Neutral Citation Number [2011] IEHC 534

THE HIGH COURT

2011 /365 JR

2011 /305 JR

BETWEEN

QDM CAPITAL LIMITED

Plaintiff

v.

GALWAY CITY COUNCIL

Defendant

JUDGMENT of Mr. Justice Kevin Feeney delivered on 28th day of July 2011

This is an application for judicial review brought by the plaintiff in two separate sets of proceedings. The matter is urgent and the Court has indicated that the decision of the Court is urgently required as the works which are the subject matter of the litigation and which will be affected by the outcome of these proceedings will affect the timing and procedures to be adopted for the contracting of certain works.

The Court has had the opportunity to consider the arguments of both sides and to review the written submissions, documentation and the authorities relied upon by both sides. The Court will briefly outline its decision and the basis upon which it has come to its conclusions.

There are two separate proceedings before the Court, judicial review 2011/305 JR and judicial review 2011/365 JR. It is clear that the factual basis upon which the first judicial review in time was commenced, and in respect of which leave was sought and obtained, was based upon a number of misconceptions and incomplete information as to the true factual position. The second set of judicial review proceedings in time was brought pursuant to order 84A and therefore leave was not required.

Both the judicial review proceedings concern the format and method by which the respondent, Galway City Council, advertised a proposed tender for works to be carried out at the Leisureland swimming pool complex at Salthill in Galway. The boiler or heating system for the swimming pool has ceased to operate and is currently being operated by a temporary system which has significant limitations and a permanent replacement is urgently required; in particular a new system is indicated as being essential prior to the winter. The nature of the work required is the replacement of the boiler or heating system for the pool with a combined heat and power unit and boilers together with the works necessary to remove and carry away the existing fixed system and to install and attach the new CHP unit and the boilers. The process or works involved also requires that the temporary system is able to operate continuously during the works. The new system will be a so-called LPHW, that is, a new low pressure hot water system. The works are envisaged to last 18 weeks or possibly 20 weeks, though they were initially identified incorrectly as having an eight-week duration in the original notice and the form of contract notice used and issued by Galway City Council.

Central to these judicial review proceedings is the respondent's contract notice published on the 6th of April 2011 and the intention to award by tender a contract by a process commencing with that notice. The applicants, QDM, contend that the contract is properly to be described as a public supply contract within Directive 2004118/EC and the European Communities (Award of Public Authorities' Contracts) Regulations 2006. The respondent's notice is predicated on the works being a public works contract and Galway contend that the works have been correctly designated as a public works contract. It is clear and there is no real dispute but that the works involved are a mixed contract, requiring the supply of goods and the carrying out of works, and that therefore in addressing the core issue as to whether the contract is properly a supply contract or a works contract, that the test applicable to mixed contracts must be applied, which is a test by which the Court is to ascertain which -that is, the supply of goods with works, or works with the supply of goods - is the predominant feature.

The Court in considering this matter has applied the test as used in mixed contracts and addressed the issue using the main purpose test. In using this test the Court has had to consider what, on the evidence, is the main purpose of the category. In answering that question, the Court can identify the correct or proper categorisation of the contract for the purpose of the notice of the 6th of April 2011. To carry out that test, the Court considers all the features of the contract, including the goods to be supplied, the cost of those goods, the percentage cost of such goods to the overall estimated cost. the format in which the goods will be supplied or delivered to site, the works necessary to remove and carry away and disconnect the existing system, the nature and extent and complexity of the works necessary for the installation connection and location of the system, the issue as to whether different areas of expertise are required, such as mechanical, electrical, plumbing and construction and demolition, and the format or environment in which works will be carried out, and the factor that the works must not interrupt the continuous usage of the complex. All these matters are of relevance and must be applied to the particular circumstances and the state of affairs which apply in this case.

