THE HIGH COURT

2018 No. 938 J.R.

IN THE MATTER OF COUNCIL DIRECTIVE 2004/18/EC

AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES CONTRACTS) REGULATIONS 2006

AND IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC

AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010

BETWEEN

WORD PERFECT TRANSLATION SERVICES LIMITED

APPLICANT

AND

MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 March 2019

INTRODUCTION

1. This judgment is given in respect of cross-applications for the discovery of documents in public procurement proceedings. The proceedings have been taken by an unsuccessful tenderer, Word Perfect Translations Ltd. ("*Word Perfect*"), seeking to challenge a decision to award a contract for the provision of translation services to An Garda Síochána to a rival tenderer. Word Perfect seeks discovery of a number of categories of documents which it says are necessary to allow it to pursue its application for judicial review. The Contracting Authority resists the application on the basis *inter alia* that the documents sought are not "indispensable" to the resolution of the proceedings, and that the documentation sought in respect of the successful tender is commercially sensitive.

2. The Contracting Authority has brought a separate application for discovery against Word Perfect. The documents sought relate to certain pleas made by Word Perfect in respect of (i) its previous experience of public authorities applying a standstill period following a tender competition, and (ii) its claim that the successful tender was an abnormally low tender.

3. There is some disagreement between the parties as to the legal test governing applications for discovery in public procurement proceedings. In particular, there is some debate as to whether there a is requirement that the documents sought must be "indispensable" to the resolution of the proceedings. I address this issue under the first heading below.

CASE LAW ON DISCOVERY IN PUBLIC PROCUREMENT PROCEEDINGS

4. The most detailed discussion of the legal test governing applications for discovery in public procurement proceedings is to be found in the judgment of the Court of Appeal in *BAM PPP PGGM Infrastructure Cooperatie UA v. National Treasury Management Agency* [2015] IECA 246 ("*BAM*").

5. Giving the judgment of the court, Ryan P. emphasised the importance of identifying the issues by reference to the pleadings. See paragraph [35] of the judgment.

> "The first task in a discovery application is to ascertain the issues that arise on the pleadings. The Court's function in the substantive case is to decide on the issues put before it by the parties; it does not possess a power to engage in a roving investigation of the relationship between the parties or of the circumstances that gave rise to the proceedings. It is a question of jurisdiction and function fundamentally. The Rules of the Superior Courts require that claims be stated and defended and that particulars be furnished to enable the parties to know the case they have to meet. In the case of the claimant that consists of the statement of claim or equivalent pleading document. For a defendant or respondent party meeting the case, clarity of pleading is also required. The point is that each side should know what the other's position is so that is can address the matters that are in dispute and can take for granted those that are undisputed."

6. At an earlier point in the judgment, Ryan P. had summarised the principles applicable to an application for discovery as follows at paragraph [29].

> "1. The primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues.
>
> 2. Relevance is determined by reference to the pleadings. O. 31, r. 12 specifies discovery of documents relating to any matter in question in the case
>
> 3. There is nothing in the *Peruvian Guano* test which is intended to qualify the principle that documents sought on discovery must be relevant, directly or indirectly, to the matter in issue between the parties on the proceedings.
>
> 4. An application for discovery must show it is reasonable for the court to suppose that the documents contain relevant information.
>
> 5. An applicant is not entitled to discovery based on speculation.
>
> 6. In certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse.
>
> 7. As Fennelly J. pointed out in *Ryanair plc v. Aer Rianta cpt* [2003] 4 I.R. 264, the crucial question is whether discovery is necessary for 'disposing fairly of the cause or matter.'
>
> 8. There must be some proportionality between the extent or volume of the documents to be discovered and the degree

to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial.

9. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties."

7. As appears from this summary, Ryan P. emphasised that the primary test is relevance, and that once relevance is established, it will follow in most cases that discovery is necessary. On the facts of the present case, the categories of documents sought are undoubtedly relevant. As explained at paragraph 60 below, the documents all relate to issues in the proceedings. The debate at the hearing before me was directed principally to questions such as whether the discovery sought was necessary, reasonable or proportionate. It may be useful at this point of the judgment to seek to separate out and distinguish these related concepts.

(i). The concept of "necessity" is closely related to relevance. In most cases, it will follow from a finding that a document is relevant to an issue in dispute in the pleadings that an order for discovery will be necessary. It is only where there is some *alternative* procedural route available by which the party seeking discovery can advance its case on the issue that discovery might not be necessary. One obvious example from judicial review is where the respondent is under a statutory duty to make certain documents available. An Bord Pleanála, for instance, is required under the planning legislation to make its file on a planning appeal available to the public. Such documents will meet the test of relevance, but an order for discovery will not be necessary.

As discussed below, there was some disagreement between the parties as to whether the judgment of the Court of Appeal in *Word Perfect Translation Services Ltd. (No. 2) v. Minister for Public Expenditure and Reform* [2018] IECA 87 has introduced a higher standard than necessity, namely indispensability.

