

OUTER HOUSE, COURT OF SESSION

[2011] CSOH 22

OPINION OF LORD MENZIES

in the cause

HEALTHCARE AT HOME LTD

CA132/10

Pursuer;

against

THE COMMON SERVICES AGENCY

Defender:

Pursuer: Sandison, Q.C.; Maclay Murray & Spens LLP

Defender: S. Smith; R F Macdonald

For BUPA (Havers): Cormack, Solicitor-Advocate; McGrigors LLP

1 February 2011

[1] In this action the pursuer seeks an order in terms of Regulation 47A(1)(b)(i) of the Public Contracts (Scotland) Regulations 2006 (SSI 2006/1) as amended, ("the Regulations"), setting aside the decision of the defender to award the "NP 341/10 Trastuzumab Homecare and Near Patient Treatment Services" Framework Agreement to BUPA Home Healthcare Ltd ("BUPA").

[2] On about 24 February 2010 the defender, acting through its National Procurement division, invited tenders for the award of a single-supplier Framework Agreement, to endure for an extendable two year term, for a compounding, dispensing and delivery service of Trastuzumab (otherwise known as "Herceptin"), with a nursing administration and support service, to the homes of patients or other agreed designated delivery points within Scotland.

[3] The pursuer is an economic operator within the meaning of Regulation 4 of the Regulations. BUPA is another such economic operator. The defender is a contracting authority within the meaning of Regulation 3 of the Regulations. The defender's processes in relation to seeking tenders for, and awarding, the framework agreement, were subject to the terms of the Regulations. The defender was obliged to treat the pursuer equally and without discrimination and to act in a transparent and proportionate manner. The defender required to apply award criteria set in accordance with Regulation 30. The defender determined to select the most economically advantageous tender, evaluated against award criteria and weightings set out in the Tender Document.

[4] The pursuer submitted a tender for the award of the Framework Agreement on 7 April 2010. On 13 May 2010 it was advised by letter from the defender that its tender had been unsuccessful and that the successful tenderer had been BUPA. The pursuer was provided with details of the scoring process applied by the defender, and advised that in accordance with that process its own tender had been evaluated as scoring 89.06%, and BUPA's as scoring 90.48%. A statement of reasons why the pursuer was unsuccessful was also provided. The pursuer considered that the matters set out in the letter disclosed various failures on the part of the defender to discharge the obligations incumbent on it in terms of the Regulations. Following

correspondence, this action was raised. In it the pursuer makes averments challenging the way in which the defender assessed the pursuer's Tender Document. In particular, criticisms were made of the way in which the defender assessed sub-section 8.2.1, 8.3.1 and 8.3.2 of the Tender Document. The defender has sought to answer these criticisms in the defences.

[5] By interlocutor dated 15 October 2010, having heard submissions for the pursuer, the defender and BUPA, the court granted diligence for recovery of the documents called for in the specification of documents for the pursuer, number 11 of process and remitted the matter to a commissioner to excerpt and report, reserving all questions of confidentiality. This specification of documents sought the recovery of the tender submitted by BUPA to the defender, in order that excerpts might be taken therefrom of entries showing or tending to show five specified aspects. The commissioner carried out his excerpting role, which did not of course include considerations of confidentiality. By agreement between the parties, the pursuer's legal advisers were given access to the whole of the excerpted Tender Document, on the undertaking that they would not disclose its terms to the pursuer itself until issues of confidentiality had been agreed between the parties, which failing determined by the Court. Agreement could not be achieved, so the matter came before me on the pursuer's motion dated 13 January 2011 and BUPA's opposition thereto. I heard submissions for the pursuer and BUPA; counsel for the defender was present throughout but did not oppose the motion. I was provided with the full unredacted Tender Document, subject to the commissioner's excerpting, in a sealed confidential envelope (number 22 of process) and in another sealed confidential envelope the Tender Document excerpts with redactions made by BUPA on grounds of commercial confidentiality (number 23 of process). I also had the commissioner's report and the Tender Document excerpted by him (number 26 of process).

