Neutral Citation Number: [2011] IEHC 57

THE HIGH COURT

2008 768 JR

BETWEEN

RELEASE SPEECH THERAPY LIMITED

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice McMahon delivered on the 18th day of February 2011

Introduction

1. On 1st August, 2007, the H.S.E. (hereafter "the respondent") published a contract notice in respect of a tender for the provision of early intervention diagnostic and treatment speech and language therapy services on a pilot basis to run for an initial twelve month period. This notice was published in the Official Journal of the European Union and on the respondent's website. The tender was for the provision of speech and language therapy (SLT) to children from 0-5 years of age who had moderate to severe speech and/or language delay or disorders. The tender was for a framework agreement, the hope being that several tenderers would be successful and would then be included in a panel from which they would be selected from time to time to provide the services as the need arose. It happened, however, that Release Speech Therapy Limited (hereafter "the applicant") was the sole tenderer. On 8th April, 2008, the applicant received a letter from the respondent dated 31st March, 2008, stating that its tender was unsuccessful.

2. In these proceedings, the applicant seeks an order of *certiorari* by way of judicial review quashing the decision of the respondent that the applicant's tender was unsuccessful. The respondent decided not to award the applicant a contract for the provision of speech and language therapy services pursuant to a tender process. The services in question comprise "health and social services" falling within Annex II B of Council Directive 2004/18/EC of 31 March, 2009 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, O.J. L134/114 30.04.2004 (hereafter "the Directive"), and schedule 2, part B of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006), which transpose Directive 2004/18/EC into domestic law.

3. The respondent, as well as maintaining that its decision was lawful, also argues that an order of *certiorari* is not an appropriate remedy as the applicant cannot now receive any benefit from such an order.

4. The applicant's arguments can be summarised as follows:-

> (i) The contract requirements section of the invitation to tender was misleading and contained no indication that providers who could offer only "group therapy" were excluded. To determine this, the Court must, of course, consider the relevant documentation. The respondent argues that this was clear from the invitation to tender documentation, to which the applicant asks, why, in that case, was it not excluded at the outset as failing to meet this threshold requirement, rather than proceeding to an assessment. By proceeding to assess its application, the respondent confirmed, according to the applicant, that the invitation to tender was not clear in that respect and the argument now advanced, that the tender was clear, smacks of an *ex post facto* rationalisation.
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> (ii) The applicant complains also that in the award criteria published, it was indicated that one of the criteria was "cost". Apparently, after discovery was made, the applicant learned that no award was in fact made under the heading "cost" and this was a fatal irregularity as far as the applicant was concerned. The respondent argued that the cost issue was not a normal criterion of capacity, but something that would be assessed only if the applicant had succeeded in the assessment of the other nominated criteria. Needless to say the applicant disagrees with this.
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> (iii) The applicant finally argues that when the criteria were announced by the respondent (something it was not obliged to do under the Directive), and when the weighting was indicated for each of the five criteria listed, there was no indication furnished that certain minimum grades or thresholds applied in assessing each of the separate sub-headings within the criterion. For example, in criterion no. 2, that is, the *Ability to Fulfil Requirements*, where 40% of the total marks were allocated, it was not disclosed in the documentation that the applicant had to achieve a "good" standard under that heading, whereas under other sub-headings an "adequate" standard was only required. Failure to disclose these differences in the weighting system also, according to the applicant, offended against the principle of transparency. Moreover, it was not disclosed that it was an absolute condition that an overall score of 50% had to be achieved on criteria other than "cost".

5. Both the applicant and the respondent agree that this is an Annex II B contract, as defined in the Directive. The applicant accepts that because the contract in question is classified in the Directive as an Annex II B type contract, it is only affected by the terms of the Directive in a very minor way, that is, by Article 23 and Article 34(5) of the Directive only. It is agreed between the parties that Article 34(5) has no relevance to these proceedings. Even though the contract in question is an Annex II B type contract, the case law of the European Court of Justice (hereafter "the E.C.J."), confirmed by its latest judgment of 18th November, 2010*, Commission v. Ireland* (C-226/09), holds that the general principles of transparency and equality do apply to such contracts. It should be recorded that the decision of the E.C.J. was only handed down on the third day of the hearing in these proceedings, and although the respondent contested the above legal proposition initially, it accepts now that the general principles of transparency and equality apply to the tendering process used in the present case. In these circumstances the applicant is encouraged to argue that the tendering and assessment process followed by the respondent in this case breaches the principle of transparency.

