THE HIGH COURT

BETWEEN

O'KELLY BROTHERS CIVIL ENGINEERING COMPANY LIMITED

APPLICANT

AND

CORK CITY COUNCIL

RESPONDENT

AND

NCOLL CONSTRUCTION LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Birmingham delivered the 22nd day of February 2013

1. This matter comes before the court by way of an application on behalf of O'Kelly Brothers Civil Engineering Company Limited (the applicant) seeking an interlocutory injunction to stop the performance of a contract entered into (the contract) between Cork City Council (the respondent/the council) and Ncoll Construction Limited (the notice party). The application for an injunction is brought in the context of judicial review proceedings seeking to quash the award of a contract entered into by the respondent and the notice party. Leave to seek judicial review having been granted by Peart J. on or about the 29th January 2013.

2. The background to the proceedings is that Cork City Council, as part of the Cork City North West Regeneration Project, was anxious to demolish sixty six dwellings, some of which have long been unoccupied at Knocknaheeny, Cork, and others of which have been detenanted more recently. The contract for the demolition of the sixty six dwellings along with associated ancillary work is estimated at approximately €500,000 in value.

3. The value of the contract means that it falls below the threshold required to engage the European Communities (Award of Public Authorities' Contracts) Regulations 2006, and the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010.

4. The events with which this application is concerned begin on or about the 26th October, 2012, when the applicant was contacted by telephone by an official of the council informing the applicant of the intention of the respondent to embark on a tender process in respect of the demolition. The applicant, through its contracts manager, expressed interest in the contract and subsequently received the tender documentation by email on or about the 30th October, 2012 consisting of:

(1) Instructions To Tenders (ITT),

(2) A Suitability Assessment Questionnaire,

(3) Volume A – works requirement,

(4) Volume B – tender and schedule,

(5) Volume C – pricing document.

The applicant was one of five companies contacted and one of five companies that submitted tenders. The applicant's tender was submitted on the 23rd November 2012, the closing date for receipt of tenders. The original closing date had been the 20th November 2012 but this was extended. The applicant's tender was delivered by hand to the reception desk at City Hall, Cork.

5. By letter of the 10th December, 2012, the applicant received a letter informing it that it had not been awarded the contract. The letter in question was received on the 11th December, 2012 and hardcopy was subsequently received on the 12th December, 2012. As it is an important letter in the context of the arguments that the applicant is now advancing it is convenient to quote the relevant portion of the letter. It was in these terms:

> "I write to inform you that we have assessed the tenders received for the above contract and have determined that your tender was unsuccessful. Furthermore, I wish to inform you that the *lowest price compliant tender* has been accepted. I would like to thank you for the interest you have shown in this competition."

6. By letter dated the 14th December, 2012, the applicant, responded through Mr. Liam Ryan, Chartered Quantity Surveyor. The letter expressed surprise and concern that EU procurement rules and the guidelines of the Works Management Framework issued by the Department of Finance were not being adhered to in this case. The point was made that the Council appeared to have "accepted" the successful tender, but that under EU procurement rules only a "letter of intent" could be issued at this stage to the successful tenders informing him and others that there is a compulsory "standstill period".

7. The Council wrote to the applicant through its senior engineer Mr. Seamus Coughlan. The applicants have indicated that the letter dated the 14th December, 2012, was received by them on the 17th December, 2012. The material portion of the letter was as follows:

> "We refer to your letter of Friday, December 14th regarding the abovementioned project and in particular the procurement process. We can confirm that the estimated value of the works was below the EU Threshold for Works, ie. below €5,000,000 and as a result of this, the procurement process for this project is not subject to EU procurement rules,

including the requirement for a standstill period."

8. By letter dated the 18th December, 2012, Mr. Ryan wrote again, reiterating his concerns and spelling those concerns out in greater detail. The letter included this sentence: "At this stage we do not know if a contract is awarded/signed, who was awarded the contract, where we were in the ranking based on price or other factors".

