Neutral Citation [2015] IEHC 438

THE HIGH COURT

[2015 No. 149 J.R]

IN THE MATTER OF THE REVIEW OF THE AWARD OF A PUBLIC CONTRACT PURSUANT TO THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES' CONTRACT) (REVIEW PROCEDURES) REGULATIONS 2010 AND

ORDER 84 OF THE RULES OF THE SUPERIOR COURTS, AS AMENDED

BETWEEN

WORD PERFECT TRANSLATION SERVICES LIMITED

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr. Justice Brian McGovern delivered on the 19th day of June, 2015

1. In these proceedings the applicant seeks a judicial review of a decision made by the respondent to award interpretation services to certain preferred bidders to the exclusion of the respondent and for other ancillary relief. Pending the hearing of the judicial review an application has been made for an interlocutory injunction in the following terms:-

> *"(i) An order restraining the respondent from procuring interpretation services on the basis of the framework for the provision of telephone interpretation, face to face interpretation and document translation services, which commenced on 1 February 2009 which expired on 31 August 2013;*
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> *(ii) An order restraining the respondent pending the determination of these proceedings and/or pending the re-tender of these services, the subject matter of the contract at issue in these proceedings, from procuring interpretation services other than on the basis of the provisions of the Department of Justice and Equality Framework Agreement for the Provision of Interpretation Services;*
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> *(iii) An order directing the respondent, when procuring interpretation services pending the determination of these proceedings and/or pending the re-tender of the services the subject matter of the contract at issue in these proceedings to procure such services under the Department of Justice and Equality's Framework Agreement for the Provision of Interpretation Services."*

2. A number of issues arise on the hearing of this application. The first is whether the *Campus Oil* principles which normally apply to applications for injunctive relief apply or whether the matter should be dealt with in accordance with the principles set out by Barrett J. in *OCS v. Dublin Airport Authority PLC* [2014] IEHC 306. That decision was appealed to the Supreme Court and the court's judgment can be found at [2014] IESC 51. The Supreme Court distinguished between Regulation 8(1)(a), which refers to applications for suspensions of tender proceedings at "an interim" stage of the procedure, that is to say during the course of the tender procedure, and Regulation 8(1)(b) which refers to contract award decisions, arising at the end of the procedure. Clarke J. stated at para. 9.13:-

> *"..the Regulations makes a clear distinction between, on the one hand, an application to court seeking to suspend the procurement procedure or processes while it is in the course of being conducted and an application to review the result of that process after a decision to award the relevant public contract has been made, on the other hand. The two types of court applications are separately dealt with in, respect of the, Regulation 8(1)(a), Regulation 8(1)(b)."*

3. In this case it is clear that the application for interlocutory relief is not an application for an order in connection with an alleged wrong taking place in respect of a procurement procedure in the course of its being conducted and which is under review. Nor is it an application for review of a decision to award a contract at the end of that procedure.

4. The basis of a claim for an injunction is that the respondent has been making illegal direct awards of contracts since the expiration of the previous Framework Agreement in 2013.

5. There is significant dispute between the parties as to whether or not the relief sought is of a type envisaged by Regulation 8 of the Remedies Regulations. But even if it is, the respondent argues that in the *OCS* case Barrett J. held that it is for the applicant to show that *"…negative consequences of making any interim or interlocutory order as is sought do not exceed the benefits of such order"*. If this case does not concern Regulation 8 then clearly the Campus Oil principles apply. Having listened to the arguments on behalf of the parties I am not persuaded that I should depart from the usual principles applicable to the granting of interlocutory relief namely the *Campus Oil* principles. The *OCS* case is distinguishable from this application because it concerned a challenge to an award of a contract before it became operative and it therefore resulted in an automatic suspension of the appointment which was challenged. That is not the case here.

6. In *Commission v. Ireland* [2007] ECR 1-9777D CJEU accepted that discrimination as between potential tenderers may be "*justified by objective circumstances*" and this is accepted by the applicant. In this case the respondent has set out the basis on which it has given interpretation or translation services to parties (including those complained of). It has stated that this has been done on an ad hoc basis in situations where it was necessary to do so. The respondent claims that circumstances of urgency or non-availability of other interpreters or translators are the sort of justification referred to in that case and that there is express provision made for exceptions to the requirement to advertise in cases of extreme urgency where contracts do fall within the scope of public contract regulations. The court is referred to Regulation 32.

7. The awarding of an interlocutory injunction is a discretionary matter although the court's discretion must be exercised on well established principles. In this case, I am applying the *Campus Oil* principles. Applying these principles and in the exercise of my discretion, I have concluded that the applicant has not met the test for an interlocutory injunction. I have reached my decision on the basis of the following matters:-

> (1) The relief sought is in the nature of a final remedy or mandatory injunction and the applicant has not met the test required to entitle it to such relief.
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> (2) The applicant urges the court to order that the respondent utilised the Department of Justice framework which commenced in June 2011. But that framework expired on 5th June, 2015, and the notice of motion grounding this application was only filed on 6th May, 2015.
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> (3) The applicant has been guilty of delay. The applicant has been aware of the alleged illegality of which he complains since January 2013 (when it participated in the extension of the 2009 Framework Agreement). This application was brought at the last moment in respect of agreement that has been in place since June 2011 and expired on 5th June, 2015.
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> (4) It is not at all clear what will be achieved by the order which is sought by the applicant. I am satisfied on the evidence that the maintenance of the status quo is best achieved by not granting interlocutory relief and that the balance of convenience suggests that the order sought should not be granted particularly as it is, in effect, a mandatory injunction.
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> (5) At present, the applicant is receiving some work form the respondent although not at the same level as heretofore. If the applicant proves that it has suffered loss as a result of the matters complained of, it seems to me that damages would be an adequate remedy. While there might be some difficulty establishing, with precision, the damages (should the applicant be successful). It would not be impossible to do so.

8. There is a significant level of dispute between the parties on the Rules and Regulations which apply to the scheme being operated by the applicant. It is not for the court, at this stage, to determine those issues but merely to ascertain whether the applicant has made out an arguable case. While the applicant may have met that test I am satisfied that it has not met the other Campus Oil tests for the reasons which I have outlined above.

9. I refuse the application for interlocutory injunction.