6. The facts of the *Ireland* case were as follows. On 16th May, 2006, the Irish Department of Justice, Equality and Law Reform

published contract notice no. 2006/S 92-098663 in the Official Journal of the European Union for the award of a contract for the provision of interpretation and translation services to a number of competent institutions dealing with asylum matters. Section IV 2.1 of the contract notice stated that the contract would be awarded to the most economically advantageous tender on the basis of the following seven criteria:-

1. 'Completeness of tender documentation.

2. Stated ability to meet requirements.

3. Range of lots [the contract was subdivided into several lots], services and languages.

4. Qualifications, relevant experience.

5. Cost.

6. Suitability of proposed arrangements.

7. Reference sites.'

Section VI.3 of the notice stated that the seven criteria were not listed in descending order of importance. The invitation to tender document set out the criteria in a similar manner and they were numbered 1 to 7. Unlike the contract notice however, that document did not expressly state that the criteria were not listed in descending order of importance.

7. The Commission of the European Communities sought a declaration from the E.C.J. that, by attributing weightings to the criteria for the award of a contract for the provision of interpretation and translation services after the closing date for the submission of tenders, and by altering those weightings following an initial review of the tenders submitted, Ireland had failed to fulfil its obligations under the principles of equal treatment and transparency, as interpreted by the E.C.J. There were two issues before the E.C.J. in that case. The E.C.J. held that, in relation to Annex II B contracts, the full demands of the Directive do not apply. Such contracts are only affected by Article 23 and Article 35(4) of the Directive. The Court did hold that in advertising such contracts the advertiser is of course subject to the general Treaty provisions relating to the right of establishment and the right to provide services, and in particular to the non-discrimination and equality provisions. It followed that the system established by the European Union legislature for contracts relating to services falling within the ambit of Annex II B to the Directive could not be interpreted as precluding application of the requirements designed to ensure transparency of procedures and equal treatment of tenderers (see, to that effect, *Wall A.G.* (Case C 91/08), para. 37).

8. The E.C.J. held that Ireland, which had granted potential tenderers access to appropriate information concerning the contract at issue prior to the closing date for the submission of tenders, did not infringe the principle of equal treatment or the consequent obligation of transparency by attributing weightings to the award criteria without granting the tenderers access to those weightings before the closing date for the submission of tenders. Therefore in Annex II B type contracts, there is no obligation on the State to advertise the prior weighting of the award criteria. The relevant paragraphs in the judgment are paragraphs 43, 44 and 48. These paragraphs are of relevance to this case.

9. The second complaint against Ireland made by the Commission was that the weighting of the criteria was altered after an initial review. Ireland had furnished the individual assessors with a certain weighted system when the individuals commenced their individual work, but when the group of assessors had its first meeting, a change in the weighting system was introduced. The Court said that to introduce a change such as this once the process had begun was a breach of the requirements and Ireland was found guilty in that respect. Therefore, if weighting of criteria are published, the weights cannot be altered once the process has begun. This latter point is of no relevance in the case before this Court.

10. The E.C.J. also held that it cannot be assumed from the fact that the award criteria have been listed without any indication of a relative weighting for each individual criterion that they are necessarily listed in descending order of importance or that the award criteria have the same weighting. Moreover, the relative weighting of the award criteria communicated to the members of the evaluation committee in the form of a matrix would not have provided potential tenderers, had they been aware of that weighting at the time the bids were prepared, with information which could have had a significant effect on that preparation and did not constitute an alteration of those criteria.

The Tender

11. In the invitation to tender documentation in the present case, the respondent states that it seeks a service provider to "deliver a Speech and Language Therapy Service to approximately 100 children who present with moderate to severe Speech & or Language delay or disorder for a defined pilot area" and that "a plan of the Speech & Language Therapy Interventions [is] to be provided [and is to] include identified short & long term goals that are specific, measurable, achievable, realistic & within a time frame. These goals should be supported with rationale and methodology as to how they will be implemented, for example, group therapy, individual therapy, direct or indirect therapy or a multi-method approach. A holistic view of the child is required."

