

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 789 JR]

**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 (AS AMENDED) AND ORDER 84A OF THE
RULES OF THE SUPERIOR COURTS (AS AMENDED)**

BETWEEN

ELECTRIC SKYLINE LIMITED

APPLICANT

AND

DONEGAL COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 2nd day of April, 2019

SUMMARY

1. This case is an application for discovery in relation to the review of an award of a public contract by the respondent ("Donegal County Council"), which review has been instituted by the applicant ("Electric Skyline") with an address in Claremorris, Co. Mayo pursuant to the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 and Order 84A of the Rules of the Superior Courts.

2. The contract in question is a lighting contract for Donegal County Council and includes the provision of maintenance services and the supply of light fittings and was awarded to SSE Airtricity ("SSE"). At the time of the tender, the contract notice gave an estimated value for the contract of €3.5 million, excluding VAT.

3. Electric Skyline is challenging, *inter alia*, its disqualification from the tender process. The grounds provided by Donegal County Council for this disqualification were that the tender submitted by Electric Skyline contained prices/rates which were below market value. Electric Skyline also alleges that it was treated in an unequal and discriminatory manner by Donegal County Council, as the successful tender, submitted by SSE, also contained non-compliant prices/rates, but, despite this, SSE was not disqualified from the tender process.

4. In order to consider whether the request for discovery by Electric Skyline from Donegal County Council is relevant and necessary for the resolution of the dispute between the parties, it is necessary to understand what is the core of the dispute between the parties.

BACKGROUND FACTS

5. Under the terms of the Instruction to Tenderers ("ITT"), there was an instruction to submit a pricing document with the tender and Section 4.6 of the ITT provided that "*Tenderers must not use abnormally high or low rates or prices*". The ITT also stated that "*[e]ach amount in the Pricing Document must cover the full inclusive value of the relevant work including market prices for plant, equipment and labour*". It also provided for the 'avoidance of doubt' that "*Tenderers are obliged to price all items in the Pricing document at full market value*".

6. Section 5 of the ITT provided that, if the tenderer failed to comply with the instructions included in the ITT, Donegal County Council could disqualify the tenderer concerned as non-compliant and reject any tender concerned.

Nature of the dispute based on correspondence and affidavits

7. By letter dated 13th of August, 2018 Donegal County Council wrote to Electric Skyline and stated:

"The tender submitted by Electric Skyline does not comply with Section 4.6 of the Instruction to Tenderers since it includes a high percentage of rates, which could not possibly cover the full inclusive value of the relevant work including market prices for plant, equipment and labour."

8. By letter dated 24th of August, 2018, solicitors for Donegal County Council go into further detail regarding the basis for disqualification at paragraph 4 of that letter. This paragraph explains, in particular, that a cost of €10 for a lantern, when other lanterns cost many multiples of that price, was one of the reasons for its decision that Electric Skyline's tender did not contain rates that reflected market values. The letter states:

"The basis for disqualification of your clients Tender as set out in our clients said letter was that it included:-

"A high percentage of rates, which could not possibly cover the full inclusive value of the relevant work including market prices for plant, equipment and labour."

We attach spreadsheet herewith which highlights in brown the rates concerned. Taking the first one thereon by way of example ("L.E.D. LANTERN ON COLUMN") item 3.02 can be starkly contrasted with the others grouped within the red box (i.e. a rate of €10 as against rates of €215, €255 and €360 for items 3.01, 3.03 and 3.04 respectively. The only difference between all four is the size of the lantern concerned. The rate of €10 tendered for item 3.02 would not even go anywhere close to the cost of the lantern itself – even before the cost of plant, equipment and labour is factored in. For that reason as stated in our client's letter the rate could not possibly cover the full inclusive value of the relevant work including market prices for plant, equipment and labour. Similar considerations apply in relation to the other rates highlighted on the attached."

