



OUTER HOUSE, COURT OF SESSION

[2016] CSOH 64

CA10/16

OPINION OF LORD DOHERTY

In the cause

SCOTT & CO (SCOTLAND) LLP

Pursuer:

against

ABERDEENSHIRE COUNCIL

Defender:

**Pursuer: McBrearty QC., J.N.M. MacGregor; ADLP Ltd**

**Defender: O'Neill, Solicitor Advocate; Brodies LLP**

26 April 2016

**Introduction**

[1] On 10 August 2015 the defender advertised a public procurement competition for the provision to it of sheriff officer services. The period of the contract was to be four years with the option of an extension for a further two years. The Public Contracts (Scotland) Regulations 2012 (“the Regulations”) applied to the competition. It was under the open procedure (in terms of regulations 15 and 19). Up to October 2015 the defender had contracted with the pursuer for the provision to it of sheriff officer services.

[2] On 5 January 2016 the pursuer was advised that its tender had been unsuccessful. In this action it avers that the defender has breached the Regulations in several respects. The effect of the action has been to prohibit the defender from concluding the agreement (regulation 47(9)). The matter which came before me on the Commercial Roll was a motion by the defender for an interim order to bring that prohibition to an end (regulation 47(9)(b)). I heard the motion on Friday 22 April 2016, and I continued it until Tuesday 26 April 2016 when I gave this decision in open court.

**The Regulations**

[3] The Regulations provide:

**“Part 1 GENERAL**

...

#### **4.— Economic operators**

- (1) In these Regulations, an “*economic operator*” means a contractor, a supplier or a services provider.
- (2) When these Regulations apply, a contracting authority must not treat a person who is not a national of a relevant State or is not established in a relevant State more favourably than one who is.
- (3) A contracting authority must—
- (a) treat economic operators equally and without discrimination; and
  - (b) act in a transparent and proportionate manner...

...

### **Part 5 THE AWARD OF A PUBLIC CONTRACT**

#### **30.— Criteria for the award of a public contract**

- (1) Subject to regulation 18(28) and to paragraphs (6) and (9) of this regulation, a contracting authority must award a public contract on the basis of the offer which—
- (a) is the most economically advantageous from the point of view of the contracting authority; or
  - (b) offers the lowest price.
- (2) In order to determine that an offer is the most economically advantageous, a contracting authority must use criteria linked to the subject matter of the contract which may include quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period or period of completion.
- (3) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it must state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.
- (4) When stating the weightings referred to in paragraph (3), a contracting authority may give the weightings a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.
- (5) Where, in the opinion of the contracting authority, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the contracting authority must indicate the criteria in descending order of importance in the contract notice or contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.

...

### **Part 9 APPLICATIONS TO THE COURT**

#### **47.— Enforcement of obligations**

...

- (9) Except in the case of a contract or framework agreement to which regulation 6 applies, and without prejudice to the application of any relevant standstill period, where proceedings under this Part are served on a contracting authority or concessionaire in relation to a contract that has not been entered into or a framework agreement that has not been concluded, the

contracting authority must not enter into the contract or conclude the framework agreement unless—

- (a) the proceedings are determined, discontinued or disposed of; or
- (b) the Court, by interim order, brings to an end the prohibition.

...

#### **48.— Powers and duties of the court**

...

(2) In any interim proceedings under this 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.

..."

### **The Invitation to Tender (“the ITT”)**

[4] In terms of section 2.1 of the ITT tenderers were required to submit:-

- “1. Completed Selection Questionnaire (see Section 6)
- 2. Completed Award Questionnaire/Method Statement (see Section 7)
- 3. Price Schedule (see Section 8)
- 4. Completed and Signed Declaration (see Section 9)”

Section 2.1 also provided:

#### **“Presentations**

Tenderers must be willing to attend at the Council, before its Officers, to give a presentation of how they would satisfy the Council’s requirement as outlined in this ITT.