12. The first question for the Court is whether it is clear from this description in the documentation that providers of 'group therapy only' are automatically disqualified. The parties are agreed that the standard the Court should adopt in reading the invitation to tender is that of "a reasonable and intelligent speech therapist provider". The transposing Regulations provide that the contracting authority must treat all tenderers equally and without discrimination and must act in a transparent way. The respondent's own protocol states that its evaluation criteria are to be open, fair and transparent. There is case law which was referred to the Court which casts light on the exact standard of objectivity that is to be used. The jurisprudence states that award criteria must be stated in the relevant tender documentation and must be stated clearly so as to allow "…all reasonably well-informed and normally diligent tenderers to interpret them in the same way…[and] the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure… [and] the award criteria must be applied objectively and uniformly to all tenderers." (*SIAC Construction Ltd. v. County Council of the County of Mayo* (Case C-19/00) [2001] E.C.R. 1-7725, paras. 42, 43, 45.

13. The applicant disputed that the tender documentation clearly indicated that only therapists or contractors who could provide both group and single (that is, one to one) therapy were eligible. It argues that a literal interpretation does not lead to such a conclusion. Nor would all reasonably well informed and normally diligent tenderers adopt such an interpretation, based on the wording used. It does not, read literally, state that a broad spectrum of services was an essential requirement. Indeed, to the contrary, the statement refers to "group therapy, individual therapy, indirect or direct therapy **or** a multi-method approach" (*emphasis added*). This, again according to the applicant, shows that the respondent was referring in its illustration to a variety of methods.

14. Moreover, the applicant contends that the respondent subsequently failed to disclose its insistence on this at the tender evaluation meeting, which the applicant attended before the Procurement Group and members of the respondent's procurement department. The applicant argues that if it was so clear that this was an essential requirement, why then did the respondent proceed to assess the applicant rather than exclude it at the threshold stage (*ad limine*).

15. Judith Thornton, an expert called by the respondent, however, stated in an affidavit that the tender requirements "clearly specified that a range of services were required to be provided by a successful tenderer to treat all of the children in the pilot group who would present with moderate to severe speech and language delay or disorder." She also believed that "[t]he model of group tuition proposed did not meet the service requirements for the HSE tender in its entirety, as set out in the tender document." Moreover, she stated there were a number of concerns with the applicant's tender. It was considered that the applicant's tender did not comply with the tender specification insofar as the applicant focused only on group therapy and appeared to limit its therapy to children that it assessed as suitable for the group therapy model. The age profile of the group (0-5 years) demonstrated that a range of services would be required in order to be able to provide the programme to a full cohort of clients in that age group. A holistic view of the child was required which shows that a range of therapies would need to be factored into the treatment of an individual child.

16. The respondent submits that the methodology adopted by the applicant in its tender submission demonstrated an intention to "cherry pick" clients from the pilot group that would be suitable to participate in group therapy sessions only. This methodology was therefore not in compliance with the tender specification to provide the programme to the full cohort of clients in the defined pilot area.

17. The respondent further argues that even if it was in breach under this heading, it would make no difference on the facts of this case as the applicant had indicated at the interview process that she was inflexible on this matter and her refusal to provide individual therapy was "non-negotiable".

18. Much emphasis was placed by the respondent on the fact that the competition in this case was for a framework agreement. Referring to the definition of a framework agreement in the Directive, the respondent explained that under such an arrangement, when the assessments are made, the result will be that a number of tenderers will be selected to go on a panel from which they will be selected in future, as required. It is also significant to note that in the present invitation a two phase process was contemplated: first, it was contemplated that there would be a pilot exercise in respect of a hundred children aged from 0–5 years of age (in the Louth area); the second stage of the programme, which was not so closely defined, would follow later. The respondent said that since the applicant could not, as the sole applicant providing group therapy only, meet the requirements for the pilot exercise, it was not qualified to go onto the panel. Furthermore, once the exercise was completed, the respondent had limited flexibility and could not go outside the panel selected to seek a provider in lieu of the applicant.

19. Since the tender was for a framework agreement, the applicant further argues that it was reasonable for it to assume that if both group and individual therapy was required, different tenderers could jointly provide the service, one providing the group therapy and the other providing the individual element required. This, however, does not address the situation, which as it transpired was the factual position, where it was the only tenderer, and accordingly there was no other provider who could complement its services in the circumstances. In this situation its response at the interview that it could not and would not extend its services to include individual therapy assumes greater significance on these facts. Had the applicant indicated flexibility in this regard, its argument here might have been more convincing. This also, in my view, justifies the holding of the interview.