[6] Senior counsel for the pursuer began by observing that the procedures which had been carried out in this case were not directly comparable to the procedures considered in the English authorities. The documentary material had already been through what he described as a "double filter", as the Court had decided that the terms of the specification of documents (number 11 of process) were sufficiently relevant to allow a commission and diligence to be granted and thereafter the commissioner had considered the Tender Document and excerpted those parts which are not relevant for the purposes of the specification. Matters were therefore at a more advanced stage than that at which the Courts in England had considered the issue of confidentiality, and the possible safeguards discussed in the English authorities were less relevant here. I was also informed that the pursuer had already been given partial disclosure of some of those parts of the Tender Document for which BUPA claimed confidentiality as a result of an application which the pursuer made to the defender in terms of the Freedom of Information (Scotland) Act 2002.

[7] Senior counsel set out the respects in which disclosure of the whole Tender Document was important for the fair presentation of the case presently made by the pursuer, and also further points which the pursuer would seek to add or elaborate if allowed to rely on the material for which confidentiality was claimed. I do not repeat these points here.

[8] With regard to the law, senior counsel submitted that when determining an application of this sort in which the disclosure of documents claimed to be commercially confidential is sought, the Court requires to carry out a balancing exercise, weighing the confidentiality and commercial importance of the document to the haver against the degree to which the proper disposal of the litigation may be hampered by non disclosure. It might be that a document was highly confidential and contained vitally important and commercially sensitive material, and which might have only a peripheral relevance to the subject matter of a litigation. On the other hand, the commercial sensitivity of the document might be minimal, and a weak claim for confidentiality would carry little weight if the document was clearly relevant to the determination of a dispute before the Court. I was referred to the observations of the House of Lords in *Scientific Research Council v Nassé* [1980] A.C. 1028, and also to *Varec SA v Belgium* [2008] 2 CMLR 24, *Amaryllis Limited v HM Treasury (No. 2)* [2009] EWHC 1666 (TCC), [2009] BLR 425, and *Croft House Care Limited v Durham County Council* [2010] EWHC 909 (TCC).

[9] Senior counsel made it clear that the pursuer did not seek details of the names of any employees of BUPA, and was content that these should be redacted. He observed that on a previous occasion on which this case came before the court BUPA had indicated only one aspect of the tender documentation as confidential, namely the price tendered. There was no suggestion at that time that any of the material now said to be confidential was confidential. Moreover, BUPA were aware that they were tendering in the context of a public procurement regime and subject to the requirements of the Regulations, and that it was possible that competitors might be allowed sight of their tender documentation. They submitted their tender in the hope of obtaining a contract which would be profitable to them, but one of the possible consequences of submitting the tender was that it would not remain confidential.

[10] Senior counsel drew attention to the conditions of tender at paragraph 6.1 of the Invitation to Tender document (number 6/1 of process), which provided *inter alia* as follows:

"Nothing shall preclude the Authority from making public, under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 ('FOISA') or otherwise, details of all matters relating to this ITT and responses unless such details fall within an exemption under FOISA ... and (in respect of commercially sensitive information only) a Potential Framework Participant has advised the Authority in writing that disclosure of specified information would or would be likely to substantially prejudice the commercial interests of any person (including but not limited to the Potential Framework Participant or the Authority).

Potential Framework Participants should also note that the receipt of any material or document marked 'confidential' or equivalent by the Authority and/or any Participating Authority should not be taken to mean that the Authority and/or any Participating Authority accepts any duty of confidence by virtue of that marking."

Senior counsel observed that there was no suggestion that BUPA had advised the defender in writing about any such substantial prejudice, and such references as were made to confidentiality in some of the documents appended to the tender document fell far short of the requirements of Condition 6.1 quoted above. This is a relevant factor to be taken into account in the balancing exercise which the court requires to undertake.

[11] Senior counsel accepted that, all other things being equal, the tender document might contain information which BUPA would prefer not to fall into the hands of a competitor. However, all other things were not equal. The information contained in the tender document was not particularly sensitive or commercially valuable - there was no question of unique technical or scientific information. The details of practices and procedures which are contained within the tender document, and in the appendices thereto, have been compiled from public documents and are based on best practice.