9. By letter dated 4th of September, 2018, solicitors for Electric Skyline reply to solicitors for Donegal County Council and state:

"Taking "market prices" in the first instance, we query your client's intentions and how it determined "market prices". A

market price is usually determined as the price on which a willing seller sells to a willing buyer. Accordingly all the prices on our client's tender documents reflect market prices.

[....]

If, on the other hand, your client has compared individual items provided by our client against each other (as paragraph 4 of your 24 August letter suggests) to determine "*market prices*", this is an equally flawed methodology which does not take into account the existing lighting inventory managed by our client, nor its existing lantern supply or other circumstances that could apply to one item but not the other that could result in differing prices. It is not a comparison of like-for-like.

Our client priced particular items in the tender on the basis that (if successful) this tender would result in a substantial increase in work for its business and would allow for greater economies of scale to be obtained from its suppliers. Therefore, the prices provided in its tender constituted "*market prices*".

10. Solicitors for Electric Skyline asked in their letter of 4th of September, 2018 for confirmation from Donegal County Council as to whether SSE was fully compliant with Section 4.6 and, as they did not receive a response, they asked for the same confirmation again by letter dated 20th of September, 2018. Donegal County Council's solicitor replied by letter dated 28th of September, 2018:

"In your letter of 20 September, 2018, you seek confirmation that SSE Airtricity's tender was '*fully compliant*' with the provisions of the Instructions to Tenderers. With respect, and as you are fully aware, '*full compliance*' is not the threshold for exclusion or inclusion in the assessment process. The SSE Airtricity tender contained two non-compliant rates. The Council took the view that the non-compliance by SSE Airtricity was *de minimis* and decided not to disqualify them. This is to be contrasted with the degree of non-compliance by your client where a high percentage of the rates were nominal rates. The Council is satisfied that the decision taken by it in relation to SSE Airtricity was lawful and proportionate."

11. In her first affidavit sworn on behalf of Donegal County Council by Ms. Clíodhna Campbell dated 13th of November, 2018 reference is made to a third non-compliant rate contained in SSE's tender in the following terms:

"I do not agree that [Donegal County Council] was reluctant or vague in its response in relation to the non-compliant rates quoted by [SSE]. As adverted to in the correspondence, [SSE] quoted two non-compliant rates, being items 6.60 and 6.62 where a nominal price of €0.01 was inserted for each and for a quantity of 3 gave a total tender price for each item of €0.03. Further on review of [SSE's] pricing document again for the purpose of preparing the opposition documents herein, it was noted that there was one other item (no. 5.34) for which a nominal non-compliant price of €0.01 was inserted. That was an "extra over" item for items 5.31 to 5.33 immediately above it. [...]

I say that in the assessment of [SSE's] tender there were just two non-compliant nominal rates identified and the degree of non-compliance in their tender was found to be materially different, inconsequential and de-minimis compared to the degree of non-compliance in [Electric Skyline's] tender. I say that the additional item referred to above (making a total of 3 non-compliant items in all) does not materially alter the situation and the third item is if anything more inconsequential and de-minimis. [Donegal County Council] does not therefore agree that it was obliged to disqualify [SSE] on that basis."

12. In her later affidavit dated 31st of January, 2019, Ms. Campbell avers:

"In my first affidavit I gave full details of all the nominal rates quoted by [SSE] specifying the amounts quoted and the items to which they referred. Further, I stated on oath that the first two nominal rates were identified during the course of the tender evaluation process and that a decision was taken that the degree of non-compliance was materially different, inconsequential and de minimis compared to the degree of non-compliance in [Skyline Electric's] tender. Those averments were true and complete."

