Neutral Citation Number: [2020] EWHC 785 (TCC)

Case No: HT-2018-000296

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Tuesday 21st April 2020

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

- -

Between:

ACCESSIBLE ORTHODONTICS (O) LIMITED

Claimant

- and –

NATIONAL HEALTH SERVICE COMMISSIONING BOARD

Defendant

AND

Case No. HT-2018-000355

ACCESSIBLE ORTHODONTICS LLP

Claimant

-and-

NATIONAL HEALTH SERVICE COMMISSIONING BOARD

Defendant

- -
- -

Christopher Lundie (instructed by **Shakespeare Martineau LLP**) for the **Claimants in both actions**
Simon Taylor (instructed by **Blake Morgan**) for the **Defendant**

Hearing dates: 27 March and 2 April 2020

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Tuesday 21st April 2020.

Mr Roger ter Haar QC :

1. On 27 March 2020 I held a Case Management Conference in these two cases. Because of the current restrictions imposed by H M Government in response to the health emergency the hearing had to be conducted over the telephone.

2. This was not ideal, but with considerable hard work by all concerned it was made to work. However, Mr. Lundie, counsel for the Claimant in each of these two actions, experienced some technical problems which partially interrupted the proceedings. In the event it was not possible to complete all the necessary business. I decided that I would issue my decisions on two important issues, permission to amend and disclosure, then reconvene the hearing at a time convenient to the parties and the Court. I issued an earlier draft of this judgment containing my decision on those two issues. This judgment is issued following a further hearing on 2 April 2020. In part it varies the decision which I made in respect of disclosure.

3. I would like to thank the parties and their representatives for their co-operation which made both the hearings possible.

4. These proceedings concern two challenges made to awards made pursuant to two procurement processes run by the NHS for the provision of NHS orthodontic referral services. The tendering process, award criteria and issues arising are largely the same in both cases. By a consent order made on 8 February 2019, the proceedings are to be case managed and tried together.

5. The details of the two claims are as follows:

(1) In the first claim the Claimant is Accessible Orthodontics (O) Limited ("AO Ltd"). The case number is HT-2018-000296 and the procurement relates to the lots for Oxford City 1 & 2 (SC16 and 32);

(2) In the second claim the Claimant is Accessible Orthodontics LLP ("AO LLP"). The case number is HT-2018-000355 and the procurement relates to the lot for Thame (SC11).

6. In each case the Claimant is a small orthodontic service provider. Dr. Alan Davey is the incumbent provider of the services in the Oxford City lots and he is a shareholder in AO Ltd (of which Dr. Davey is a member). Dr. Davey was unable to tender as a sole trader and so tendered through AO Ltd. AO LLP, of which Dr Davey is a member, is the incumbent provider of the services in Thame.

7. The NHS contracts which were the subject of the procurement exercises were for a 7 year period which was meant to start on 1 April 2019.

8. The NHS informed AO Ltd that it was unsuccessful in SC16 and 32 by 'standstill' letters dated 4 September 2018. The successful bidder scored 80.25% whereas AO Ltd scored only 47.75%.

9. The NHS informed AO LLP that it was unsuccessful in SC11 by 'standstill' letter of 22 October 2018. The successful bidder scored 65.25% whereas AO LLP scored only 44.75%.

10. Feedback was provided by the NHS to the Claimants on the reasons for the Claimants' scores and the characteristics and relative advantages of the successful bidder in each of the 'standstill' letters.

11. AO Ltd issued the first claim on 27 September 2018 and served the Particulars of Claim on 2 October 2018. AO LLP issued the second claim on 14 November 2018 and served the Particulars of Claim on or about 19 November 2018.

12. The Particulars of Claim in both claims alleged breaches of the Public Contract Regulations 2015 ("**PCR 2015**") and manifest errors in the scoring of the Claimants' bids. The appendices particularise the scoring allegations in some detail. No allegations were made about the scoring of the successful bidder's bid or any other bidder's bid. The Claimants seek to set aside the award decisions amongst other relief.

