



THE COURT OF APPEAL

Neutral Citation Number: IECA 87

Record No. 2018/118

**Peart J.
Hogan J.
Gilligan J.**

**IN THE MATTER OF THE REVIEW OF THE AWARD OF A PUBLIC CONTRACT PURSUANT TO THE EUROPEAN COMMUNITIES
(PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 AND ORDER 84A OF THE RULES OF THE
SUPERIOR COURTS (AS AMENDED)**

BETWEEN

WORD PERFECT TRANSLATION SERVICES LIMITED

APPELLANT

- AND -

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM (NO. 2)

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 28th day of March 2018

1. This is now the second appeal on an interlocutory matter which this Court has been required to address in these public procurement proceedings in the space of a few weeks. In the first judgment, *Word Perfect Translation Services Ltd. v. Minister for Public Expenditure and Reform* [2018] IECA 35, this Court held that as the damages recoverable under the European Communities (Public Authorities Contracts Review Procedures) Regulations 2010 (S.I. No. 130 of 2010) ("the 2010 Regulations") were confined to Francovich damages, this meant that damages would not be an adequate remedy for the appellant in the event that its public procurement was to be proved successful. The net effect of that conclusion was that this Court refused to make an order lifting the automatic stay

2. While this Court held that the automatic stay provided for in the Regulations should not, therefore, be lifted, we did require nonetheless that the substantive proceedings should proceed with dispatch. As the substantive action is now listed for hearing in the High Court on 18th April 2018, this Court has now been required to hear an appeal brought by Word Perfect against the refusal of the High Court in a judgment delivered on 16th March 2018 to direct the discovery of parts of the successful tender document which is at issue in these proceedings.

The background to the present proceedings

3. Before considering the ambit of this discovery request and the appeal presently before us, it is first necessary to say something about the background to the proceedings. The appellant company is the supplier of specialist translation services to a range of State bodies. These public procurement proceedings which have been brought by it concern a challenge to the award by the Minister for Public Expenditure of a contract for the supply of translation services to the State's immigration services (including the International Protection Appeals Tribunal) and the Legal Aid Board.

4. In October 2015 the Office of Government Procurement ("OGP") initiated a tender request for interpretation services over a range of public bodies. The tender request was divided into some eight different lots. The present proceedings concern Lot 4, which is concerned with the State's immigration service and the Legal Aid Board.

5. The modern practice of public procurement often involves framework tendering in the first instance. The preferred bidders who are admitted to the framework agreement are then invited to participate in a mini-tender against each other. Word Perfect were included as among the tenderers admitted as preferred bidders in the Interpretation Services Framework Agreement in January 2016. Three suppliers were nominated to Lot 4 which included Word Perfect and another service provider, Forbidden City Ltd., which trades as Translation.ie.

6. The fact that the number of framework suppliers is confined to three entities is not without significance, because these companies are in competition with each other for each relevant contract and, accordingly, discovery of the terms of the tender documents (or even part of them) could be of considerable benefit to another tendering entity. All of this simply serves to highlight and underscore the importance of confidentiality in respect of these particular tender documents.

7. On the 27 April 2016, a supplemental request for tenders for a 12 month contract was issued by way of mini-competition to the three service providers concerned. The result of the mini-competition was published to the tenderers on the 5th August 2016, by way of a voluntary standstill letter. As it happens, Word Perfect's tender was unsuccessful and, as a result, in a pre-action letter dated the 12 August 2016, it indicated that it intended to bring a legal challenge to the contract award. This prompted the OGP to review the tender process. It concluded that the process was flawed and, accordingly, on 31 August 2016, the OGP cancelled the tender.

8. On the 7 December 2016, the OGP issued a new mini-tender to the three service providers on the framework agreement with a closing date of 17 January 2017. The rules of the mini competition provided for a maximum word count in respect of each relevant submission. In the category entitled "Management Plan", the maximum permitted word count was 2,000 words. The word count was exceeded by Word Perfect, although it was complied with by the other tenderers.

9. There then followed lengthy correspondence between the OGP and Word Perfect's solicitors which included demands by Word

Perfect that it be permitted to submit a new edited version of its tender. This proposal was rejected by the OGP as representing an unlawful breach of the rules. The OGP proposed instead to consider Word Perfect's submission on a *pro rata* basis in respect of each of the categories concerned so that it would comply with the word count limit. The net effect of this was that Word Perfect was ultimately marked on the first 2,000 words of its tender.

10. On the 18 April 2017 a voluntary standstill letter was issued to each tenderer notifying them that Translation.ie was the preferred bidder. As it happens, Translation.ie had prevailed by a margin of some 15 marks out of 1,000 so that the outcome of the tender was a close one. Word Perfect were also sent a letter by the OGP on that day ("the regret letter") explaining the marks and giving reasons why Translation.ie won the competition.

11. In response, Word Perfect issued these proceedings on 8 May 2017 in which it challenged the proposed award of the contract. On 28 June 2017 the Minister then issued a motion pursuant to Article 8A of the 2010 Regulations seeking to have the automatic stay on the execution of the contract lifted. The Minister originally succeeded in the High Court but an appeal by Word Perfect was successful in this Court.