During the hearing the Court identified two matters which appeared central to its decision and which were acknowledged as such during argument. First, what is the type of contract involved, and if the con tract can be properly described as a supply of goods contract then it follows that the notice of the 6th of April 2011 is defective and not in compliance with the necessary procedures or statutory regime, and the applicant would be entitled to a declaration that the notice of the 6th of April 2011 failed to comply with regulation 45 of the EC regulations SI329/2006, the European Communities (Award of Public Authorities' Contracts) Regulations 2006. If the works can properly be described and identified as a public works contract then the declaration sought in that regard should be refused. Both parties agreed the Court must address this issue and should apply the main purpose test. In considering tendering for public contracts under the procedures and regulations, the actions and decisions of the public contracting authority in a procurement process must be viewed objectively to ascertain that it is not only objectively justifiable, but that the process is proportionate, transparent and reviewable. The Court recognises this, and it is based upon that approach that the applicant sought the Court to

address a second issue over and above the issue concerning the type of contract involved, that issue being, namely, whether the notice of the 6th of April 2011 contains the necessary elements to treat the contract as a public works contract and to have the notice reviewed or to be capable of review, and whether, based upon the principle said to be identified in the *Lämmerzahl GmbH case v. Freie Hansestadt Bremen* [2007] EMECJ C-241 /06, [2007] ECR I-841S, there was such a failure by Galway City Council to reveal the essential nature and scope of the contract, thereby rendering the notice in the claim made by the applicants defective and in contravention of the requirements of procurement contracts. In looking at this second question, the Court must look at the contents of the notice of the 6th of April 2011 and the details disclosed therein, and the Court must also look with care, as it has done, at what is to be identified in the Lämmerzahl judgment of the European Court of Justice, and to identify what were the particular effects of that case and how the principles therein might be deemed to apply to the facts of this particular case. The Court has had the opportunity since the conclusion of the hearing to consider that judgment in detail and I will return to it later in this summary.

A number of matters were not proceeded with by the applicant at the hearing and the Court does not have to address those issues. They include: (a) The complaint raised by the applicant in relation to the pl acing of a minimum turnover of €1.25 million on parties seeking to tender and the process followed in identifying that sum (b) The claim that the respondent's time limits were disproportionate to the nature of the contract (c) That guidelines are binding on the respondent even where they do not place an express obligation or are not identified as being mandatory in nature and (d) that the respondent acted *ultra vires* in adopting a restricted procedure.

It is clear that following the question and answers and given the respondent's identification of type of contract involved, rightly or wrongly, that the value estimate of the contract was in excess of €193,000 and that the respondent valued the contract in the range of €250,000 to €500,000. A more focussed estimate was identified during these proceedings and that was to the effect that the estimated figure is likely to be nearer the €500,000 figure. In the light of the fact that a tendering process is envisaged, it was not contended that the respondent should have provided a more precise or definitive estimate.

The first question which the Court must address is the type of contract which was involved in this particular case. What type of contract is involved on the facts? The parties agree that the main purpose test applies, given that the two elements, that is goods and works, are both involved in this contract. The High Court has recently considered the statutory framework identical to the framework involved in this case and the approach to be adopted in considering and deciding what is the correct designation of the type of contract within the meaning of Directive 2004/18/EC and ST 329/2006. It did so in *QDM Capital Ltd v. Athlone Institute of Technology,* [2011] IEMC 387. That case involved the same applicant as the applicant in this case and even though QDM are appealing the judgment of Birmingham J, both that company and the respondent herein have accepted that for the purposes of this hearing the approach and principles identified in that case in deciding whether a contract constituted a contract for works or not should be followed and applied by this Court to the facts of this case. This Court has therefore carefully considered the judgment and has proceeded on the basis that the approach and principles therein set out should be applied to the facts of this case as identified in the affidavits which have been delivered by both sides. Certain portions of the judgment are of assistance to the Court in identifying the principles and approaches to apply. In the judgment of Mr Justice Birmingham he identifies the following at paragraph 21,

> "How to approach categorising a contract and how a contract is to be identified, whether as a public works contract or otherwise, has been considered in a number of decisions of the European Court of Justice. The case of *Gestion Hotelera Intemacional SA v. Comunidad Autonoma de Canarias and Others*,[2008] ECR 1-619, concerned a contract for the renovation of a hotel and fitting-out of a casino, and then the operation of both the hotel and the casino. The Court held that the contract was not governed by the then applicable directive as it was not a public works contract because the main object of the contract was the operation of the hotel and casino and the carrying out of the works was merely incidental to the main objective of the contract."