[12] The solicitor advocate for BUPA opposed the motion on the primary ground that the redacted material falls to be regarded as confidential because it would be of material assistance to BUPA's competitors such as the pursuer, and sight of the redacted material is not necessary for a fair resolution of the issues in this litigation. If the court was not with him on this primary position, his secondary position was that additional protective measures should be considered in order to protect confidentiality, particularly in view of the fact that if the pursuer was successful in the present action it would be necessary to re-run the tender process. Safeguards such as undertakings that only a specified number of copies of the tender document would be taken, where these would be kept and who within the pursuer's organisation would be allowed to see these should be considered. If the tender process requires to be re-run, given the nature of the services which the tenderers were seeking to provide, it would probably be re-run on a very similar basis. The way in which BUPA sought to distinguish its offering from those of its competitors was confidential, and the process may be compromised if the pursuer has access to the redacted material. This was an important consideration in the balancing exercise - it was not necessary for BUPA to show that their tender document contained a trade secret or confidential technical or scientific information in order that their plea of confidentiality should be sustained. BUPA's argument was very similar to that set out in paragraph 9 of the *Croft House Care* case. He

accepted that BUPA did not attempt to attach confidentiality to the text of the tender document when it was submitted to the defender, but several of the documents appended to the tender bore a docquet stating "the contents of this document are strictly confidential and must not be divulged to any third party without the prior written permission of BUPA".

[13] The pursuer's case as presently pled does not require consideration of the BUPA tender - it is based on a challenge about the defender's treatment of the pursuer's tender, and does not pertain to the relative attributes of rival bids. The pursuer complains (1) that it did not receive adequate instructions in the Invitation to Tender document as to which features might be relevant, (2) that part of the pursuer's tender has been ignored by the defender, and (3) in the post-tender process the pursuer has not been given adequate material to demonstrate that the defender has acted fairly, equally and transparently. Sight of BUPA's tender is not relevant to any of these complaints. The dispute in this litigation can be dealt with by looking at the invitation to tender, the pursuer's response, the defender's marking of the pursuer's tender, and an evaluation of the information given by the defender to explain why the pursuer was not successful. The pursuer's complaint relates to the marking of its own tender; it is not trying to overturn the marking of the BUPA tender. Senior counsel for the pursuer had identified certain areas in which he would seek to amend the pursuer's pleadings if he was allowed to use the confidential material, but that would be an improper use of the material, and would simply be a fishing expedition.

[14] The solicitor advocate for BUPA went on to consider some elements of the BUPA tender which were most commercially sensitive to BUPA and caused most concern. The proposals in section 8.3.1 for contract implementation/change in business volume were precisely the sort of commercial evaluation which was of the essence of competitive tendering, and which tenderers would wish to keep from their competitors. He had no explanation as to why this had not been stated by BUPA to be commercially sensitive and confidential when the tender document was lodged - it may be that nobody in BUPA applied their minds to this at the time. However, as was observed in the *Croft House Care* case, an absence of a statement of confidentiality, while a factor properly to be taken into account, was not determinative. The information contained in section 8.3.2 regarding contingency proposals was also commercially sensitive, as were several of the internal BUPA memoranda appended to the tender document and dealing with subjects such as safeguarding vulnerable adults; complaint, accident and incident management; recall of non-compounded products; peripheral cannulation, and others. All of the material sought to be redacted would be of assistance to a competitor if the tender procedure requires to be re-run, and no compelling reasons have been offered on behalf of the pursuer as to why this information is necessary.

[15] In reply, senior counsel for the pursuer observed that the main concern expressed on behalf of BUPA appeared to be difficulties which disclosure of the BUPA tender documentation might cause if the tender process requires to be re-run; however, this is not a concern expressed by the defender, which would be the public body re-running the procedure. Unlike the *Croft House Care* case therefore, there was no question of public interest being prejudiced by the disclosure of this information; the only potential prejudice was commercial prejudice to BUPA. When assessing how much weight should be attached to that potential commercial prejudice, the court should bear in mind that the highest that the solicitor advocate for BUPA could go in his submissions was that the information contained in the tender document "may or may not be of use to a competitor".