#### **Site Visits**

The Council may wish to visit the Tenderer’s premises in order to assist its evaluation of the tender content to satisfy the Council’s requirement as outlined in this ITT.

Presentations and Site Visits will be included in the scoring for question D1 Section 7.”

Section 2.5 stated that responses would be evaluated against the pre-determined Evaluation Criteria set out in the ITT and that the award would be on the basis of the most economically advantageous tender. The responses of tenderers who reached the award stage would be evaluated against the Award Criteria. Quality was to be given 80% of the overall score and price 20%. The 80% for quality was divided between eighteen Quality Criteria set out in Questions D1 to D18 in Section 7. 20% of the quality score was for Question D1. Section 3 of the ITT was headed "SPECIFICATION". The subheading for Section 3.1 was "Requirement" and it stated:

"The Council is seeking to secure a supplier for the Provision of Sheriff Officer Services in accordance with the requirements detailed in this document."

Section 3.1 continued to provide a general description of the services to be supplied. The following sections contained more detailed requirements. For example, section 3.10 stated:

**"Remote access**

The tenderer must provide remote access to the Council in respect of the Council's accounts held on the Tenderer's appropriate computer system (Question D3 Section 7)."

For present purposes it is unnecessary to mention more than the terms of Questions D1, D3 and D11 of the Award Questionnaire:

**"D1**

You are invited to describe how you plan to deliver the Services to the Council. Please explain in detail how you would deliver the requirements as detailed in the Specification Section 3.1. Your response should include the following details as a minimum:

- Relevant Experience
- Relevant Qualifications
- Collection Methodology for all debt types including details of how you would deal with debts corporately for the Council
- Location of Office base
- Timetable for action following receipt of a debt for collection for all debt types and the timescales for follow up action and for further diligence
- Payment Methods
- Rent Evictions, Notice of Proceedings, Serving of Statutory documents

Site Visits and presentations will be included in the total scoring for this question...

**D3**

Please detail all communication methods to be used with both the Council and the Customer ... Please provide details on how the Council will remotely access your database in respect of the Council's accounts held on your system ...

## D11

### Management Information

Please detail what information you propose to provide to the Council to assist them in managing their requirements and managing this contract.

(Please provide examples of the format and content that you propose)...”

#### The pursuer’s tender and the site visit

[5] The pursuer duly submitted a bid. During the tender evaluation period officers of the defender carried out a site visit during which certain matters were demonstrated and certain information was provided by the representatives of the pursuer in response to questions by the officers.

#### The award to Stirling Park and the explanation provided by the defender

[6] By letter dated 5 January 2016 the defender advised the pursuer that it had been unsuccessful and that the winning bidder was Stirling Park LLP. The letter explained that while the pursuer’s submission was of a high standard Stirling Park had been given a higher score for quality. In fact, the only scoring difference between the pursuer and Stirling Park related to Question D1. In relation to the question Stirling Park was given the highest possible score (10) whereas the pursuer was given a score of 8. In explanation of the characteristics and relative advantages of the successful tender the defender indicated that access to the pursuer’s website

“was restrictive with debt types not linked together to show a true corporate picture of a debtor (*sic*) account. We found your system quite complex for debtors and staff members to navigate.

The winning tenderer’s approach provided a more user friendly website and council access. Debts are visible holistically and their technology allows real time updates from both the council and the provider and provided direct access to run management reports. Innovative ideas were also provided on the use of resources in the Aberdeenshire area.”

Following queries by the pursuer the defender issued a further letter dated 20 January 2016 to the pursuer’s solicitors. In that letter the defender stated:

“Question D1 relates to the delivery of the service and relates to how the bidder would deliver the “debts corporately”. It was the successful bidder’s innovative response to this element that in the opinion of the evaluation panel merited a score of 10 as opposed to your client’s score of 8. In the opinion of the evaluators the score of 10 was justified for the following reason:-

- Remote access via their website demonstrated how the debt will be dealt with at a corporate level, how easily their staff and the Council staff will identify whole debts at a glance without the requirement to search or log into different databases.
- Their website also enables communications both ways to receive information from the council but also for Council staff to provide information automatically to the Sheriff Officer staff, updating accounts instantly in real time, with no overnight download required.