This Court identifies that it is of some significance to identify whether or not it could in any way be identified that certain works could be categorised as merely incidental to the main objects of the contract. Mr Justice Birmingham went on in paragraph 23, there being no paragraph 22 in the judgment, to state the need to focus on the main object of the contract emerges even more clearly from the case of *Auroux and Ors v. Commune de Roanne*, case 220/05, reference given, a case involving a mixed contract arising out of the development of a leisure centre. There the Court of Justice observed as follows, paragraph 37 is quoted from: "It is clear from the case law of the Court that where a contract contains elements relating to a public works contract and another type of public contract, it is the main purpose of the contract which determines which community directive on public contracts is to be applied in principle," and it then gives a reference. Mr Justice Birmingham goes on in paragraph 25 to state: "Guidance on how to determine what is the main purpose of the contract is provided by the leading case in this area of the *Commission v. Italy*, case C412/04, the reference given. There the Court commented as follows, quoting from paragraph 47 of that judgment, as follows: 'It is, moreover, clear from the case law of the Court that where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is the main purpose of the contract that determines which community directive on public procurement is to be applied in principle. See case C220/05, Auroux and Others.'" In paragraph 48, the European Court of Justice identified in particular, therefore, the scope of Directive 93/37 is linked to the main purpose of the contract, which must be determined in an objective examination of the entire transaction to which the contract relates.

That again, is of assistance to this Court because it is clear that the test and approach to be carried out by this Court is an objective examination of the entire transaction of which the contract relates. Mr Justice Birmingham went on to quote paragraph 49 of the *Commission v. Italy* judgment, which stated: "The assessment must be made in the light of the essential obligations which predominate and which, as such, characterise the transaction as opposed to those which are only ancillary or supplementary in nature and are required by the very purpose of the contract. The value of the various matters covered by the contract is in that regard just one criterion among others to be taken into account for the purposes of the assessment."

That is the end of paragraph 49, and that again is an approach which informs this Court in relation to its examination of the effects of this particular case. The Court must look at the essential obligations which predominate and characterise the transaction, and then must see what could be truly said to be ancillary to those main obligations or supplementary in nature and/or require -- and also to identify what is the very purpose of the contract. Whilst the value of the contract is one of the factors to take into account, and in certain situations could be an important one, it is by no means the only one and it is certainly not determinative.

It is also appropriate, even though it is not quoted in the judgment of Mr Justice Birmingham, to quote from section 50 of the same judgment of the European Court of Justice in the Italy case and in paragraph 50 the European Court stated as follows:

> "It may be inferred from the foregoing, as the Advocate General has indicated in points 38 and 74 of his opinion, the value of the works cannot, without infringing the requirements of directive 93/37, constitute the sole criterion capable of resulting in the application of law No. 109/1994 to a mixed contract, where those works are only ancillary."

As this Court has already indicated, the cost of the works is one of the factors which the Court will take into account but it is by no means the sole factor, nor is it determinative.

