

Neutral Citation No: [2021] NIQB 41

Ref: HUM11469

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 14/04/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL HUB)

Between:

QMAC CONSTRUCTION LIMITED

Plaintiff

and

NORTHERN IRELAND HOUSING EXECUTIVE

Defendant

Robert McCausland (instructed by McIlldowies) for the Plaintiff
David Dunlop QC and Emily Neill (instructed by Cleaver Fulton Rankin) for the
Defendant

HUMPHREYS J

Introduction

[1] In this action, the plaintiff challenges a decision made by the defendant, as Contracting Authority, to reject the plaintiff's tender for planned maintenance works to be carried out at the defendant's properties across Northern Ireland.

[2] The decision to reject was communicated to the plaintiff on 10 December 2020. This litigation has been conducted on an expedited basis, as facilitated by the Commercial Hub. The parties and their advisors are to be commended on the degree of industry and collaboration shown which has enabled a full trial of this action to take place less than three months from the date of issue of proceedings. I am particularly grateful to Counsel for the focussed presentation of the evidence and legal submissions.

The Competition

[3] The plaintiff is a limited liability company which carries on business as a contractor in the construction industry. It is an incumbent provider of planned maintenance services for the defendant.

[4] On 30 September 2020, the defendant placed an OJEU Notice seeking tenders for these services. This was to be a competitive tender exercise, carried out using the open procedure and governed by the Regulations. The contract for the works was to be divided into 13 lots, with no contractor permitted to be awarded more than one lot.

[5] On 2 October 2020, the defendant published on the online portal eTenders NI stating that the time limit for the receipt of tenders was 3pm on 16 November 2020.

[6] The tender documents consisted of an Invitation to Tender ('ITT') and a Selection Questionnaire ('SQ1').

[7] As part of the selection criteria for the contract, the SQ1 set out that tenderers were obliged to satisfy certain requirements of technical and/or professional ability. Section D-01 of SQ1 provided that tenderers were obliged to furnish three separate examples of previous experience meeting certain qualifying parameters in order that the tenderer could demonstrate the necessary technical and/or professional ability to be awarded one of the lots. As part of the requisite information, the tenderer had to supply a Certificate of Technical and/or Professional Ability ('the Certificate') independently verified by a nominated referee in respect of each contract relied upon.

[8] In the event, the plaintiff's tender was rejected because it did not submit the required Certificates by the closing date and time, and the defendant concluded that the late submission of the documentation was not permissible under the terms of the procurement documentation.

The Decision to Reject

[9] On 22 October 2020, the defendant published an 'Advice Note' through the eTendersNI portal. It recognised that the defendant may itself be asked to provide references in the form of the Certificate to prospective tenderers who wished to engage in this, or any other, procurement competition. The advice note set out the internal procedures which would govern any such request made by a prospective tenderer. It stated that any member of the defendant staff who was approached to provide a reference must first of all inform the Assistant Director of Project Delivery and then, it was described as being '*vital*' for staff to contact the Corporate Procurement Unit to have it verify the correct details, including the contract reference number, contract title, contract value, contract duration and the entity

which entered into the contract. The request for a reference then had to be approved by the Assistant Director of Project Delivery and thereafter provided to the contractor.

[10] On 11 November 2020, Mr Jack Bothwell of the plaintiff company contacted Mr Paul Pollock of the defendant in relation to the provision of a Certificate. Mr Pollock confirmed that would be acceptable and asked for the Certificate to be forwarded to him. On 12 November 2020, Mr Gerard Graham of the plaintiff sent an email to Mr Pollock stating that the plaintiff was submitting a tender for the planned maintenance competition and sought to include two contracts which the plaintiff had carried out for the defendant and therefore required a completed reference for each of those. On that same day, Mr Pollock sent the reference forms to Mr McGurnaghan, who was the Project Manager in relation to each of the contracts. Mr McGurnaghan identified inaccuracies in the draft Certificates provided and corrected these. On 13 November 2020, Mr Graham emailed Mr Pollock making the required changes and at 14:07 on that same day Mr McGurnaghan confirmed that the changes which had been made were accurate and that he was content with the draft references.