12. The dispute which now arises is whether Word Perfect is entitled to discovery of three particular sections of the winning tender document which had been submitted by Translation.ie. In his judgment delivered on 16th March 2018 Barrett J. refused to order discovery on the ground that this material was not relevant. The focus of the appeal to this Court was whether this conclusion as to relevance was correct. It should be stated, however, that for the purposes of this appeal, Word Perfect has somewhat refined its approach to the discovery request. It no longer seeks access to the entire document as it had before Barrett J., but rather to three specified portions of it.

13. Relevance for discovery purposes is, of course, determined in the first instance by reference to the pleadings: see *BAM PPP PGGM Infrastructure Cooperatie BV v. NTMA* [2015] IECA 246. This is perhaps especially true in procurement cases where the parties are expected to bring forward their entire case with particularity within a short period of time and where the possibility of amendment of pleadings is generally limited. It is therefore necessary carefully to scrutinize the case made by Word Perfect in their grounding statement as bears on this discovery question.

The case as pleaded by Word Perfect

14. It is not dispute but that the claim as pleaded by Word Perfect in its statement of grounds dated 8 May 2017 bears on three particular grounds of complaint, namely, in relation to the service delivery plan, the telephone resourcing plan and the quality assurance plan. In relation to the service delivery plan, the case made by Word Perfect is that its tender was evaluated on the basis that "it did not include any proposal in respect of the methods employed to ensure that interpreters will retain their skills in the language and remain up to date with their practice and fluency" to a sufficient standard. It maintains that this is manifestly incorrect and it points to certain parts of its own tender to refute that suggestion. The case thus made is that there was a manifest error of assessment on the part of Minister in awarding marks under this criterion.

15. So far as the telephone resourcing sub-criterion is concerned, the complaint is that Translations.ie were awarded full marks under this heading (50 marks) on the basis that it assigned a "dedicated phone number for uninterrupted 24/7/365 service available nationwide, whereas Word Perfect was assigned only 30 marks under this heading. It says that, viewed comparatively, these marks are not sustainable having regard to the level of detail contained in its own tender dealing with telephone resourcing.

16. The final area of complaint is that of the quality assurance plan sub-criterion. Word Perfect was awarded full marks under this heading, but Translation.ie was awarded some 170 marks out of the 200 marks. The complaint here is a slightly different one because in its "regret" letter of 18 April 2017 the OGP gave no reasons as to why Translation.ie obtained 170 marks under this heading. The OGP appears to have taken the view that it was only obliged by Article 6(2)(c) of the 2010 Regulations to give detailed reasons only in respect of the those criteria where the successful bidder outscored the losing party. Word Perfect accordingly maintains that it is necessary for it to have access to this part of their rivals tender in order to make out its case that there was a manifest error in the marking assessment of its rival.

The test governing relevance in discovery applications in public procurement challenges

17. While it is generally true that if, as Clarke J. said in *Telefonica O2 Ltd. v. Commission for Communications Regulation* [2011] IEHC 265, "the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to disclosure", this statement must nonetheless be treated with some reserve in the special context of an Ord. 84A procurement challenge. Confidentiality and the legitimate protection of business secrets are indispensable features of a tender process because this calls upon potential business rivals to advance their best case in the tender, often revealing their business plans, methods and pricing strategies in the process. There is, of course, an important public policy in promoting a competitive tendering process. That public policy would be impaired – perhaps even jeopardised – if highly sensitive tender documentation could readily be disclosed via a subsequent discovery process to business rivals because this would inevitably tend to inhibit potential tenderers advancing their best case.

18. This, of course, is particularly true in the context of framework tendering which forms the background to the present case given that such competitions are confined to a pre-selected small group of business rivals who are likely to be in constant competition with each other for these tender awards.

19. These general principles were acknowledged by the Court of Justice in Case C-450/06 *Varec S.A. v. Belgium* EU:C: 2008: 91 where the Court stated:

35. "In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.

36. Furthermore, both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them.

37. Accordingly, Article 15(2) of Directive 93/36 provides that the contracting authorities are obliged to respect fully the confidential nature of any information furnished by the suppliers.

38. In the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender, and of publishing a notice of the award of a contract, Articles 7(1) and 9(3) of Directive 93/36 give the contracting authorities the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.

39. Admittedly, those provisions relate to the conduct of the contracting authorities. It must nevertheless be acknowledged that their effectiveness would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners.

40. In such circumstances, the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets.

41. In such an appeal, the respondent would be the contracting authority and the economic operator whose interests are at risk of being damaged would not necessarily be a party to the dispute or joined to the case to defend those interests. Accordingly, it is all the more important to provide for mechanisms which will adequately safeguard the interests of such economic operators."

20. At the same time, however, the tender documentation cannot be regarded as inviolable and immune from the discovery process. Both Article 34.1 and Article 40.3. of the Constitution on the one hand and Article 41 and Article 47 of the EU Charter on the other each in their own way require the courts to ensure that the administration of justice is effective and that the principles of fair procedures are respected. Much of the case-law on this point was summarised by me at some length in *Efe v. Minister for Justice, Equality and Law Reform* [2011] IEHC 214, [2011] 2 I.R. 798 and it is perhaps unnecessary to repeat this exercise here.