9. The Council responded by letter from Mr. Coughlan on the 20th December, 2012. Again, this is a very significant letter in terms of the arguments that the applicant now advances. It is convenient to set out the relevant portion of the letter in full:-

> "I refer to your letter dated the 18th December, 2012, to which I now reply as follows:
>
> At the outset, I wish to advise that the abovementioned public works contract is not a contract to which the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (SI 329/2006) apply since its estimated value was below the EU prescribed threshold for a Works Contract. It is not therefore a *'reviewable public contract'* as defined in Article 2(1) of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 and accordingly the 'standstill period' as provided for in Article 5 of the aforementioned regulations does not apply to the award of the above contract.
>
> For the record Mr. Mark Birch spoke to Mr. Karl O'Kelly prior to being invited to tender that there would not be a standstill period.
>
> Clause 7 of the Government document entitled 'Guidance for Public Contracting Authorities: facilitating the participation of SME's in Public Procurement issued with the Department of Finance Circular 10/10 should be read and understood as applying where constructing authorities have obligations under the Revised Remedies Directive. In this regard, please be advised that the aforementioned regulations implement EU Directive 89/665/EEC as amended by Directive 2007/66/EC (the Revised Remedies Directives). In accordance with Clause 7 of the aforementioned Guidance Document concerning the constructive debriefing of unsuccessful bidders, please note that your tender submission was incomplete when one of the envelopes marked 'pricing document' did not contain the pricing document and was empty and in these circumstances your incomplete tender could not be further considered."

10. The applicant says that it was surprised at the response from Mr. Coughlan alleging that the applicant's tender was incomplete and that in particular the "pricing document" was not furnished as it was required to be and that in consequence the application was not further considered. This has given rise to a fundamental factual dispute between the applicant and the respondent. On behalf of the applicant it is contended that on the 22nd November, 2012, Karl O'Kelly and Liam Ryan treble-checked the envelopes to be submitted with the tender as was its practice given its familiarity with public procurement requirements. The applicant contends, that complete documentation, including the Pricing Document was submitted.

11. In contrast on behalf of the respondent it is said that the tenders that were submitted were opened in the Lord Mayor's chamber on the 23rd November, 2012, in the presence of the Deputy Lord Mayor and another city councillor. Also present was Andy Walsh, the senior executive engineer and project manager for the City Northwest Regeneration Scheme. Mr. Walsh observed that the envelope labelled "pricing document" included with the applicant's tender documentation and which ought to have contained the pricing document was in fact empty. At that stage, Mr. Walsh assumed that the applicant must have inadvertently placed the pricing document in with the remaining tender documents which were submitted. However, when on Monday the 26th November, 2012, Mr. Birch executive engineer for the Cork City Northwest Regeneration Scheme examined the five tender submissions he noted that not only was that the envelope labelled "pricing document"empty, but when he checked the remaining documentation of the applicant to see if the completed pricing document was there; it was not. Checks were carried out to see if the pricing document might have been left in the car in which the tenders were transported and also in the office of the project manager where the tenders had been before they were brought to the office of Mr. Birch, but there was no sign of any pricing document. The conflict is a fundamental one. On behalf of the applicant it is said that the pricing document was placed in the appropriate envelope and then submitted. On behalf of the respondent it is said that when that envelope was formally opened it was empty, and that the document in question was not submitted.

12. The suitability assessment questionnaire required tenderers, inter alia, to provide evidence of the educational and professional qualifications and experience on similar projects of their managerial and personnel staff and to provide details of works that tenderers had carried out over the previous five years.

13. The applicant has questioned how and why the notice party was invited to tender for demolition works in circumstances where it says that the notice party had little or no relevant prior experience of demolition works.

14. On behalf of the notice party the suggestion that it is not qualified to carry out the contract works is roundly rejected. The notice party also points out that the contract works go beyond pure demolition and says this is a factor which needs to be borne in mind in considering capacity to carry out the contract.

15. On the 17th January, 2013 a meeting took place that was attended by Carl O'Kelly and Liam Ryan on behalf of the applicant and by Seamus Coughlan and Andy Walsh on behalf of the respondent. At that meeting it emerged that the contract had been awarded to the notice party who was described as the "lowest price compliant tenderer". The actual lowest price tender that had been submitted was "ruled out". It appears that there was a technical defect in this tender submission. This does not seem to have generated any controversy. Very significantly it emerged the applicant submitted the second lowest price. Given that the lowest tenderer was excluded without controversy, this means that if the applicant had not been excluded its tender would have won.

Submissions

16. On behalf of the applicant it is acknowledged that the contract is a sub threshold one but it is said that this was a contract that was of cross border interest and it is contended, in consequence, that EU law is engaged as a result, including general principles involving equality of treatment, non discrimination, transparency, competition, proportionality, objectivity and effective judicial protection. On behalf of the respondent, the protest is made that while the applicant ostensibly accepts that this is a sub threshold contract, the applicant proceeds to seek to introduce into the current dispute the elaborate and carefully constructed architecture that is applicable only to contracts to which the threshold apply. On this question of whether the contract is one that is of cross border interest Mr. Birch on behalf of the respondent is dismissive of the suggestion pointing out that the contract in question is less than 10% of the relevant threshold. The applicant on the other hand says that a number of cross border demolition and asbestos removal contractors regularly participate in tender competitions, listing by name a number of Northern Ireland companies that frequently participate and sometimes participate in contracts that are significantly less valuable than this one. Examples from Carlow,

Sligo and Limerick are quoted. The information presented by the applicant supports the view that this is a contract that might have attracted cross border interest.