[11] At 14:44 on 13 November 2020, Mr Gillespie emailed the defendant's Corporate Procurement Unit, in accordance with the Advice Note, stating "*I know that you don't have the scheme details but can you please confirm the contractor name and contract*". The scheme information was, in fact, provided by Mr McGurnaghan that same day at 14:57 but Mr Gillespie pointed out that Corporate Procurement needed to confirm these details. On Monday 16 November 2020 at 9:42, Mr Gillespie sent a reminder email to Corporate Procurement stating that he was conscious there was a deadline of 3pm. A response was received from the Corporate Procurement Unit at 12:06 stating "*all I can confirm is that Qmac is one of the contractors listed on the planned schemes framework which started in January 2014.*" Despite the fact that this verification process had been described as '*vital*' in the advice note, it was clear that the defendant's staff knew that Corporate Procurement was unable to provide the details of the contracts in question.

[12] At 12:34 on the same date, Mr Gillespie sent an email to the Assistant Director of Project Delivery seeking approval for the draft references. At 13:40, Ms Pamela Strain confirmed that the references had been approved by Leeann Vincent, the Assistant Director of Project Delivery. It is therefore apparent that 1 hour and 20 minutes before the deadline for the submission of the tenders the references in the form of the Certificates had been approved by the relevant officer within the defendant. However, the approved references were not forwarded by the defendant to the plaintiff until 14:37 on 17 November 2020, almost 24 hours after the deadline for the submission of the tenders had passed.

[13] On 16 November 2020, the plaintiff had purported to submit its tender via the eTendersNI portal. In doing so it included a note to the following effect:

"We are awaiting the return of two signed reference forms from the Contracting Authority itself. As they were not received in advance of the submission deadline, we have included this linage to state so. When the signed Reference Forms are received we will submit them through the messaging function on eTendersNI. The two relevant Reference Forms are included unsigned."

[14] The approved Certificates were uploaded by the plaintiff at 20:41 on 17 November 2020 using the messaging function on the online portal.

[15] On 23 November 2020 at 8:52 the defendant messaged the plaintiff as follows:

"We are currently conducting compliance checks and note the references provided before closing date were submitted 'unsigned.' We further note the 'signed' references provided post the closing date via the messaging function on eTendersNI. We are currently assessing whether this is permissible under the terms of the procurement documentation."

[16] On 10 December 2020, the defendant wrote to the plaintiff to inform it that its tender had been rejected. This communication stated:

"Further to my message issued 23 November 2020 @ 8:52, the Contracting Authority has now concluded that the receipt of the 'signed' Certificate of Technical and/or Professional Ability (references) is not permissible under the terms of the procurement documentation."

The Tender Documentation

[17] Insofar as is relevant to the issues before the Court, the ITT provided as follows:

"Paragraph 4.6: TENDER SUBMISSIONS

Economic Operators should note the following points in relation to their submission and note that the Contracting Authority reserves the right to exclude any Economic Operator who fails to comply with same:

- *Each Economic Operators is responsible for the safe and timely delivery of its Tender. Any Tender received after the time specified for receipt will not be accepted and the Economic Operator will be disqualified and excluded from further involvement in the Competition.*

- Failure to provide the required information, make a satisfactory response to any question, or supply documentation referred to in responses, within the specified timescale, may mean that an Economic Operator is disqualified and excluded from further involvement in the Competition.
- Tenders should be complete and all details requested should be submitted. Incomplete tenders may be rejected.
- If any Economic Operator has deviated from the Contracting Authority's requirements, then that Economic Operator may have its tender rejected.

In order to be considered for evaluation Tenders must be formally "submitted" on eTendersNI prior to the final Closing Time and Date. Documentation which has been uploaded onto eTendersNI but not "submitted" will not be considered.