20. Having considered the matter in some depth, I find that a reasonably well informed and normally diligent tenderer would have understood that it was a requirement that the tenderer should be in a position to provide both group and individual therapy to qualify for the contract, for the reasons given in the affidavit of Ms. Thornton. Moreover, the interview gave the applicant the opportunity to expand the services it was willing to provide, but it declined to amend its application in the circumstances. It is my view that the respondent was entitled to conclude that the applicant was not qualified. There was no breach of the transparency requirement in the circumstances. I am not satisfied, given the facts of this case that, even if the applicant is correct in its interpretation of the tender document, and if it knew the true details of the weighting system in advance, it would have had a significant effect on the preparation of its tender.

21. Having reached that conclusion, it seems to me that the applicant's other complaints necessarily fall away to nothing. In particular, the argument that the applicant could have expected that a tenderer who provided individual therapy could combine with its specialty, that is group therapy, to meet the respondent's needs, has no validity to my mind where the applicant, as here, is the only tenderer. Further, if the applicant could not provide the required service, the marking scheme for assessing candidates was irrelevant to its elimination from the process. Nevertheless, because counsel for the applicant raised other issues which it said showed a lack of transparency, I will refer to these issues briefly.

Costs

22. Giving no percentage of weighting to costs does not justify the conclusion that cost was not taken into account in the process. The respondent will always have a budget when dealing with its services. In the present case, however, the applicant was the only tenderer and therefore cost was not very significant. It would have been more significant if there was more than one tenderer as the respondent would have then engaged in a comparative process.

Marking Scheme

23. In relation to the marking scheme, which did not need to be disclosed here, and in relation to the sub-thresholds, the respondent did not disclose:-

> i. that an overall score of 50% had to be achieved on criteria other than cost;
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> ii that a score of 75% had to be achieved in respect of the categories "Ability to fulfil requirements" and "Supplier Capability"; and
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> iii. that no score for cost/pricing would be granted unless the said 50% score, as per (i) above, was achieved.

The applicant says that although the marking scheme did not have to be disclosed, once it is volunteered, it must be fully disclosed.

24. Mr. McGowan, who swore the affidavit for the respondent, accepts that the above elements of the scoring methodology were first communicated to the applicant only on 10th April, 2008, after the decision on the tender, but suggests that the scoring

methodology was merely a guide for the application of the award criteria. The applicant argues that the failure to advise it of these criteria does not meet the appropriate level of transparency. However, as the E.C.J. held in *Commission v Ireland (supra),* there is no obligation on the State to advertise the prior weighting of the award criteria, and in the circumstances the applicant's argument has no force.

25. My conclusion based on the case law of the E.C.J. therefore is as follows. Since there is no obligation in Annex II B contracts to publish in advance the weighting criteria, the applicant cannot take issue on grounds of transparency when subsequently it learns of the criteria. The present case is not a case where the criteria were inconsistently applied or changed during the assessment process which might attract condemnation on equality or on fairness principles. Moreover, at the interview stage the applicant was alerted to the respondent's requirements and indicated an unwillingness to adapt to meet these requirements. Accordingly, I do not think that if the applicant knew of the weighting system in advance it would have made a significant difference to the preparation of its tender.

Appropriateness of Relief: *Certiorari*
26. The respondent also argues that the single relief sought of an order of *certiorari* should not be granted in the circumstances of this case since it would be futile to do so. The relief sought is an order to quash the decision of the respondent in the letter dated 31st March, 2008, which finds that the applicant's tender was unsuccessful. The respondent asks in this circumstance what benefit would the applicant gain if the Court was minded to accede to its request. It is not as if the applicant would be awarded the contract. It is not even certain that the respondent will hold a further competition. Case law was opened to the Court on the issue as to when *certiorari* is an appropriate order. Both parties referred to *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381, the respondent especially referring to the early part of Walsh J's. judgment in that Supreme Court decision. The respondent, however, referred more fully to O'Higgins C.J.'s judgment and also to Walsh J's. dicta later in his judgment in the same case. Reference was also made by the applicant's counsel to *Sharon Howard v. District Judge William Early & Director of Public Prosecutions* (Unreported, Supreme Court, 4th July, 2000) and *Joyce (a minor) v. Watkin* [2007] 3 I.R. 510. Since I have decided that the applicant is not entitled to any relief, I need not engage with this argument.

27. I hereby refuse the relief sought.