Nature of dispute based on the Statement of Grounds

13. The Statement of Grounds, as part of the pleadings in this case, provide the key criteria for determining whether the discovery sought is relevant and necessary. In this regard, the relevant claims in the Statements of Grounds are that:

- Donegal County Council wrongfully disqualified Electric Skyline's tender on the erroneous basis of its view that Electric Skyline did not comply with the ITT because it included "*a high percentage of rates which could not possibly cover the full inclusive value of the relevant work including market prices for plant, equipment and labour.*" This, Electric Skyline claim, amounts to an interpretation by Donegal County Council of Section 4.6 of the ITT in a subjective manner which reserved to itself an unfettered discretion in breach of principles of equal treatment, transparency and proportionality.
- While disqualifying Electric Skyline, it is claimed that Donegal County Council failed to disqualify the winning bidder, SSE, despite the fact that SSE's tender contained rates that did not comply with the ITT, in breach of the principle of equal treatment. In deciding that the rates submitted by SSE were inconsequential and in not disqualifying SSE, it is claimed that Donegal County Council committed a manifest error of assessment and breached the principles of transparency, equal treatment and proportionality.
- Following the commencement of these proceedings, it is claimed that Donegal County Council carried out an *ex post facto* review of the tender submitted by SSE and took a decision that prices submitted by SSE which did not comply with the ITT were inconsequential. In doing so, it is claimed that Donegal County Council acted in breach of the principles of equal treatment, transparency and proportionality and also breached Article 18(1) of S.I. No. 284/2016, European Union (Award of Public Authority Contracts) Regulations, 2016 (the "2016 Regulations").
- In deciding that non-compliant rates of €0.01 submitted by SSE were inconsequential compared to the alleged degree of non-compliance by Electric Skyline's tender, it is claimed that Donegal County Council applied criteria which were not advertised in the ITT, in breach of the principles of transparency, equal treatment and proportionality and also breached Article 18(1) of the 2016 Regulations.

The essence of the dispute between the parties

14. It is clear from the foregoing that there are two key elements to the claim by Electric Skyline in these proceedings. First, it claims that Donegal County Council's decision to find that its tender contained rates or prices which did not reflect market value breaches general principles of EU law, including equal treatment, transparency and proportionality. Second, it claims that Donegal County Council's failure to disqualify SSE's tender, when it also contained rates/prices which did not reflect market value and its subsequent review of that tender, is unlawful.

DISCOVERY SOUGHT

15. Against this background, Electric Skyline seeks five categories of discovery, which this Court will take in the following order:

Category 3

"To the extent not within Category 1 and/or Category 2, all documents referred to and/or considered by [Donegal County Council] in the course of its review and/or assessment and/or evaluation of the tenders submitted in the tender process in dispute in these proceedings and all documents referring to [SSE's] tender, including but not limited to, all documents submitted by [SSE] (or its servants or agents) including its tender submission and in particular, its Pricing submission, and all communications between [Donegal County Council] and [SSE] (or its servants or agents) between the submission of the tender and the announcement of [SSE] as the Preferred Bidder, including any clarifications issued after tenders had been submitted.

Category 4

"To the extent not within Category 1 and/or Category 2 and/or Category 3, all documents relating to the assessment by [Donegal County Council] of the pricing submissions of [SSE], including documents which evidence when [Donegal County Council] evaluated and/or reviewed [SSE's] tender and documents relating to decisions taken by [Donegal County Council] in respect of [SSE's] tender.

16. The second element to the dispute between the parties is that Donegal County Council failed to disqualify SSE's tender even though SSE also had rates in its tender which did not reflect market value. Counsel for Donegal County Council argues that discovery should not be necessary in this regard because Ms. Campbell has sworn on affidavit that the three non-compliant rates disclosed by her were the only non-compliant rates contained in SSE's tender and that these non-compliant rates were inconsequential. Therefore, counsel for Donegal County Council argues that this is the end of the matter as Electric Skyline has not produced any evidence to contradict this averment.

17. However, as noted by Hogan J. in the Court of Appeal decision in *Word Perfect Translation Services Limited v. The Minister for Public Expenditure* [2018] IECA 87, the right to challenge public procurement decisions would be illusory if a disappointed tenderer was not entitled to have access to tender documents which might support its case. At para. 21, Hogan J. states:

"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.

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. [.....]

Quality Assurance plan

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.

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.

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."