Paragraph 4.9: REQUESTS FOR ADDITIONAL INFORMATION

The Contracting Authority expressly reserves the right to require an Economic Operator to provide additional information supplementing or clarifying any of the information provided in its Tender. The Contracting Authority may seek independent advice to validate information declared or to assist in the evaluation.

Paragraph 5.2: DISQUALIFICATION OR EXCLUSION

A Tender may be disqualified if (inter alia):

- It is not submitted via the eTendersNI site by the Closing Date and Time of the Tender submission deadline.*
- The Tender is incomplete in material respects*

Paragraph 6.1: INITIAL COMPLIANCE AND COMPLETENESS CHECK

The Contracting Authority will conduct an initial assessment of the Tender Submissions received to ensure that they comply with the requirements as set out in this document and will be conducted in accordance with section 6 below.

At the Contracting Authority's discretion clarification may be sought from an Economic Operator:

- *in order to determine if a tender is complete and compliant;*
or

- *to clarify aspects of their tender that are ambiguous or unclear.*

Paragraph 6.5: INCOMPLETE MISSING OR ERRONEOUS INFORMATION/DOCUMENTS

6.5.1 *Where information or documentation to be submitted by the Economic Operators is or appears to be incomplete or erroneous, or where specific documents are missing for example the Appendices requested in the Selection Questionnaire Pack (including the Certificate of Technical and/or Professional ability document, or documents, insurances, Build Safe requirements, SSIP certificates and/or the Environmental Management System certificates), the Contracting Authority may request the Economic Operators concerned to supplement, clarify or submit the relevant information or documentation within an appropriate time limit provided that such requests are made in full compliance with the principles of equal treatment and transparency. Failure to provide the required information, complete a satisfactory response to any question or supply the requested documentation within the timescale may result in the Economic Operator being disqualified.*

6.5.2 *Note if any answer, to any scored question required for the tender evaluation is missing the Economic Operator will not be requested to provide it and the Tender Submission will be assessed accordingly. The Economic Operator's Tender Submission will be scored only on the information provided. It is the sole responsibility of the Economic Operator to ensure that Tender Submission has been completed and submitted in full before the Closing Date and Time of the Tender.*

Paragraph 6.11 FINAL DUE DILIGENCE

In addition the Contracting Authority reserves the right to require the submission of any additional, supplementary or clarification information, at its absolute discretion that it considers appropriate.

Paragraph 8 DISCLAIMER

The Contracting Authority reserves the right to disqualify any Economic Operator who:

- *does not supply the information required by this ITT or as directed otherwise by the Contracting Authority during the procurement process*

[18] In relation to the provision of the required documentation, the SQ1 stated:

“GUIDANCE FOR COMPLETION OF SQP

Failure by an Economic Operator to ensure that all questionnaires are completed fully and in accordance with all requirements therein and to return the SQP Submission and all supporting information required by the SQP Submission Deadline may result in the Economic Operator’s Tender Submission being rejected as set out in the Invitation to Tender document.

SECTION D [01] TECHNICAL AND/OR PROFESSIONAL ABILITY

The Economic Operator’s Certificate of Technical and/or Professional Ability must:

- i. Be addressed to the Northern Ireland Housing Executive.*
- ii. Be on headed paper from their immediate client (Referee) for each example contract referred to in its response.*
- iii. Be signed by the Economic Operator’s immediate client’s contract/project manager with direct responsibility and/or knowledge of the contract.*
- iv. Be in the form of the template letter set out in the Certificate of Technical and/or Professional Ability document.*

If the Economic Operator fails to provide a completed Certificate of Technical and/or Professional Ability as set out above for each of the example Contracts in its response, the entire tender submission will be excluded.”

[19] The tender documentation did not contain any clause specifying a hierarchy of documents or clauses which could be invoked in the event of any inconsistency or ambiguity.