13. The Defences to the claims were served on 12 November 2018 and 16 January 2019 respectively. The Defences denied the allegations and pointed out among other things that the claims lacked any case on causation given the wide disparity in scores between successful bidders and Claimants and the lack of any pleaded case as to how the allegations if made out entitled the Claimants to the relief claimed.

14. The parties have since sought to engage in alternative dispute resolution but have failed to settle the claims. The automatic suspensions remain in place and the services which are the subject-matter of the procurements are currently being provided by the Claimants or Claimant group entities as incumbents further to extension contracts.

The procurement regime

15. These NHS contracts, which were public contracts for social and other services, fell within the "light touch regime" in regulations 74 to 77 of PCR 2015. It is the Claimants' case that the NHS were permitted to determine the applicable procedure provided that the procedure chosen was at least sufficient to ensure compliance with the principles of transparency and equal treatment required by regulations 18 and 76(2) of PCR 2015. The NHS elected to use a dynamic purchasing system and set the award and evaluation criteria.

16. The challenges by AO Ltd and AO LLP to the awards made as a result of the procurement exercise are based on essentially the same grounds – breach of the obligation to act in a transparent manner, breach of the obligation to treat tenders equally and manifest error. Mr. Lundie submits that as is often the case in these types of claim, the information available for the purpose of settling the Particulars of Claim was somewhat limited. He says that the NHS provided disclosure of some additional documentation in September 2019, having previously submitted that documentation on a without prejudice basis in June 2018, and that this has enabled the claims to be formulated with a greater degree of focus and the nature of the problem with the tender process to be better identified.

The Application to Amend

17. The Claimants' application to amend their respective pleadings was served and filed on 2 March 2020.

18. The majority of the amendments for which permission is sought relate to new matters that arise from the disclosure of evaluator and moderation notes relating to the scoring of the Claimants' bids and certain training materials made available by NHSE in June 2019. The NHS submits that these amendments give rise to potential limitation issues given that they were not made within 30 days of the Claimants being first aware of the facts to which they plead.

19. However, the NHS accepts that they do not have wider implications to the conduct of proceedings and disclosure process in particular. Given also the limited time available to the Court and the need to progress associated case management matters, the NHS has given its consent to those pleadings which relate to the Claimants' bids without prejudice to its right to plead limitation points in its Amended Defence and on the basis that the amendments will take effect at the date of the Order. This was communicated to the Claimants by the NHS's solicitors on 24 March 2020.

20. This category of agreed amendments covers all amendments to the first claim and all those relating to the second claim save for paragraph 19.5 and paragraphs 3.11, 4.11, 5.14, 6.11 and 8.11 of the Appendix to the second claim.

The Disputed Amendments

21. The NHS opposes amendments comprising the new paragraph 19.5 and paragraphs 3.11, 4.11, 5.14, 6.11 and 8.11 of the Appendix to the second claim. The new paragraph 19.5 states: "These errors were not limited to consideration of the Claimant's tender but extend to the evaluation of other

tenders which were also assessed in a similar manner by reference to tenders which had been submitted for other Lots. See the particulars at 5.14, 6.11 and 8.11 of the Appendix." It seems to me to be common ground that if the amendment to paragraph 19.5 is allowed, then the amendments to the particulars in the Appendix would also be allowed. Conversely, if the amendment to paragraph 19.5 is not permitted, the amendments to the particulars in the Appendix would also be refused.

22. The original paragraph 19 allegation of breach is in summary that the similarity between the debrief reports for the two Claimants indicates that "The Defendant did not properly consider the Claimant's tender but, with regard to the majority of the Claimant's responses, merely adopted the scoring and moderated reasoning of the tender of [AO] Ltd." The amended (agreed) introductory wording to paragraph 19 frames the allegation as: *"... the Defendant failed to evaluate the tenders in a transparent manner."* Paragraphs 19.1 to 19.4 of the agreed amendments relate to the Claimant's tender.