Discussion

[16] On the basis of the authorities to which I was referred I am satisfied that the exercise which I require to carry out requires me to balance BUPA's right to confidentiality against the need for the dispute between the pursuer and the defender to be disposed of fairly. There is clearly a public interest in maintaining commercial confidentiality, but there is also a public interest in the open administration of justice.

[17] In the present case, I do not regard the claim by BUPA for confidentiality as being particularly strong. There is no question of highly sensitive technical or scientific information being contained in these documents. I do not intend by this observation to suggest that such technical or scientific information is

essential for a successful claim for confidentiality, but merely to indicate that one may loosely categorise information on a scale ranging from information which is of the highest commercial sensitivity to information of little sensitivity. The information contained in the tender documents in this case is such that, while I accept that BUPA would prefer it not to fall into the hands of their competitors, it falls towards the lower end of the scale of sensitivity.

[18] Another factor to which I am entitled to have regard is the fact that BUPA did not avail themselves of the opportunity of giving written advice to the defender that disclosure of any part of the tender documentation would be likely to substantially prejudice BUPA's commercial interest, although this was expressly provided for in condition 6.1 of the invitation to tender document. Again, this is not conclusive, but it is a factor which weighs against BUPA's argument for confidentiality.

[19] It is true that there is a docquet attached to the bottom of several of the memoranda which are appended to the tender document, stating that the contents of the document are strictly confidential and must not be divulged to any third party without the prior written permission of BUPA. However, this falls well short of the sort of written notice envisaged in condition 6.1 of the Invitation to Tender. Moreover, many of these memoranda are compiled from publicly available material and best practice; they appear to me to be the sort of document that any contractor working in this sector would be likely to have prepared, and any commercial prejudice to BUPA by this information being disclosed to a competitor appears to me to be minimal.

[20] On the other hand, there is some force in the submission for BUPA that this information is of peripheral relevance to the pursuer's action, at least as it is currently stated in the pleadings. The general thrust of the pursuer's claim is that the defender did not mark the pursuer's tender document correctly - the pursuer is not trying to overturn the marking of the BUPA tender, and the contents of the BUPA tender are therefore not of central importance to the pursuer's case as presently framed. I do not consider that it is a legitimate argument for disclosure of this documentation that the pursuer may seek to amend its pleadings if it is able to rely on this documentation. That would amount to a fishing expedition, which is not permissible under our procedures. This having been said however, although the main thrust of the pursuer's case is based on the way in which the defender marked the pursuer's tender, it seems to me inevitable that this will involve some comparison with the way in which the defender treated the BUPA tender. Such a comparative exercise is foreshadowed in the pursuer's averments at article 5 of condescendence on page 7 of the summons (as adjusted 25 November 2010):

"Had the defender properly considered the error reporting system described by the pursuer in subsection 7.5.5, it would have assessed that system as at least equivalently economically advantageous to that of the successful tenderer."

[21] Carrying out the balancing exercise between BUPA's right to confidentiality and the pursuer's right to obtain documentation necessary for the fair presentation of its case, I conclude that the commercial sensitivity of much of this tender document is so low that the right to confidentiality must yield to the right to disclosure of necessary information.

[22] There are however some parts of the tender document which I consider to be sufficiently commercially sensitive that they should not be disclosed. These are section 8.3.1 "contract implementation (change in business volume)" and 8.3.2 "contingency proposal", which I consider sufficiently confidential in their entirety that they should not be disclosed. Section 8.3.3 "stability of product" should be disclosed, but only subject to the redactions proposed by BUPA. None of the rest of the tender documentation sought in the motion for the pursuer is sufficiently confidential to outweigh the interests of the administration of justice in ordering disclosure. I therefore propose to grant the pursuer's motion, with the exception of items 4, 5, and the redacted portions of 6. I shall continue consideration of the pursuer's motion for seven days from the date of this opinion to enable discussion to take place as to what safeguards, by way of undertakings and restrictions as to the pursuer's use of the material to be disclosed, are appropriate. If agreement on these safeguards can be reached, the continued hearing can be discharged of consent, without appearance.