The Evidence

[20] The defendant called one witness, Mr Paul Isherwood, its Director of Asset Management. He was responsible for procurement delivery and ultimately took the decision on behalf of the defendant to reject the plaintiff's tender. It was his clear and unambiguous understanding that the defendant did not enjoy a discretion to permit either the late submission of tenders or the late submission of missing or incomplete documentation. When asked how he arrived at that conclusion, Mr Isherwood stated that he took account of the terms of SQ1 and also paragraph 6.5.2 of the ITT. He was unable to explain why he did not take into account paragraph 6.5.1 of the ITT. 17 days elapsed between the first consideration of the position and the decision to communicate the rejection of the plaintiff's tender. Mr Isherwood's evidence was that he considered the tender documents for a period of about 15 minutes during those 17 days. He did not pay any attention to the various provisions of the ITT and the SQ1, set out above, which referred to the existence of a discretion to admit incomplete or missing documentation.

[21] His evidence was that if he did have a discretion he would not have exercised it in favour of the plaintiff. This, apparently, was based on two considerations. Firstly, Mr Isherwood indicated that it would not have been appropriate to exercise any discretion in favour of the plaintiff as a result of the lateness of its request for Certificates. This was said to be in the interests of fairness and equality to other contractors. Secondly, Mr Isherwood was concerned about litigation. He stated that any decision to exercise the discretion in favour of the plaintiff would likely have been the subject of a challenge by another tenderer. He did not indicate that he would have taken any other factors into account in determining whether to exercise any discretion which did exist in favour of the plaintiff.

[22] In cross-examination, Mr McCausland pressed Mr Isherwood as to why the plaintiff was not informed that the Certificates had in fact been approved by the relevant officer of the defendant prior to the deadline for submission at 3pm on 16 November 2020. Mr Isherwood was unable to answer that question. This was clearly a highly unsatisfactory situation whereby a prospective tenderer was kept in the dark about an important feature of this dispute until well after proceedings had been issued.

The Legal Principles

[23] Regulation 18(1) of the Regulations sets out the fundamental principles of procurement:

"Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."

Regulation 56(4) states:

“Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.”

[24] In the event therefore that documents which are required to be submitted in a tender competition are missing, a Contracting Authority may request such documentation but this must be done in compliance with the fundamental procurement principles. As the jurisprudence¹ in this field makes clear, there is no scope for a margin of appreciation in relation to compliance with the fundamental principles. However, in matters of judgment, discretion or evaluation, a Contracting Authority does enjoy a margin of appreciation and the Court should only intervene when the Authority has committed a manifest error.

[25] The interaction of these principles has been considered in a number of cases addressing late or incomplete tender submissions.

[26] In *JB Leadbitter & Co Ltd v Devon CC* [2009] EWHC 930 (Ch.), the claimant failed to submit a number of case studies which were required as part of its bid in a tender competition. The rules of that competition provided that:

“An incomplete set of documents will mean your tender is invalid...If your tender is not fully submitted before the closing date and time it will not be accepted”

However, this was subject to the caveat that:

“Should a material and genuine error be discovered in the tenderer’s submission during the evaluation period by the tender evaluation team, the tenderer will be given the opportunity of confirming their offer or of amending it to correct the error”

[27] David Richards J considered that the principle of proportionality, which was not expressly referenced in the 2006 Regulations, applied to a decision by a Contracting Authority to exclude an economic operator from a tender competition. Proportionality requires that measures adopted by an authority do not exceed what is required in order to achieve the desired objective and where there is a choice between several measures, recourse must be had to the least onerous of these². The

¹ *SIAC Construction –v- Mayo CC* [2003] EuLR 1; *Lion Apparel –v- Firebuy* [2007] EWHC 2179 (Ch.)