23. Each of the particulars associated with the new paragraph 19.5 claim (paragraphs 3.11, 4.11, 5.14, 6.11 and 8.11 of the Appendix to the second claim) relate to specific questions challenged and make the same point in identical terms that: "The Feedback provided on winning tender in the debrief reports provided on 7th October 2018 and 22nd October 2018 has in parts been copied verbatim from the Feedback provided in respect of the winning tender in Lots SC16 and SC32."

24. It is the NHS's submission that these claims could have been made in the original Particulars of Claim in January 2019 as they are based on the contents of the 'standstill' letters of 4 September 2018 and 22 October 2018.

25. Regulation 92 of the PCR 2015 sets out the limitation rule applicable to procurement claims:

> "(2) Subject to paragraphs 3 and 5, such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen."

Sub-paragraph (5) provides for extensions to be granted for up to a 3 month period from when grounds arose.

26. Regulation 91 provides that:

> "(1) A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.
>
> "(2) Proceedings for that purpose must be started in the High Court, and regulations 92 to 104 apply to such proceedings."

27. The question for the court is whether the paragraph 19.5 claim is a new breach of the PCR 2015 and thus a new claim which would trigger the need to bring proceedings further to Regulation 91(2) or, alternatively, further particulars of an existing breach. The NHS accepts that if it is not a new claim, permission can be granted for an amendment to the Particulars of Claim further to CPR rule 17.1.

28. However, the NHS submits that if it is a new claim and the Regulation 92 limitation period has expired, such permission cannot be granted under CPR rule 17.4 because it does not relate to a period of limitation under the

Limitation Act 1980 or any other enactment which allows such an amendment. The PCR 2015 do not allow a new claim to be brought after the expiry of the limitation period (save where an extension of up to the 3-month limit is granted) by amendment.

29. This was an issue considered by Mrs Justice Jefford. in *Perinatal Institute v Healthcare Quality Improvement Partnership* [2017] EWHC 1867 (TCC) at paragraphs 24 to 27. For the reasons given by Jefford J. in that case and the arguments put forward before me by the NHS in this case reflecting her reasoning, I accept the submission that I do not have power under CPR rule 17.4 to grant permission for an amendment which would have the effect of depriving the NHS of an accrued limitation defence under Regulation 92.

30. The question of whether an amendment gives rise to a new claim in a procurement action was discussed by the Court of Appeal in *D&G Cars Limited v Essex Police Authority* [2013] EWCA Civ 514, which concerned a claim that D&G Cars had been wrongfully eliminated from a tender process in breach of the Regulations. The amendments sought to introduce a new allegation that the elimination of D&G Cars had been for "dishonest, corrupt and unconscionable reasons". The Court of Appeal found that the amendment gave rise to a new cause of action which was at least *prima facie* time barred. Lord Justice Leveson at paragraph [23] cited the observations of May LJ in *Steamship Mutual Underwriting Assn Ltd v Trollope & Colls (City) Ltd* (1986) 33 BLR 77 at page 98:

> "I do not think one can look only to the duty on a party, but one must look also to the nature and extent of the breach relied upon, as well as the nature and extent of the damage

> complained of in deciding whether, as a matter of degree, a new cause of action is sought to be relied upon. The mere fact that one is considering what are, as it is said, after all only different defects to the same building does not necessarily mean that in any way they are constituents of one and the same cause of action."

31. The NHS submits that the nature and extent of the breach that the Claimants seek to introduce via the amendments some 18 months after the factual grounds on which the allegations arose are quite different to the claims made to date. In particular, they challenge the scoring of the winning tenderer's bid for the first time and would if permitted lead to disclosure of confidential documents relating to the winning tenders and the tenders themselves.

32. The NHS says that such a challenge would thus substantially increase the scope of the disclosure and witness evidence required and add time and cost to the trial.