- Management reports are also available to run on their website by Council staff, which will provide a simpler working practice to the Council and efficient interaction between parties. By comparison your client can provide management reports but Council staff have to submit a report request to their IT department.
- A sophisticated profiling system which generates recovery based on previous histories and a personalised approach where any review or broken arrangement will be dealt with by the same member of staff who set the arrangement up. Recovery letters can also be designed and personalised based on the type of debtor and account history...”

### **The pursuer’s challenge and its submissions in response to the defender’s motion**

[7] The pursuer seeks an order setting aside the defender’s decision to award the contract to Stirling Park, failing which it seeks damages.

[8] The first ground of challenge was that the defender has breached regulations 30(3) and 4(3) of the Regulations. The thrust of this challenge was two-fold. First, that the defender had used undisclosed criteria and weightings in its evaluation of the tenders. The reasonably well-informed and normally diligent (“RWIND”) tenderer would have understood Question D1 to be concerned with “core” sheriff officer services, not the ancillary matters dealt with in the other questions. It would have understood that the sort of differences relied upon by the defender would have been matters which, if legitimate matters for consideration, would have been scored only in answers to the other questions, not in the answer to Question D1. It would have understood that detail in relation to the computer system would have been assessed only under Question D3 and management information would have been assessed only under Question D11. That would have informed its response to Question D1. In any case there was no indication in the tender documents that there would be an assessment of how “user-friendly” the website/information technology/computer system would be; or how readily accessible and navigable it was for the defender’s staff or debtors. Even more fundamentally, ease of access and navigation, and user-friendliness, were opaque, subjective and intuitive matters in relation to which no objective criteria had been provided. There was a lack of transparency. In relation to this submission Mr McBrearty made reference to *Mears Limited v Leeds City Council* [2011] EWHC 1031 (TCC), per Ramsey J at para 122; and *Easycoach Limited v Department for Regional Development* [2012] NIQB 10, per McCloskey J at para 72.

[9] The second ground of challenge was that there had been manifest errors in scoring the pursuer’s bid. The defender had ignored material information provided by the pursuer in its tender submission and at the site visit. The defender had assessed the pursuer’s tender on the erroneous basis that the pursuer’s computer system/IT system/website lacked some of the functionality which the Stirling Park bid provided in relation to debt linkage, real time updates and the provision of management information. The affidavits lodged by the parties disclosed that there was a clear factual dispute as to what had been said by the pursuer’s representatives during the site visit. The divergence was puzzling but if, ultimately, the accounts of the pursuer’s representatives were accepted by the court, the defender would have proceeded on an erroneous basis. Until the matter was so determined the pursuer should be treated as having a *prima facie* case on this ground. Reference was made to *DWF LLP v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900, per Sir Robin Jacob at para 49, and to

*Counted 4 Community Interest Company v Sunderland City Council* [2015] EWHC 3898 (TCC), per Carr J at paras 35-37.