In this case it is clear that in examining the overall circumstances and the essential obligations of the contract in question that the contract contains both a requirement for goods and a requirement for works. As regards goods, there are two main items or main category or types of goods, namely, the CHP unit and two boilers. The value of the goods, whilst not determinative, is and can be, as it is in this case, a significant and relevant matter to take into account, particularly where, as is the fact in this case, both the CHP unit .and the boilers can be pre-assembled. Even though that is the case, it does not in fact truly answer the question as to what predominates and what are the essential obligations of the contract. The Court must address the question, is the main purpose of the contract the supply of the CHP unit and the two boilers on an objective test, or is the main object the removal of an existing system and the installation of a new system while continuing to operate the leisure complex? The evidence is that the value of the CHP unit and the two boilers is significantly less than 45% of the envisaged total price. There are a number of important factors that point significantly to this being a works contract when viewed objectively. There is the fact that the CHP unit and the two boilers require not just mere simple attachment, as might be the case with a boiler purchased for a family home or even a small business, but it is the case that when obtained those boilers must be integrated into an existing construction requiring plumbing, electrical and construction works and works which are compatible with the existing installations. It is also the case that there is a significant and technical issue in relation to the demolition and removal of works, and that they are required, including the removal of asbestos. It is also the case that the total time period now identified of being at least 18 weeks makes it clear that it is not a work of simple or indeed an uncomplicated nature or which could be categorised as a straightforward attachment of goods on a site. It is also the case that the site in issue is a leisure site open to the public and that that leisure complex must continue to operate during the works over an 18 week period and the works must be carried out and supervised to permit such continued access by the public in a safe manner. It is also the case that the description of the works in the affidavit of Brian Carroll indicate the need for significant multi-discipline works over a number of months, requiring expert professional governance and management from a number of different professionals. It is also the case that the description of the nature and type of works by the respondent's witnesses who know the works and the location and site identify the relevant intricacy of those works. It is also the case that the type and nature of the contracts required of the successful tenderer can properly be equated with a party carrying out construction works and that a contract based upon the supply of goods would be inappropriate. This is illustrative of the true, predominant and essential obligations which are required in this particular case.

It is also the case that the interconnection of the works involving the removal, installation and continued operation leads to the requirement for there being a lead contractor and it is not a situation where a party supplies goods and can arrange for sub-contractors to carry out specified works. This again is of significance in assisting the Court in applying the test identified by the European Court of Justice in the Italy case. Even if the goods were supplied, radical interconnected and complex works would be required to complete the installation and not just mere attachment. It is also the case that a number of different experts and technical skills are needed. The tasks required to be carried out can truly be said to be predominantly of a construction contractor type. It is also the case that the works required cover a number of works specifically covered by the activities listed in schedule one. The works clearly fall within the terms of schedule one.

Having identified those matters particular to this case it is appropriate to return to paragraph 38 of the judgment of Mr Justice Birmingham in the *Athlone Institute of Technology* case. In that paragraph he stated:

> "While I have considered carefully all of the arguments advanced by the applicant, I am firmly of the view that the primary purpose of the contract is the carrying out of major refurbishment and upgrading works to a science area and of the view that the project involves works of a constructional/civil engineering nature. The great bulk of the tasks listed in the contract documents which will have to be carried out were activities that are listed in schedule one. Insofar as there are elements of supply or service involved, and indeed there are such, these are clearly incidental and ancillary to the main purpose of the contract. The essential obligation under the contract is the carrying out of the works of construction/refurbishment character. It is this obligation which gives the contract its character."

This Court is satisfied that having examined the position in this particular case a similar conclusion is appropriate in this particular case in relation to the type of contract. The delivery of the two boilers and the unit to site would only be the commencement of the true character of the works, which requires the removal of existing boiler system, the installation of the new boiler and heating system and the integration of that into the existing premises. The fact that is going to take over a period of some 18 weeks is of significance and indicative of the nature and type of construction, refurbishment and instalment works which are required in this case, and in this case it can also be said that those works identify, and those obligations identify, the character of the contract. The Court is therefore satisfied that, in relation to the first question, that this can properly be categorised as a works contract and not a supply of goods contract.

The Court will now turn to the second question which has been identified as requiring to be answered by this Court. The starting point for consideration of this is to identify the factors which can be gleaned from a full and proper consideration of the Lämmerzahl GmbH case. The applicant in this case sought to rely on that case of placing an onus on the respondent to have included in their notice of the 6th of April 2011 sufficient detail, facts and information as would allow that notice to be capable of being identified as to its true scope and nature and capable of being challenged if necessary. It is therefore necessary to look at w hat the judgment in Lämmerzahl in fact was addressing, the manner in which it addressed, and also then address and associate those factors which can be properly gleaned from the Lämmerzahl decision to the actual notice in this case. In the Lämmerzahl judgment, the Court held in its judgment at paragraph 12, in identifying the dispute in the main proceedings and the order for reference, paragraph 12:

> "In March 2005 Bremen, the local authority, issued a national call for tenders regarding standard software for the computerised handling of cases in the adult and social service and economic aid field. The time limit for submission of tenders stated in the contract expired on the 12th of April 2005."