21. Rather, the critical point is that without access to the tender documentation a disappointed tenderer might in some instances never be in a position to advance a case of manifest error or to contend that there was some other significant flaw in the assessment process. One might equally say that in such circumstances the right to challenge a tender award on these grounds – itself a key aspect of the rule of law and the fair operation of the procurement process – would remain illusory.

22. All of this means is that access to a rival's tender documentation via the discovery process is not just governed simply by the standard requirements of relevance and necessity. Rather, the case for discovery of this documentation must be convincingly established as indispensable for the fair disposal of the procurement challenge. Against that background the case now made by Word Perfect for discovery of the relevant extracts from the Translation.ie tender can be considered by reference to the three headings of the claim.

Service delivery plan

23. As I have already noted, the key feature of Word Perfect's case under this heading is that *its own tender* was not properly evaluated and that it was not given sufficient credit for the fact that it too had proposals to ensure that its own interpreters retained and kept up their language skills. While I do not doubt but that it might well be of some advantage or utility for Word Perfect in the context of the litigation to have access to the rival tender's treatment of this topic, this *in itself* is not enough.

24. For my part, I do not think that it could be said that access to the relevant part of the Translation.ie tender dealing with the service delivery plan is indispensable in the sense I have just described. After all, the claim advanced under this heading is essentially that the OPG misunderstood or wrongly evaluated Word Perfect's own tender document. If that is so, then the claim under this heading can proceed almost entirely without reference to what did or did not happen to its rival in respect of this particular criterion.

25. I would therefore dismiss the appeal insofar as it related to discovery of the Translation.ie tender dealing with the service delivery plan.

Quality Assurance plan

26. Word Perfect's claim under this heading is that no explanation at all has been offered by the OPG as to why Translation.ie obtained 170 marks under this heading. It maintains that it does not know why its rival obtained these marks and that it needs to have access to that part of the tender in order to make out its case that these marks may not have been justified.

27. I agree that in circumstances where no reasons at all have been given in respect of this heading – because, it seems, Word Perfect outscored its rival under this heading – the claimant cannot reasonably hope to make out its case on this front without access to the relevant portion of its rival's tender. In these particular circumstances, I consider that access to the relevant portion of the Translation tender dealing with quality assurance is indispensable if the Word Perfect is to have any prospect of making out this part of its case.

28. I would therefore allow the appeal in respect of this aspect of the case and, subject to certain confidentiality commitments which I will discuss later, would direct the Minister to make discovery of the relevant portion of the Translation.ie tender dealing with the quality assurance plan.

Telephone Resourcing

29. The case made by Word Perfect under this heading is partially that the OPG failed to evaluate its tender properly under this heading. It maintains that it had developed a bespoke, stand alone telephone service which was designed to meet the needs of the Minister and the other public departments indicated in the supplementary request for tenders issued on 7 December 2016 by the OGP. It is true that it also complains that Translations.ie was wrongly accorded marks because it assigned "a dedicate phone number for uninterrupted 24/7/365 service available nationwide" and this was the precise reason given by the OPG in its "regret" letter of 18 April 2017.

30. At first blush, however, it might be thought that Word Perfect cannot quite meet the requirement of indispensability under this heading. If it has indeed developed a bespoke, stand alone telephone service which was not properly evaluated by the OPG, one might think that this is a matter which it can advance by reference to its own tender alone and in respect of which it does not need to have access to its rival's tender.

31. It is true that Word Perfect also maintain Translation.ie was wrongly given credit or, perhaps, it might be more accurate to say, undeserved additional credit for its dedicated telephone line proposal. If that is so, one might think that this can be established in the

first instance by reference to the reasons given in the "regret" letter and by reference to the specific tender requirements themselves. As matters stand, I cannot say that access to this aspect of the Translation.ie tender requirement is indispensable in the sense I have described elsewhere in the judgment.

32. At the same time I recognise that this issue is not as clear-cut as the other two categories. Furthermore, it may be that at the substantive hearing a fuller picture will emerge. I cannot therefore exclude the possibility that at that hearing it will become plain that the claimant is too greatly handicapped in the presentation of this aspect of its claim without access to this aspect of the Translation.ie tender document.

33. In these circumstances, I would propose that the order of the High Court be varied and this aspect of the motion should be adjourned to the trial of the substantive action. In essence it will be for the trial judge to determine afresh in the light of this judgment whether access to this part of the tender documentation is indeed indispensable in the manner I have already described.

Confidentiality requirements

34. It remains only to address the issue of specific confidentiality requirements. I think that these requirements can be met in the first instance by stipulating that only named solicitors and counsel retained by Word Perfect will be permitted to have sight of the discovered material comprising that part of Translation.ie tender dealing with the quality assurance plan. Any further applications in that regard can be made to the High Court, but any such application must also be made by motion which is on notice not only to the Minister, but also to Translation.ie.