17. A number of breaches are alleged by the applicant in relation to the award of the contract. First of all, it is said that there has been a material error of fact amounting to irrationality in concluding that the pricing document was not submitted by the applicant. The applicant points to a number of circumstances which it says are suggestive of the fact that the pricing document was not missing when the tender documentation was opened in the Lord Mayor's chamber. It is said that if a significant document was missing when the tenders were opened that this would have been noted and drawn to the attention of the observers present including, the deputy Lord Mayor and the other councillor. The applicant points to the fact that the initial correspondence from the City Council had not made any reference to missing documentation or disqualification. The Court is invited to draw the inference that had the document been missing, that this would have been referred to at the outset. The applicant draws attention to a sentence that appears in the affidavit sworn by Mark Birch. He had sworn that the respondent's position is that the applicant was unsuccessful in its tender in common with two of the remaining tenderers. The applicant says that this sentence does not make any sense if the reality was that it was one of two tenderers which were excluded. If it was excluded, as now claimed, then it was not one of those that had a tender assessed and was unsuccessful and should not have been listed with them. That these and other matters that they point to are of interest to the applicant is understandable. However, it is not possible at this stage to resolve this disputed question of fact as to whether the pricing document was or was not submitted. However, it seems to me that the most that can be said is that a live and significant issue of fact has been identified. In that regard given that this controversy is of such central significance I would just observe that I find it surprising that Mr. Walsh has not sworn an affidavit dealing with the opening of the tenders.

18. Procedural matters identified as failures on the part of the respondent by the applicant included:

(1) Failing to advertise,

(2) Not sending the correct letter to the applicant,

(3) Not observing a required standstill period before evaluating the tenders in the manner advertised.

I find a number of these complaints less than convincing. In relation to the failure to advertise, which counsel for the applicant now accepts is not her strongest point five potential contractors had been identified and invited to tender. The applicant willingly and without raising any issue went along with the procedure proposed. It seems to me that regardless of whoever else may have a complaint about the lack of advertising those who were invited to tender cannot have any complaint. Their position could not have been improved in any way if the contract had been advertised on e -Tenders The situation in relation to the standstill period is only marginally different. The evidence would appear to establish that on the 26th October, 2012, Mr. Birch spoke with Mr. Karl O'Kelly as well as speaking with representatives of the other contractors. According to Mr. Birch, each of the contractors was given the same information, namely:

(1) Sixty-six houses were for demolition,

(2) The work was being carried out on an emergency basis,

(3) Five contractors were being asked to price the work with an award based on lowest price and subject to a suitability assessment questionnaire,

(4) "Although there is not requirement for one we will not have a standstill period and will be awarding the contract ASAP after the last day for receiving tenders" (quotation from affidavit of Mr. Birch reflecting an email sent by Mark Birch to Andy Walsh on 26th October, 2012.)

Mr. Liam Ryan deals with this conversation in the course of his affidavit by saying that in a conversation in or about mid October between Karl O'Kelly and Mark Birch, Mark Birch indicated that the respondent intended to try to avoid holding a standstill period. Mr. O'Kelly's treatment of this issue in the course of his affidavit is less than convincing. He comments as follows:-

"At paragraph 4, Mr. Birch suggests that the applicant was aware that the 2006 Regulations would not apply prior to submission of its tender. This issue was addressed in the affidavit of Mr. Ryan. I did not therefore regard the statement made by Mr. Birch as being definitive that there would be no standstill period. I also could not assume based on the telephone call averred to that the respondent would not comply with its legal obligations and conduct a standstill period. It is also incorrect to say that I "accepted" that there would be no standstill period; the applicant certainly did not accept that the respondent could simply ignore its legal obligations".

19. A major element of the complaint made by the applicant relates to the failure to give reasons or rather the giving of apparently inconsistent reasons. The applicant stresses that the initial notification of a lack of success, to use that neutral phrase, gave the impression that the applicant's tender as submitted had been assessed but had lost out to a lower tender. Instead, the applicant complains that it was only on the 20th December, 2012, which was the third opportunity that had been given to the respondent was there the first indication that the applicant had been excluded from the competition because of missing documentation.