It is of some significance that the facts of that case was that there was a call for tenders, a limited amount of information identified, and then tenderers had to be in by a specified date. The process which was being followed on the facts of this case is different. There was a notice of the 6th of April 2011, there was a process by which interest could be identified and then tenders could be put in. Central to what is the logic behind the Lämmerzahl decision is that tenderers were being placed in an impossible and unfair position as having to, in effect, determine what tenders they would make when there was no sufficient information to allow a quantification of the tenders and proper, fair or transparent competition.

In paragraph 14 of the judgment the Court goes on to state that the contract notice relating to the call for tenders did not contain any implication of the estimated value of the contract or of its quantity or scope. So, what the facts of Lämmerzahl identified was that there was a call for tenders regarding software and that call for tenders did not contain any indication of the estimated value of

the contract, nor did it contain any indication of its quantity or of its scope. I will look at those features relevant to the notice of the 6th of April 2011 in relation to this case. The European Court of Justice stated at paragraph 28 -and this is to put in context what was being considered before the Hanseatic court in Bremen - Lämmerzahl maintained the position adopted by the court in its decision of the 7th of November 2005 made access to legal remedies excessively difficult, contrary to Directive 89/665/EEC. In those circumstances, the court in Bremen decided to stay the proceedings and referred a series of questions to the Court of Justice for a preliminary ruling, and those questions are set out in paragraph 32 of the judgment. Paragraph 34, in dealing with the questions referred from the preliminary ruling, the Court identified that Lämmerzahl, which was the complaining party, does not specifically indicate precisely what information as to value of the contract must appear in the contract notice, but it does insist that for the purposes of applying a time limit for seeking review, information cannot be relied upon against a person concerned, which the contracting authority did not include in the contracting notice.

At paragraph 41 of the judgment some of the findings of the Court are to be identified. That states:

> "The model contract in annex four provides for reference to the total quantity or scope of the contract (including all lots and options, if applicable). Consequently, a contract notice concerning a public supply contract within the scope of directive 93/36 must, in accordance with that directive, state the total quantity ..." --and that is partly what was opened to me, but the findings of the Court goes on to say, "Or the scope of the contract to which it relates."
>
> In paragraph 43 the Court in its findings states: "If in a specific case that requirement, that is the requirement to state the total quantity or the scope of the contract, is not fulfilled, there is an infringement of Community law in the field of public procurement within an identified article."

In paragraph 44 the judgment and findings of the Court states:

> "Consequently, the answer to the second question must be that in accordance with article 9.4 and the annex to the relevant directive, the contract notice concerning a contract within the scope of that directive must state the total quantity or scope of that contract. The absence of such an indication must be capable of being reviewed under article 1."

So it is to ensure, as a matter of policy, that the document which is relied on must, on the face of it, identify the total quantity, which would be particularly applicable in the supply of goods contract or, more applicable in a works contract, the scope of the contract, and that it is absence an indication as to the scope, and the use of the word "indication" is of significance, in those cases if there is neither the total quantity, which would be particularly applicable to the purchase of goods, or no indication as the scope of contract, which would be particularly applicable to a works contract, and if there was no indication as to that or either of those on the face of the notice, that notice would not be capable of being reviewed and would be deemed to be defective.

In paragraph 54 of the judgment, which is again a section dealing with the findings of the Court, it is stated:

> "It is clear from the case file that by repeated questions and its own initiatives Lämmerzahlsought to confirm its conclusions made on the basis of the tender documentation and with a degree of uncertainty that the contract concerned 310 licences and training events. However, even the last response from the contracting authority, namely its letter of the 6th of April 2006, was not very clear, ambiguous and evasive in that regard."