[10] Mr McBrearty submitted that in relation the first ground of challenge the strength of the *prima facie* case was compelling - particularly in relation to lack of transparency. Given the existence of the factual dispute it was clear that the matter could not be stated as highly in relation to the second ground, but there was a *prima facie* case standing the terms of the affidavits which the pursuer had produced. The pursuer's challenge could be determined rapidly in view of the availability of an early diet. On the other hand there would be very considerable difficulties in assessing damages (*cf. NATS (Services) Ltd v Gatwick Airport Ltd* [2015] PTSR 566, per Ramsey J at para 81 *et seq.*; *DWF LLP v Secretary of state for Business Innovation and Skills, supra*, at para 52; *Edenred (UK Group) Limited v HM Treasury* [2014] EWHC 3555 (QB), per Legatt J at para 16). The defender would not suffer material prejudice if the prohibition remained in place for a relatively short period. It was not an urgent contract. The defender had managed since the previous contract with the pursuer had expired in October 2015 without there being a new contract in place. The pursuer had offered to carry out the services meant in at the new contract price. If the defender did not take up that offer it could make other similar arrangements. Any such temporary arrangements - whether or not with the pursuer - would be very unlikely to be of a contract value which could give rise to a public procurement issue. The relevant threshold for application of the Regulations was about £180,000. The collection of debt of the order of £12 million would be needed to generate commission etc. of that magnitude. Given the delay since October 2015 a short further delay to determine the pursuer's challenge was not material. The prejudicial effects on the pursuer of the prohibition being lifted would outweigh the prejudice to the defender and Stirling Park of it remaining in place. The pursuer had an established workforce in the north of Scotland. There was a very real prospect they would have to be redeployed or made redundant if the award to Stirling Park stood. There was a strong public interest in the integrity of the public procurement process. For all these reasons the balance of convenience favoured the prohibition remaining in place pending an early full hearing. In the whole circumstances that was proportionate.

### **Submissions for the defender**

[11] Ms O'Neill submitted that the pursuer's grounds of challenge to the award did not give rise to a *prima facie* case. If any of them did, then it was at best a weak *prima facie* case.

[12] There was no substance in the complaint that in evaluating the response to Question D1 the defender had employed undisclosed criteria or criteria which were not relevant to that question. The pursuer's approach involved giving Question D1 a restrictive reading. It was not restricted to "core services" or the particular topics mentioned. That was not how it would have been understood by the RWIND tenderer. It was very plain from examination of the pursuer's response to the question that it had not in fact understood the question to have the restricted purview which it now contended it had. The ITT had made it perfectly plain that matters pertaining to a site visit would be scored under Question D1. The RWIND tenderer would have understood that.

[13] The defender had been perfectly entitled to have regard to all the matters which it did have regard to. On a reasonable reading of the criteria set out in the ITT all the matters the defender had had regard to fell within them. It defied credulity that the pursuer might think that ease of access and navigation, and user-friendliness, would not be relevant aspects of the criteria described in the ITT. The RWIND tenderer would have understood that they were relevant. They were not undisclosed sub-

criteria. It had not been necessary for the defender to formulate technical IT requirements in relation to these factors.

[14] The manifest error ground was ill-founded. The defender had had regard to everything the pursuer had said in its written response; but it had also had regard to the information provided, and the demonstration given, during the site visit. The affidavit from the defender's officer, Ms Smith, set that out. It was accepted that the accounts in the affidavits from the pursuer's Mr McLaughlin and Mr Lyall differed from Ms Smith's account; but it was inherently improbable that she had been told or shown the very different things that they say she was. Mr Lyall had been the person primarily involved in providing the demonstration and explanation at the site visit. The terms of his affidavit were, at best, obscure. That did not inspire confidence that he had, with clarity, communicated and demonstrated the matters which the pursuer maintains were communicated and demonstrated.

[15] If the court took the view that the pursuer had a *prima facie* case on any of the grounds of challenge, it was at best a weak one. The benefits of an order recalling the prohibition outweighed any negative consequences. There was a need for certainty. The previous contract had ended in October 2015. The new contract had been set to commence in February 2016. The defender and the successful bidder would be prejudiced by any further delay in the new contract taking effect. The successful bidder would have no means of recovering his loss. As usual, the defender would have an increased requirement for collection and enforcement during the month of May. If the prohibition continued there would be a risk that any temporary contractual arrangements made might be challengeable on the ground that a contract for them had not been put out to tender. If the prohibition was lifted and the pursuer succeeded at the end of the day, damages would be an adequate remedy. The assessment of damages would not be especially difficult.