² *Tideland Signal –v- European Commission* [2002] ECR II-3785

learned Judge noted that a waiver of terms is itself a departure from the rules of the competition and therefore carries the risks of unequal treatment and lack of transparency which the Contracting Authority is mandated to avoid. In the circumstances of that case, it was held that the authority was entitled to reject the tender and did not act disproportionately in doing so. However, the Court found:

“There may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender, most obviously where...it results from a fault on the part of the procuring authority. But, in general, even if there is a discretion to accept late submissions, there is no requirement to do so, particularly where, as here, it results from fault on the part of the tenderer.”

[28] The General Court of the Court of Justice of the European Union, in *Ministeriet for Forskning v Manova A/S* [2014] PTSR 254, considered a Danish competition for the provision of occupational guidance and advice centres. Tenderers were required to submit, inter alia, a copy of the most recent balance sheet. Two of the tenderers did not include balance sheets in their submission but were afforded an opportunity by the Contracting Authority to do so some 2 weeks later. Manova filed a complaint in relation to the decision to award contracts to those two entities. The question posed to the General Court was whether the principle of equal treatment meant that the Contracting Authority could not ask for a copy of a document such as a balance sheet after the deadline for the submission of tenders. As such, *Manova* is a case about the application of the principle of equal treatment rather than proportionality.

[29] The key findings of the Court were as follows:

“39. Accordingly, a contracting authority may request the correction or amplification of details of such an application, on a limited and specific basis, so long as that request relates to particulars or information, such as a published balance sheet, which can be objectively shown to pre-date the deadline for applying to take part in the tendering procedure concerned.

40. However, it should be explained that this would not be the case if the contract documents required provision of the missing particulars or information, on pain of exclusion. It falls to the contracting authority to comply strictly with the criteria which it has itself laid down.”

[30] In *Dem-Master Demolition Services v Renfrewshire Council* [2016] CSOH 150, the tenderer failed to supply required information as part of its tender for the provision of demolition services. The pursuer had failed to submit percentage figures for overheads and profit, and had included a blank template as part of its offer for one

of the lots. Its tender was rejected, a decision which was claimed to be disproportionate. The tender documents reserved a right for the Contracting Authority to clarify any information supplied although it also expressly stated that a failure to provide required responses would result in the tender not being considered.

[31] Lord Tyre was not satisfied that the *Manova* requirements which would have allowed the late submission of documents were satisfied in that case. Firstly, he held that the spreadsheet which ought to have been submitted in place of the blank template could not objectively be shown to pre-date the submission deadline. Secondly, the right reserved to seek clarification did not override the explicit statement that a tender which was missing information would not be considered – there was no power to accept the late submission. As a result, the Court held that any decision to admit the missing information would have breached the principle of equal treatment. Furthermore, Lord Tyre observed:

“A contracting authority which acts in a manner necessary to avoid breaching that principle cannot, in my view, be said to be acting disproportionately.”

[32] The Court went on to consider the position if the *Manova* requirements were met and found that the decision was not, in any event, disproportionate. The importance of the submission of the information was clear; insertion of the information would have amounted to a new tender; there was no fault on the part of the Contracting Authority and to have accepted the information would have run the risk of jeopardising the tender as being in breach of the principle of equal treatment, were all factors in this determination.

[33] From these, and the other authorities to which the Court was referred, the following principles can be distilled:

- (1) The precise terms of the tender documents require close analysis in any given case. It is important to consider whether, for instance, a Contracting Authority has reserved to itself a wide discretion to admit late tenders or permit missing documents to be furnished after a deadline has expired or whether a bright line exclusionary rule has been adopted;
- (2) Even where a bright line rule appears, a Contracting Authority must consider the principle of proportionality. There may be exceptional circumstances, such as the fault of the authority, which justify the admission of a late tender or missing documents;
- (3) Where the Contracting Authority does have a discretion, it must only exercise it in accordance with the principle of equal treatment. One element of this requires that any missing documents or information must objectively be shown to pre-date the tender deadline;

- (4) The starting point is that deadlines are to be respected and only exceptionally should a Contracting Authority permit the submission of late or missing information.

