on the ground that the latter had been supported by evidence or by a higher standard of evidence. It was not apparent from the ITT that evidence required to be submitted in support of tenders unless

expressly requested; there were, indeed, indications that if material other than that specifically requested was submitted along with the tender, no attention would be paid to it. Accordingly, it was argued, the procedure had not been transparent because in evaluating the bids the defenders had applied a criterion not disclosed to tenderers. Reference was made to *European Commission v Netherlands* [2012] EUECJ C-368/10 at paragraphs 87-95. A particular point was made with regard to the defenders' scoring of the pursuers' proposed site traffic management plan. The letter dated 27 December 2013 from the defenders' agents had addressed this point specifically and had stated that the pursuers' tender had failed to include such a plan. This was a manifest error; the pursuers had in fact included a schematic roads layout which, because of the simplicity of the pursuers' site arrangements, was all that was required to explain their proposed traffic management scheme.

[20] As presently advised, my assessment of these challenges is that they have very little prospect of success. Appendix 2 to Section 12 of the ITT states expressly that higher scores will be awarded to proposals which are supported by a high standard of evidence and that the highest scores will be given to proposals supported by "comprehensive and robust evidence". I agree with the observation by senior counsel for the defenders that it would be wrong to read too much into the use of words such as "evidence", "information" and "details" where they appear elsewhere in the ITT. It seems to me that there is no strongly arguable complaint to be made as to transparency. Nor do I consider that the defenders' agents' statement that no traffic management plan was provided is clearly to be regarded as a manifest error as opposed to an expression of judgment, given that the document supplied by the pursuers was a schematic diagram rather than a plan.

Ground of challenge 5: Failure to identify the most economically advantageous tender

[21] The submission ultimately presented on behalf of the pursuers in respect of this ground of challenge was a somewhat narrow one. Departing from the challenge stated in pre-action correspondence and in the summons, senior counsel for the pursuers accepted that a two-stage assessment process, with quality assessed first, was in principle compliant with the Regulations. The problem in the present case arose because the sanction for failure to achieve the GRP - which was a vital component of the quality assessment - was financial. Quality and price thus became intermingled and in this particular respect it was not legitimate to purport to operate a two-stage process. It appears to me that this submission is predicated upon the existence of a manifest error in relation to achievable GRP and I have already expressed the view that no strong case has been made that such an error has been committed.

Overall assessment

[22] In some cases the court has found it possible, at the stage of considering the removal of the regulation 47(9) prohibition, to assess a pursuer's case as having no reasonable prospect of success. I do not go so far in this case. However, my assessment is that each of the grounds of challenge invoked by the pursuers is weak, for the various reasons that I have set out. I therefore consider (i) that, contrary to the submission on behalf of the pursuers, it is appropriate to take strength of case into account in applying the test in regulation 48(2), and (ii) that the effect of so doing favours the making of an interim order bringing the prohibition to an end, because (a) the negative consequences of such an order are not likely to outweigh the benefits if the action is ultimately going to fail, and (b) the probable consequences of making an interim order are likely to be beneficial to those who would be adversely affected by leaving the prohibition in place pending the outcome of an unsuccessful challenge.

Balance of convenience and public interest

[23] With that in mind I turn to consider the remaining criteria, namely balance of convenience and public interest. Counsel were agreed that these criteria overlapped and could conveniently be addressed together.

[24] Senior counsel for the defenders submitted that there would be substantial prejudice to the defenders, and to the public whose interests they represented, if the prohibition were permitted to remain in place. The new contracts are intended to commence as soon as existing contracts come to an end on 31 March 2014.

These proceedings will not be resolved before that date. If no order were made, the defenders would require to negotiate the provision of waste receipt and recycling services with effect from 1 April. It was likely that the price of the services would go up. In any event they would be deprived of certainty and of the benefit of the reduced prices offered in the tenders that they wished to accept. They could not reasonably enter into a contract with the pursuers to cover the period pending resolution of the action, not least because the pursuers' tender had already been found to fail to meet the defenders' quality criteria. The defenders would suffer reputational damage and would have difficulty satisfying Government recycling objectives. In contrast, the pursuers would suffer no prejudice if an order were made because they would have an alternative remedy in damages for the loss of a chance if the action succeeded. In *Shetland Line*, Lord Malcolm had rejected the contention that the remedy of reduction took priority over damages. In the context of regulation 48(2)(a), a decision of a contracting authority was reviewed "effectively" if damages were available in the event of a successful challenge.

[25] Senior counsel for the pursuers submitted that the prejudice asserted by the defenders was largely illusory. In the short term, waste could continue to be received and recycled exactly as if the proposed contract was in place. No explanation had been given by the defenders as to why prices would be higher if a temporary contract had to be concluded. If the defenders chose to continue to contract at an unnecessarily high price with the present incumbents (who were also the successful tenderers) then that was a matter for the defenders. The pursuers offered to provide the service at a lower rate. As regards the adequacy of damages as a remedy, if the defenders were free to enter into contracts before the court has had an opportunity properly to assess whether the tender process was compliant with the Regulations, it was hard to see how the review could be described as fully "effective". In the present case there was further prejudice to the pursuers, described in an affidavit by their finance director, which would arise from being unable to produce and sell gas from the waste that would be sent to landfill. This would be a difficult loss to prove and quantify, and if what was sought was loss of a chance, that would simply add a further layer of complication to the calculation.

[26] In my opinion the balance of convenience and the public interest favour the granting of an order bringing the regulation 47(9) prohibition to an end. I consider that there are clear advantages to the defenders and to the public whose interests they represent in the certainty of having in place, with effect from the expiry of the current arrangements, a contract on the terms desired by the defenders when they invited tenders. It seems to me that for various reasons, not least the defenders' quality assessment, it would be difficult for the defenders to enter into a temporary contract with the pursuers, and accordingly the defenders would be put in the position of having to purchase the services they require in the market, with consequent uncertainty and risk of additional cost. I was not addressed on any adverse consequences for the successful bidders were I to refuse to make the order sought. So far as the pursuers are concerned, I consider that the remedy of damages will afford, in the circumstances of this case, an adequate remedy if the action succeeds. I accept that proof of loss may not be straightforward but the court is accustomed to undertaking the task of quantifying loss of a chance, as are those who prepare and present cases for hearing before it.

[27] For these reasons I find that the application of the relevant criteria clearly indicates that I should grant an order bringing the regulation 47(9) prohibition to an end in respect of both Lots of the contract, and I shall pronounce an interlocutor to that effect. Questions of expenses are reserved.