### **Authorities**

[16] In addition to the authorities mentioned above reference was also made during submissions to *Lion Apparel Systems Limited v Firebuy Limited* [2007] EWHC 2179; *Acquatron Marine v Strathclyde Fire Board* [2007] CSOH 185; *Street Lighting Supplies & Co Ltd v Scotland Excel* [2014] CSOH 145; *Healthcare at Home Limited v Common Services Agency* [2012] CSOH 75; *Healthcare at Home Limited v Common Services Agency* 2014 S.C. (UKSC) 247; *Hastings & Co (Insolvency) Ltd v The Accountant in Bankruptcy* [2013] CSO 55; *Elekta Ltd v The Common Services Agency* 2011 SLT 815; and *Shetland Line (1984) Limited v The Scottish Ministers* [2012] CSOH 99.

### **Decision and reasons**

#### *The test for an interim order*

[17] It was common ground that in determining whether to grant an interim order I should consider the factors referred to in regulation 48(2), the strength of the pursuers' *prima facie* case, the balance of convenience, and whether damages would be an adequate remedy for the pursuer. As I have observed before (*Street Lighting Supplies & Co Ltd* [2014] CSOH 145, at para 5), this is now well trodden ground (*Elekta Ltd v The Common Services Agency*, *supra*, Lord Glennie at paragraph 26; *Shetland Line (1984) Ltd v The Scottish Ministers*, *supra*, Lord Malcolm at paragraphs 11 and 12; *Clinical Solutions International Ltd v NHS 24 and Capgemini* [2012] CSOH 10 at paragraphs 12 and 13; *Amey AG Ltd v The Scottish Ministers* [2012] CSOH 181 at paragraph 36; *Glasgow Rent Deposit & Support Scheme v Glasgow City Council and Ypeople Ltd* [2012] CSOH 199, Lord Malcolm at paragraph 7; *Hastings & Co (Insolvency) Ltd v Accountant*

in *Bankruptcy, supra*, Lord Hodge at paragraphs 53 and 54; *Patersons of Greenoakhill Ltd v South Lanarkshire Council* [2014] CSOH 21, Lord Tyre at paragraphs 10 and 11).

### *Strength of the pursuer's case*

[18] I begin by considering whether it is possible to make an assessment of the strength of the pursuer's case, under reference to the grounds of challenge as they were argued at the hearing before me. I emphasise that my views can only be preliminary, based upon the documents and upon the relatively brief submissions which were made at the hearing of the motion. No doubt, when a full hearing takes place the court will be better placed to judge the merits of each of the pursuer's challenges.

[19] In my opinion Mr McBrearty takes an unduly narrow view of the purview of Question D1. I am not persuaded that there is any sharp distinction or dichotomy between what Mr McBrearty suggests are "core services" in D1 on the one hand, and the matters in the remaining sections on the other hand. On the contrary, on a proper reading of D1 and of the ITT, D1 appears to me to have a wide scope. Matters which are relevant to other questions (*e.g.* D3 and D11) may also be relevant to D1. It seems plain from the pursuer's response to D1 that that was in fact how it understood the question. More importantly, I think it likely that the RWIND tenderer would have so understood the question.

[20] I am satisfied that the ITT made clear that the only place site visits and presentations were to be taken into account was in the scoring of D1 (see section 2.1; section 2.5 (p.11); Question D1). I think it is plain from section 2.1 that the site visits were to assist the evaluation of the tender content in relation to all the requirements of the ITT - not merely those of D1. I rather think that that is how the RWIND tenderer would have understood matters. A narrower view would make little sense.

[21] It follows that in so far as the pursuer submits that the scope of D1 did not extend to some of the matters which the defender relied upon, and that those criteria were therefore undisclosed criteria, the pursuer appears to me to have, at best, a weak *prima facie* case. Further, in my view there is fairly cogent case that all of the particular matters of which the pursuer complains are things which the RWIND tenderer would have considered fell within the scope of criteria identified in the ITT. Here too, the argument to the contrary appears to me to be a relatively weak one.