20. The complaint is made that the respondent did not follow its own procedures regarding non-compliance. It is said that if the applicant's tender had been non-compliant, then the respondent should have and would have followed the compliance and clarification provisions set out in the ITT and in particular set out at ss 7, 9.2 and 9.3. Instead, the first letter sent out was of the kind contemplated by s.10.1 and thus indicating that the applicant's tender had been evaluated but was unsuccessful following evaluation.

21. The applicant submits that even if, contrary to its contention, the tender documentation submitted had excluded the pricing document, a proportionate response on the part of the City Council would have seen it revert to the tenderer seeking clarification. The applicant is dismissive of the respondent's view that permitting a late submission of the pricing document would have been inappropriate as offering an unfair advantage by providing the tenderer with an opportunity to modify or improve on its submission after it had been submitted. There was no scope for unfair adjustment. In contrast, the respondent points out that the tender rules meant that the respondent had a discretion to accept the submitted tender, to revert to the tenderer or to exclude the tenderer, and that a discretion having been created, this could be reviewed only on O'Keefe/Meadows grounds. There is no conceivable basis for reviewing on such grounds it is said.

22. The applicant contends that some of the comments made in the respondent's replying affidavits would suggest that consideration was given to matters other than the price of the lowest tender, and that at least some element of qualitative assessment as well as some degree of analysis of the pricing documents had occurred.

23. It is agreed that the question of whether this is an appropriate case for an interlocutory injunction falls to be considered in accordance with the principles established in *Campus Oil v. Minister for Industry and Energy* [1983] IR 88. However, the applicant says that the traditional *Campus Oil* approach should be influenced by European Law principles and in particular that the requirement to provide an effective remedy should be to the forefront.

A fair issue to be tried
24. This is not an overly high threshold. In considering whether the threshold has been crossed, one has to have regard to the reliefs that are being sought which would justify the granting of an interlocutory injunction. In that regard, it is of note that amongst the reliefs sought, is a declaration that the contract between the respondent and notice party should be set-aside, along with a permanent injunction prohibiting the respondent and notice party from performing the contract. These reliefs are radical in nature. There are formidable obstacles in the path of the applicant setting aside a contract that has been entered into and that has been part performed. If such an order is to be made it would seem to be a first for a sub-threshold public contract. However, while recognising those difficulties, it seems to me that the applicant has succeeded in making out a fair issue to be tried. It has done so by reference to the factual dispute as to whether complete tender documentation was submitted or whether the pricing document, and less crucially, another document, a Works Proposal Document had been omitted. It also seems to me that the applicant has established a good arguable case that, in the case of a contract with the potential for cross border interest, there ought to have been a standstill period.

The Adequacy of Damages
25. I turn now to the question of the adequacy of damages as a remedy and the balance of convenience. A number of arguments are advanced by the applicant in contending that damages would not be an adequate remedy. The point is made that in the public procurement context, damages are inherently unsatisfactory when, what the disappointed tenderer wants is to obtain and perform the contract. The applicant says that there are significant doubts as to how damage would be calculated and about what is recoverable. Even, an entitlement to what might be seen as core heads of claim such as bid costs and lost profit on the contract is not free from doubt. Other areas where the applicant would, in fact, suffer loss are difficult, perhaps even impossible, to quantify. In that regard, the point is made that the applicant will suffer reputational damage in having lost out on the contract and will lose the reputational gain that would arise from successfully carrying out such a contract and the question is asked how is this to be addressed? It is pointed out that it is common at the tender pre-qualification stage that those wishing to tender are required to have a certain level of turnover recorded. Not being able to include the Knocknaheeny contract suppresses the applicant's turnover which may give rise to eligibility difficulties for other contracts. Again it is often the situation that those wishing to tender have to be in a position to establish that they have carried out "works of a similar nature". Demolition on this scale in a high density urban environment has to date been unusual. If there are similar schemes in the future, and it is likely there will be given the regeneration projects underway in a number of cities, the applicant will be significantly disadvantaged if unable to point to a successful outcome in Knocknaheeny.

26. In my view damages are an adequate remedy and are an appropriate remedy. I am not dissuaded from that view by the fact that there may be arguments as to whether particular heads are recoverable or by the fact that some heads may not be easily quantifiable. In some respects the applicant is in a better position than many disappointed tenderers when it comes to damages in that it is in a position to establish it would have won, if not excluded. In considering the availability of damages as a remedy and the adequacy of damages it is worth considering that if the applicant succeeds in its case then this will very probably be on foot of a finding of fact that the pricing document was not missing when the tenders were opened. That would be a truly dramatic finding and would lead to the conclusion that the applicant had been grievously wronged. In that eventuality the maximum *ubi jus ibi remedium* would clearly have relevance.