Discussion

[34] A number of issues therefore arise for determination. The first of these concerns the interpretation of the tender documents and whether, on a proper construction, the defendant did have a discretion to admit late or missing documentation.

[35] In its defence, the case was made that it was consistent with the principle of equal treatment, proportionality and non-discrimination for the defendant to refuse to exercise its discretion to allow the Certificates to be submitted after the tender submission deadline. This pleading seemed to admit the existence of a discretion, albeit that the defence does later state that the defendant was "*required and/or entitled not to depart from that express rule of the competition*" and that any decision to excuse the "*explicit requirement*" would have breached the rules of the competition.

[36] In its skeleton argument, the defendant's case had evolved to the extent that it was asserted the defendant would have acted unlawfully in admitting the Certificates since it would have been acting contrary to its own criteria and in breach of the principle of equal treatment. As such, it was claimed, the defendant had no discretion to exercise.

[37] However, in closing submissions to the Court, Mr Dunlop QC conceded that the defendant did enjoy a discretion but argued that it was not obliged in these circumstances to exercise it in favour of the plaintiff.

[38] This concession was quite properly made. On reading the tender documents as a whole, it is quite apparent that the Contracting Authority has reserved to itself a discretion to admit late or missing documents. The terms of paragraph 6.5.1 of the ITT are absolutely clear in this regard, referencing as they do the very Certificates which were absent from the plaintiff's tender. This conclusion is bolstered by the wording of the guidance in SQ1. The admonition in Section D[01] in the SQ1 that a tender will be excluded if the tenderer fails to provide a completed Certificate can properly be read as being subject to the discretion reserved by the Contracting Authority under, inter alia, paragraph 6.5.1 of the ITT. Applying the hypothetical standard of the reasonably well-informed and normally diligent tenderer, the tender documents mean that the Contracting Authority, when faced with missing documentation, must consider whether it is appropriate, in all the circumstances to exercise its discretion. If it decides not to, or having afforded a tenderer an opportunity, it still does not provide a completed Certificate, then its bid will be excluded.

[39] This conclusion is also consonant with Regulation 56(4) which contains the same important proviso as paragraph 6.5.1, namely that the power can only be exercised in compliance with the principles of equal treatment and transparency.

[40] As a result, Mr Isherwood's conclusion that the defendant had no discretion at all was clearly wrong. The defendant therefore fell into manifest error in the compliance check aspect of the evaluation of the plaintiff's tender.

[41] A possible outcome of this conclusion would result in the matter being remitted to the defendant for further consideration of whether the discretion should be exercised in the plaintiff's favour. However, it was apparent from Mr Isherwood's evidence that he had already set his face against such a course of action, and the parties invited me to consider the next issue. On the basis of the evidence and legal principle, should the defendant have permitted the Certificates to be submitted as part of the plaintiff's tender?

[42] At this stage, I remind myself that in areas of discretionary judgment, a margin of appreciation must be left to the decision maker and the Court should only intervene when the decision is unjustifiable – see paragraph 55 of *Leadbitter* and paragraph 18 of *Dem-Master* (supra). However, in the instant case, the decision maker did not carry out the sort of balancing exercise, weighing up the relative pros and cons of a particular course of action, which one would expect to be reviewing. Rather, since he rejected the notion of a discretion existing at all, Mr Isherwood was frank in his evidence that he had not taken into account various factors which may have been relied upon by the plaintiff in favour of admission.

[43] Starting from the position that deadlines are to be adhered to, and late documents only admitted exceptionally, one must identify the relevant features of this case in order to consider whether a discretionary refusal to admit the Certificates after the deadline would have been unjustifiable.