Just as in the *Word Perfect* case, it seems clear to this Court that Electric Skyline will not be able to advance its case that Donegal County Council ought to have disqualified SSE's tender for containing non-compliant rates or its case that Donegal County Council treated Electric Skyline and SSE unequally, unless it has access to all documentation in Donegal County Council's possession regarding the evaluation of SSE's tender.

18. Accordingly, discovery will be ordered, subject to certain confidentiality commitments to be discussed with counsel, in the following terms:

"All documents referred to and/or considered by Donegal County Council in the course of its review and/or assessment and/or evaluation of documents referring to SSE's tender, including but not limited to, all documents submitted by SSE (or its servants or agents) including its tender submission and in particular, its Pricing submission, and all communications between Donegal County Council and SSE (or its servants or agents) between the submission of the tender and the announcement of SSE as the preferred bidder, including any clarifications issued after tenders had been submitted.

All documents relating to the assessment by Donegal County Council of the pricing submissions of SSE, including documents which evidence when Donegal County Council evaluated and/or reviewed SSE's tender"

19. The next category of discovery to be considered is Category 2, which states:

Category 2

"To the extent not within Category 1, all documents relating to the interpretation of the ITT, including, in particular, all documents relating to the interpretation of the ITT's provisions concerning pricing submissions and Section 4.6 of the ITT and including any instructions to personnel of [Donegal County Council] or those who carried out the evaluation."

20. This category relates to the first part of the dispute between the parties, namely the claim by Electric Skyline that Donegal County Council's decision is unlawful insofar as it found that Electric Skyline's tender contained rates or prices which did not reflect market value.

21. However, this Court concludes that Electric Skyline does not require discovery of documents to advance its case in this regard. This is because the dispute between the parties is a net issue which has been set out in the *inter partes* correspondence and affidavits. It can be summarised as follows. Donegal County Council has set out in a detailed letter dated 24th of August, 2018, with an attached spreadsheet, approximately 120 items/rates which it states did not reflect market value. So, for example, there is at item 4.22 of the Replacement Programme in Electric Skyline's tender a supply of a '*rooted lighting column 12m including wiring & civil works*', which this Court was told are lampposts, for a price of €800 for each unit, with a quantity of three units. At item 4.23 in the same spreadsheet, there is a reference to the supply of four units of lampposts, but of 6 metres in height, rather than 12 metres, and their unit price was €20 rather than €800.

22. Donegal County Council indicated in that letter of 24th August, 2018 that item 4.23 therefore was an example of an item/rate which did not reflect market value. In that letter, Donegal County Council made clear that it was disallowing rates which in its opinion did not '*even go anywhere close to the cost*' of the item in question and so it seems clear that on this basis it found that €20 for the supply and installation of a 6 metre lamppost should be disallowed. That this was its basis for disallowing rates is clear from its commentary on the disallowance of the certain rates for the '*supply, install, test and commission replacement LED lantern 5001 to 10000 lumen on non network column*', which this Court was advised are the overhead lanterns in lampposts. Donegal County Council disallowed a unit price of €10 for this work of supplying and installing 1615 such lanterns, when the unit price of supplying and installing 440 lesser power lanterns (2000 to 5000 lumen) was twenty times more expensive at €215 per unit. In their letter of 24th August, 2018, Donegal County Council stated that the unit cost of €10 for the supply and installation of the lanterns did not '*even go anywhere close to the cost*' of the lantern. When making this point in relation to the 'lanterns', Donegal County Council confirmed that '*[s]imilar considerations apply in relation to the other rates highlighted on the attached*' and the attached spreadsheet contained all the disallowed rates duly highlighted amongst the rates that were not disallowed.

23. There can be little doubt therefore that the reason for the disallowance of the rate of €20 for installation and supply of 6 metre lampposts at item 4.23 (and indeed the other disallowed rates) is that they were completely out of step with other rates being quoted but significantly did not, in Donegal County Council's view, reflect the cost price of the units being supplied. While Electric Skyline is perfectly entitled in the substantive proceedings to dispute the correctness of this approach, the letter of 24th August, 2018 made perfectly clear to Electric Skyline the methodology that Donegal County Council applied to its decision to find that 120 or so items in Electric Skyline's tender did not reflect market value.