33. Whilst I accept that the proposed amendments will expand the scope of the Court's enquiries, I do not think they are such as to amount to a new claim applying the guidance in *D & G Cars*. In my view they amount to additional particulars of the existing pleaded case. The core case was and remains an allegation of a failure to evaluate the tenders in a transparent manner. Paragraph 19.5 adds further particulars to support that case.

34. Further, insofar as the particulars expand the scope of the Court's enquiries, it seems to me likely that similar investigations will find their way into the case because of the NHS's case on causation, which is, in short, that the Claimants' scores were so far adrift from what they needed that their bids would have failed in any event even if the alleged breaches had not occurred. Thus, insofar as I am exercising a discretion, it seems to me that the new particulars

will open new enquiries, but they are new enquiries which I think it likely would come into the case in any event as both parties develop their respective cases on causation.

35. For these reasons, I allow the application to amend as requested.

Disclosure

36. There is a dispute between the parties as to whether the NHS should give disclosure of the marks of other tenderers and the reasons for those marks. Given my decision on the amendment application, I understand the NHS to concede that disclosure should be given in the second claim, but not the first.

37. The category of documents for which disclosure is requested is defined as:

> "Documents recording the evaluation, moderation and marking of those tenders which achieved a higher score than the Claimant's tender scores, and award decisions taken by the Defendant, all quality questions except F01."

38. I had understood when writing the first draft of this judgment that the Defendant conceded that if I allowed the application to amend, then this category of disclosure was not contentious. However at the second hearing it was politely explained to me, and I accept, that the concession only related to the second claim.

39. I have therefore to decide whether I should order the above category of documents to be disclosed in the first claim.

40. I have concluded that I should not do so for the following reasons:

(1) As a matter of principle, given that the documents relating to the other bidders are commercially sensitive, disclosure should only be ordered if truly necessary in the interests of justice: this is a relatively high hurdle to clear;

(2) Much of the information which the Claimant seeks is, or should be, in the "standstill" letter which the Defendant was required to write under regulation 86 of PCR 2015. That regulation indicates the information which generally the legislature thought appropriate should be disclosed to unsuccessful bidders: whilst that does not preclude an order for disclosure (see the order conceded in respect of the second claim), it does indicate that I should be cautious in my approach;

(3) The objection to disclosure is particularly strong in respect of the unsuccessful bidders;

(4) There is no pleaded claim in the first claim which directly opens up an examination of the marks of the other bidders;

(5) I accept that it is possible that development of the Defendant's case as to causation may expand the legitimate scope of disclosure, but that has not happened yet, and may never do so;

(6) I strongly suspect that if there is any interesting material in the documents relating to the other bidders, it will be reflected in the disclosure in the second claim. If so, then it may be appropriate for the Claimant to renew its application.

41. For these reasons this category of disclosure is refused on the material presently before me.

42. It has been agreed that the parties should attempt to settle their differences, for which purpose there will be a stay until October 2020. Disclosure will not take place until after that stay has expired. The parties have agreed further directions, particularly as to an attempt to agree the terms of a confidentiality ring.

Security for Costs

43. The Defendant has applied for security for costs. I have decided to adjourn that application until after the stay for ADR has expired. This is for two principal reasons: firstly, as modified before the 2 April hearing, the application was for security to be provided only after the stay had expired. This was reasonable and realistic, but seems to me to indicate that the sensible time to consider whether security should be given is if and when the settlement attempt has failed (as it is to be hoped will not happen).

44. Secondly, and perhaps more importantly, the effects of the present Covid-19 are so fast moving and uncertain that the factors relevant to an order for security can only be safely considered once that period has expired: it seems unlikely that the Claimants, and those behind them, will be in the same position (for better or for worse) in six months' time.

Cost Budgeting

45. I heard arguments about, and gave decisions in respect of, the parties' proposed budgets. I do not repeat the conclusions reached, but it was

recognised in those discussions that my decision on disclosure would have implications for the final sums to be included in the budgets.