The Balance of Convenience
27. I turn now to the question of the balance of convenience. In considering this, what seems to be a relevant consideration is the fact that the applicant chose to participate in the competition knowing that the Council was approaching five identified entities to tender and was seeking to avoid a standstill period. Also highly relevant is that the *status quo* is that the contract has been awarded and was being carried out by the notice party before the application to the court. The applicant has placed very considerable emphasis on the fact that the respondent has now removed its heavy machinery from the site. However, in a situation where an undertaking to suspend work had been forthcoming, it is hardly surprising that the plant and equipment would be removed, but this should not disguise the reality that NCOLL Construction Limited had been appointed and was carrying out the contract. It seems to me that the balance of convenience strongly favours preserving the status quo and allowing the contractor who had been on site to get on with the job.

28. There is a strong public interest in getting on with this project. One house has already been the subject of an arson incident. Correspondence from the local Garda Superintendent offers powerful support for concerns that a block of unoccupied dwellings creates a magnet for anti social behaviour. Given the extent of the concerns, it is not surprising that the local authority has dealt with the project as an urgent one throughout. This is evident from the fact that in a situation where contact was made with possible tenderers on the 26th October, 2012, the tender documentation provided for substantial performance of the contract by the 18th January, 2013. The urgency is reflected in the terms of a managerial order of the 12th December, 2012, by City Manager Tim Lucey. This order expressly states that the manager considers that the demolition of the dwellings are necessary for dealing urgently with the situation existing at Ardmore Avenue, Knocknaheeny, which the manger considers to be an emergency situation calling for immediate action. This recital is provided for by s. 179(6) of the Planning and Development Act 2000.

29. In considering the manner of the applicant's response, this has to be judged against the fact that the applicant understood that the notice party was working on site from the 19th December, 2012, and was there with a practical completion date of the 18th January, 2013. Against that background, an application to Court during the last week of January 2013 would seem very late indeed.

30. However, the applicant says that the situation is not as straightforward as might be suggested. The applicant points out that only when the letter dated the 20th December, 2012 was read following the Christmas break on the 7th January, 2013, did it discover that it was being said that incomplete documentation had been submitted and that the applicant had been excluded from the competition. Only at a meeting held on the 17th January, 2013 did the applicant learn that the tender it had submitted was actually lower than that submitted by the successful notice party.

31. The applicant is sceptical about the categorisation of the project as one of great urgency, pointing in that regard to such issues as the fact that the closing date for receipt of tenders was extended from the 20th to the 23rd November and that the work on site was not proceeding at a particularly brisk pace. Furthermore, the respondents sought an adjournment to deliver a replying affidavit when proceedings were launched. The applicant draws attention to the affidavit sworn by civil engineer Ronnie Greene, and the report prepared by him, which concluded that the short term risks associated with the unoccupied dwellings are low and that risks to public health and safety will not be disproportionably increased by a temporary suspension of the demolition work.

32. I have considered the arguments made by the applicant that there has not been delay on its part and the related argument that the project is not as urgent as is suggested and accordingly that the rights of the applicant cannot be overridden and ought not to be overridden. However, as a matter of common sense, the existence of a block of 66 houses, unoccupied and boarded up in a local authority housing estate is a deeply unsatisfactory one and not one that can be permitted to continue. It seems to me that there is a very strong public interest in having the demolition project brought to a speedy conclusion.

33. The public interest is a core consideration in assessing where the balance of convenience lies. A further aspect of that is that if there is to be an interlocutory injunction which will continue until the trial of the action, then the resulting suspension of work would be a very significant one. The impact on the public will not be short-lived or limited. This militates against the granting of an injunction.

34. On the other hand, if an injunction is refused and the work is completed by the notice party and the applicant were to succeed in its action and be compensated by an award of damages then the public would be paying twice for the demolition. There is no doubt this would impact on the ability to provide public services. Such a situation is clearly not in the public interest and is a factor to be considered.

35. However, weighing all of these factors, I am nonetheless firmly of the view that the balance of convenience is clearly against granting an interlocutory injunction at this stage. The application to Court was made at a time after the date for practical completion had passed, and was made almost six weeks after the applicant believed that the notice party had gone on site. An injunction would radically alter the *status quo* and would significantly delay progress on the demolition phase of the regeneration project. This is definitely not in the public interest. Balancing the interests of the parties, the applicant, the respondent, the notice party and the public interest requires that the interlocutory injunction should be refused.