24. In order to determine what is in dispute between the parties, and thus what is relevant and necessary to be discovered, it is relevant to consider the response of Electric Skyline to this explanation which was provided to it by Donegal County Council for its decision that 120 or so items did not reflect market value.

25. Electric Skyline did not dispute that each of these items were priced at a very significant reduction to the other items in the tender or, for example, that a lantern at a cost of €10 was at a price which was well below the cost of other items. Rather the response of Electric Skyline was, in effect, an acceptance that each of these items were priced differently, but Electric Skyline also sought to justify such differential. It did so in its letter of 4th September, 2018 in the following terms:

"Taking 'market prices' in the first instance, we query your client's intentions and how it determined 'market prices'. A market price is usually determined as the price on which a willing seller sells to a willing buyer. Accordingly all the prices on our client's tender documents reflect *market prices*".

For this reason, it seems clear to this Court that the essence of the dispute between the parties regarding below market prices allegedly contained in the Electric Skyline tender, is on the one hand Donegal County Council's use of a methodology for assessing market price which compares significant differentials between the prices charged for other similar units (sometimes twenty fold), and where it believes that the item could not be purchased at anything close to the cost proposed, and on the other hand Electric Skyline says we charge 'X' and therefore 'X' is the market price.

On this basis, any documents held by Donegal County Council which deal with how it evaluated the ITT in considering Electric Skyline's tender are irrelevant, as it is clear that the dispute between Donegal County Council and Electric Skyline regarding the differing interpretations of '*market prices*' is a net issue and discovery of documents insofar as it relates to Donegal County Council's evaluation of Electric Skyline's tender would not, for this reason, aid Electric Skyline in advancing their case.

However, the category of discovery being sought by Electric Skyline is broad enough to encompass SSE's tender and so it will be allowed in the following form:

"All documents relating to the interpretation of the ITT, including, in particular, all documents relating to the interpretation of the ITT's provisions concerning pricing submissions and Section 4.6 of the ITT and including any instructions to personnel of [Donegal County Council] or those who carried out the evaluation in so far as it relates to the SSE tender"

This is because any such discovered documents may assist Electric Skyline in advancing its case that Donegal County Council wrongfully failed to disqualify SSE's tender.

26. The final two categories for this Court to consider are:

Category 1

"All documents, howsoever described and in whatever format available, referring to, evidencing, discussing, recording and/or relating to the consideration and/or evaluation of tenders submitted in respect of the tender process in dispute in these proceedings, including but not limited to:

all documents relating to the decision to find the tender of [Electric Skyline] to be non-compliant with the terms of the Instruction to Tenderers (the "ITT");

the final evaluation report;

any and all preceding drafts of the evaluation report;

minutes and/or attendance notes taken during the evaluation process;

emails, notes, memoranda, diary entries;

calculations relating to the tender evaluation;

internal deliberations;

and any instructions, advice or communications issued to or from [Donegal County Council's] evaluation team prior to and/or during the evaluation process relating to the award of the Contract"

Category 5

"All of the documents required to be maintained by [Donegal County Council] pursuant to Regulation 84(4) of SI No 284/2016 European Union (Award of Public Authority Contracts) Regulations 2016 (the "2016 regulations") and the report of [Donegal County Council] pursuant to Regulation 84(1) of the 2016 Regulations."

27. These are very broad categories of discovery and are in the nature of a fishing exercise. While this Court concludes that discovery is relevant and necessary (in particular to the issue of whether Donegal County Council properly evaluated the rates submitted in SSE's tender in light of the fact that SSE's tender also contained non-compliant prices/rates), these categories encompass an extensive range of documents which are not required by Electric Skyline to advance its claims against Donegal County Council in light of the much more specific categories, 2, 3 and 4 which are being permitted, *albeit* with modifications.

CONCLUSION

28. In light of the aforementioned issues surrounding confidentiality, this Court will hear from counsel before finalising the orders