[22] I turn to the final aspect of the first complaint, *viz.* that the defender has relied on matters which are inherently subjective, and in respect of which no objective criteria are contained in the ITT. In the circumstances of this case I do not find that to be an attractive or persuasive argument. The RWIND tenderer knew that the services it required to provide included satisfactory web-based means of communication with the defender and debtors. He would understand, because it would have been obvious, that ease of access and navigation, and user-friendliness, were relevant aspects of such provision. He would not have expected the ITT to list as a criterion or sub-criterion every factor which might have a bearing upon how satisfactory the communication provided would be judged to be. Nor in my opinion would he have expected every such consideration to be reduced to technical requirements or *desiderata*. Ease of access and navigation, and user-friendliness, were just two of many factors which might fall to be considered. It is hard to imagine that the RWIND tenderer would not have recognised, or expected, that the defender might look at those factors when comparing tenders. The comparison is likely to have involved issues of fact and degree, and of impression; but it is quite another thing to suggest that it was purely subjective and intuitive. The defender's officers were shown how the systems operated. Their queries were answered. They had experience of using similar systems. In the whole circumstances I think it is difficult to argue that the officers had no proper basis to

compare the aspects which they did compare. The pursuer's prospects of success of this ground appear to me to be less than reasonable.

[23] I come to the pursuer's "manifest error" challenge. There is a clear factual dispute as to what took place during the site visit. In light of the affidavits of Mr McLaughlin and Mr Lyall, I conclude that the pursuer has a *prima facie* case on this ground. Given the competing account of events given in Ms Smith's affidavit I do not think it is appropriate at this stage to treat the prospects of success on this ground as being other than even.

*Overall assessment, balance of convenience and public interest*

[24] In my opinion the pursuer's first ground of challenge is not likely to succeed. On the other hand the pursuer does have a *prima facie* case of breach of regulation 4(3) in respect its "manifest error" ground of challenge, and it is not possible at this stage to say that one party's prospects on that ground are stronger than the other's.

[25] Lifting the prohibition would result in the removal of uncertainty concerning the validity of the award, with resultant benefits for the defender and Stirling Park. It is in the public interest that there is not a prolonged period of uncertainty, and that the defender (and through it, the public) enjoys the cost advantages of the new contract sooner rather than later. On the other hand, it is also in the public interest that the award should not be made in breach of the Regulations. There is obvious prejudice to the pursuer if it is. The fall-out for the pursuer's operations in the north of Scotland may be significant. It may be six years before it has a further opportunity to bid for the next contract. The consequences for the defender and for Stirling Park of the prohibition continuing for a relatively short period seem to me to be much less severe. While I am not persuaded that the assessment of damages for the loss of a chance in this case would be especially difficult, I do accept that, other things being equal, setting aside the award would be a more satisfactory remedy for the pursuer. I also accept that the defender could make interim arrangements - with the pursuer, Stirling Park, or a third party - which could reflect the same cost advantages as the winning bid; and that if those arrangements were for a short period the contract value would be very unlikely to exceed the minimum threshold for a regulated public supply contract. Had the date of a full hearing been distant, that would have tipped the balance of convenience towards lifting the prohibition. In fact, a full hearing can be held in two weeks' time. That is a very early hearing. In my opinion that factor tips the balance the other way. It facilitates the effective and rapid review of the award decision. It results in a scenario where the negative consequences of an order lifting the prohibition are likely to outweigh the benefits of the order being lifted. In the whole circumstances the balance of convenience favours the prohibition remaining in force meantime. In my opinion it is right and proportionate that the motion be refused *in hoc statu*.

**Disposal**

[26] I shall refuse the motion *in hoc statu*.