[44] The following arguments can be made in favour of the plaintiff's position:

- (1) The Certificates were complete, and approved, prior to the tender deadline, a matter which can be objectively demonstrated;
- (2) The only shortcoming was that the plaintiff itself did not upload the approved Certificates with its tender submission but they were in the possession of the defendant at the relevant time;
- (3) The process of obtaining approval from within the defendant was delayed by a wholly unnecessary step of seeking verification from the Corporate Procurement Unit which did not have the information being sought;

- (4) Had that step not been required, the approved Certificates would have been sent to the plaintiff well in advance of the tender submission deadline;
- (5) The plaintiff itself was not at fault in failing to upload the Certificates at the time of tender submission – it would have done so had they been returned to it;
- (6) On the *Manova* analysis, there would be no breach of the principle of equal treatment since the plaintiff would not be afforded any opportunity to enhance its bid after the submission deadline;
- (7) The proportionate course of action would have been to permit the submission of the Certificates after the deadline.

[45] The arguments advanced against the plaintiff's contentions are as follows:

- (1) There are strong policy reasons in favour of maintaining deadlines in procurement competitions;
- (2) The plaintiff in this case delayed until 11 November 2020, just 5 days before the deadline, before seeking Certificates from the defendant;
- (3) As such, the plaintiff ran the risk of not having the Certificates in time, particularly since it was aware of the internal processes required by the defendant as set out in the Advice Note;
- (4) To admit the Certificates after the deadline may have given rise to the risk of challenge by one of the other tenderers;
- (5) The Court must distinguish between the position of the defendant as Contracting Authority and its role *qua* referee and not conflate these in considering whether any discretion should have been exercised.

[46] I have carefully considered the factual evidence in this case and the nature of the discretion to admit missing documents reserved under paragraph 6.5.1 of the ITT and concluded that had the defendant exercised this discretion to refuse to admit the late Certificates, this decision would have been unjustified. The fact that the Certificates were, in fact, approved prior to the tender submission deadline is a powerful factor in the plaintiff's favour. This recognises the distinction between the different roles played by the defendant, since the conclusion would be the same even if a different referee were furnishing the Certificates. Here, as a matter of fact, the Contracting Authority is also acting as referee. This cannot give rise to any advantage to an incumbent provider but does mean that the documents can objectively and unarguably be shown to be in existence prior to the submission

deadline. Unbeknownst to the plaintiff, the Certificates had been approved at the time it was submitting them on an 'unsigned' basis. This means that, in light of *Manova*, there would be no breach of the principle of equal treatment and the power contained in Regulation 56(4) could be lawfully exercised.

[47] The next question is whether exercising the discretion in favour of the plaintiff would have been the proportionate course of action. Whilst it is true that the plaintiff delayed in seeking the requisite Certificates, the evidence reveals that there were 5 other Certificates sought between 9 and 11 November 2020 and, in each case, the Certificate was returned to the tenderer within 2 working days. Had this been the case with the plaintiff, it would have been in possession of the approved Certificates before the submission deadline. The reality in this case is that the defendant had all the information it required to furnish the Certificate to Ms Vincent for approval at 14:57 on Friday 13 November 2020. It then internally sought verification from the Corporate Procurement Unit in full knowledge that it would be unable to provide the necessary details. This caused a delay in the seeking of approval until 12:34 on Monday 16 November. Once sought, the approval was forthcoming in just over an hour. Had the decision maker apprised himself of that factual background and properly analysed the reasons for the delay in providing the Certificates to the plaintiff, this factor must have weighed heavily in the plaintiff's favour. Taken together with the fact that the approved Certificates were in the possession of the defendant prior to the submission deadline, he could only have lawfully concluded that the discretion reserved to the Contracting Authority should be exercised in favour of the plaintiff, and the Certificates accepted as submitted on 17 November. Acting in such manner would have posed no risk to the integrity of the procurement process but rather served to obviate the risk of a competitive tender being excluded. This was the least onerous measure to take and therefore the proportionate response.

Conclusion

[48] The plaintiff's claim therefore succeeds. I will make an order, pursuant to Regulation 97 of the Regulations, setting aside the decision, communicated to the plaintiff on 10 December 2020, rejecting the plaintiff's tender for the planned maintenance competition.

[49] I will hear the parties on any consequential relief, and on the issue of costs.