In the following paragraph the findings go on:

> "A contract notice lacking any information as to the estimated value of the contract followed by evasive conduct by the contracting authority in response to the questions of a potential tenderer, such as that at issue in the main proceedings, must be considered in the view of the existence of a limitation period as rendering excessively difficult the exercise of the tender concerned of the rights conferred on him by Community law."

It is again informative that that position is entirely different from the facts which pertain in this case, which was a notice of-- a contract notice of the 6th of April 2011, and I will quote below the contract details or the descritions or scope of the works identified as being required as set out in that notice, followed by question and answers, followed by an expression of interest, followed by a tendering process, is so different in character from that identified in paragraph 55 of the judgment of Lämmerzahl that that judgment in relation to applying to this particular set of facts would have to be done with the greatest of care.

In paragraph 64 of the judgment the European Court went on to say:

> "In the light of the foregoing the answer to the first question must be that the directive, particularly articles identified, precludes a limitation period laid down by national law from being applied in such a way that a tenderer is refused access to a review concerning the choice of procedure for awarding a public contract or the estimate of the value of that contract where the contracting authority has not clearly stated the total quantity or scope of the contract to the person concerned. Those provisions of the directive also preclude the rule from being extended generally to cover the review of the decisions of the contracting authority including those occurring in stages of award procedure after the end of the limitation period. "

It is now appropriate to look at the notice in this particular case. The notice is headed, "Leisureland boiler replacement, CHP installation and ancillary works". Some reliance might, in theory, be placed by the applicant in the use of the words, "Ancillary works", after the, "Boiler replacement and CHP", unit, but they are works which are ancillary to the boiler and ancillary to the CHP installation and they are not a description as to what the overall contract works are. Quite clearly, when you are provided with a boiler or a CHP unit it is necessary that ancillary works to the supply be carried out but whether those so-called ancillary works are truly to be viewed as ancillary to the supply of goods, or alternatively are to be identified as the main purposes of the contract, is to be identified by an objective test, and this Court in applying that objective test is satisfied that from a legal point of view the works which are ancillary are the supply of the goods.

The contract notice goes on, on the second page, to give details at paragraph 2.2 of the description and goods or services required. It reads:

> "This project involves the installation of a new low-pressure hot water LPHW system boilerhouse system which will replace an existing medium-temperature hot water boilers and the installation of a new CHP unit and all associated equipment and heat exchangers.

> The installation must be programmed, planned and carried out in such a manner as to ensure that the heating system remains operational at all times with no impact on occupants in the leisure facility. The successful contractor will be required to carry out the role of a project supervisor construction stage, and will be required to comply with the Safety, Health and Welfare at Work Act 2005. It is anticipated that the project will commence in early May 2011 and it is anticipated that the period of construction will be approximately eight weeks."

It is indeed correct that eight weeks is incorrect and it should have been read 18 weeks, but even if one reads it solely on the basis that it is to be read as eight weeks, this Court is satisfied that, given the description of the goods and services required, as contained in the notice, that it is an indication of the scope of the contract and in no way could it be said that it failed to provide information identifying and giving an indication of the nature of the scope of the contract and that is all the more so where the contract was relating to the replacement of the boiler in an existing leisure centre and where the process which was to be followed was to be one where, after indication of interest had been made, that additional information and documentation would be available before any tender be submitted. The facts of this case make it clear that the principles sought to be relied upon by the applicant in the Lämmerzahl case have no application in relation to this particular case and that the respondent provided a sufficient and adequate indication of the scope of the contract to ensure that the notice was capable of challenge, capable of understanding and capable of being operated within the time limit identified in that notice. That is entirely a different situation which existed in the Lämmerzahl case and in each and every relevant section of the Lämmerzahl judgment it is identified that it, in that instance, there was neither an identification of the numbers or of the scope of the contract.

So, this Court is satisfied that in applying on an objective basis the facts of this particular case and considering the notice of the 6th of April 2011, which was a contract notice, that the Court is satisfied that the applicant has made out no case in relation to question number two. The Court will therefore ultimately proceed to make an order dismissing the applicant's application for judicial review in both sets of proceedings.