(ii). The concept of "reasonableness" is sometimes used to describe the minimum threshold which the moving party must satisfy before being granted an order for discovery. The moving party must demonstrate that it is reasonable for the court to suppose that the documents sought will contain relevant information. An applicant is not entitled to discovery based on speculation. This is discussed in detail in the judgment of the Court of Appeal in *O'Brien v. Red Flag Consulting Ltd.* [2017] IECA 258.

(iii). The concept of "proportionality" is generally invoked to resist an application for discovery which is said to be excessive in terms of the *volume* of documentation sought. However, the making of an order for discovery might also be disproportionate for other reasons. In assessing proportionality, one of the matters that might have to be considered is whether discovery is being sought in respect of documentation which is confidential or commercially sensitive. Of course, the mere fact that documentation is confidential or commercially sensitive is not necessarily a reason to refuse an application for discovery. (See *Telefonica 02 Ltd. v. Commission for Communications Regulation* [2011] IEHC 265 at §3.3). Rather, it is something to be balanced against the entitlement of the moving party to have an effective right of access to the courts. The relevance of the document and its *necessity* in advancing the case of the moving party are considerations to be weighed in the balance.

8. There was much discussion at the hearing before me as to whether the judgment of the Court of Appeal in *Word Perfect Translation Services Ltd. v. Minister for Public Expenditure and Reform (No. 2)* [2018] IECA 87 had changed the standard for discovery in public procurement cases. Counsel on behalf of the Contracting Authority, Mr Andrew Beck, BL, submitted that the judgment sets out that the test for access to documentation in respect of rival tenders is not relevance or necessity, but that discovery of the documents must be convincingly established as indispensable for the fair disposal of the procurement challenge. Counsel described this as the main battle line between the parties. It was further submitted that where discovery of a rival tenderer's information is convincingly established to be indispensable, even then only the *relevant portion* of the rival tenderer's information will be disclosed, and it will be subject to strict confidentiality requirements whereby only named solicitors and counsel would have sight of that particular section. Counsel described the Contracting Authority as having a role as guardian of the information in respect of the rival tenderer.

9. Mr Beck emphasised the following passages from the judgment in *Word Perfect Translation Services Ltd. (No 2).*

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

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

10. Hogan J. then cited the judgment of the CJEU in Case C 450/06 *Varec S.A. v. Belgium*, and went on to state as follows.

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

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

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

11. It is important to observe that Hogan J., in referring to indispensability, was concerned with the narrow question of whether the tender document submitted by the successful tenderer and its evaluation should be disclosed. It does not seem to me that Hogan J. was purporting to describe a standard for discovery generally. In any event, I do not read the reference to indispensability as being intended to introduce a new standard or a different legal test. Rather, it reflects the practical application of the concept of proportionality, previously affirmed by the Court of Appeal in *BAM*. The judgment in *Word Perfect Translation Services Ltd (No. 2)* does no more than emphasise that where discovery is sought of confidential and/or commercially sensitive documents, then the court must balance the detriment to the responding party against the benefit to the moving party, i.e. in terms of the latter's ability to properly present its case to the court. At all events, for the reasons set out in more detail at paragraph 66 *et seq*. below, I am satisfied that the documentation sought is indispensable.

12. Leading counsel on behalf of Word Perfect, Nuala Butler, SC, referred me to the judgment of the High Court (Baker J.) in *Somague Engenharia S.A v. Transport Infrastructure Ireland* [2015] IEHC 723. Although this judgment was directed to the question of leave to cross-examine, rather than to the discovery of documents, it is germane insofar as it emphasises the need for effective judicial review in procurement proceedings.

"Transparency in the Review?

53. Community rules require transparency in the process of the awarding of a public contract and I turn briefly to consider whether that transparency must influence me in the decision whether to permit cross-examination. It is well established that it is for member states to direct the process by which the rights of an individual under Community law in that member state are to be vindicated. This principle is shown *inter alia* by the decision of the Court of Justice in *Unibet (London) Ltd. v. Justitiekanslern* (Case C-432/05) [2007] ECR I-2271. However, that familiar principle must in matters of Community law also be interpreted so as to contribute to the objective of Community law. This is clear from the judgment Finlay Geoghegan in *Gaswise Ltd. v. Dublin City Council* mentioned above where she pointed to the requirement of a court giving equal effect to the core principles of equal treatment and transparency as amplified by the judgments of the Court of Justice.

54. Finlay Geoghegan J. was dealing with a substantive and not a procedural matter but it seems that the principles must be the same. Thus in a matter of a review of a procurement, which invokes Community principles, the interpretation of domestic legal principles and procedures must look also to the ultimate objective to be attained, in this case the objective of competition, and what one might call the procedural objective that competition be fair, transparent and equally available to members of all member states.

55. I take note also of the decision of McCluskey J. in *Resource (NI) v Northern Ireland Courts and Tribunals Service* at para.37 where he said that the following:

> 'any failure by the court to scrutinise with particular care the contents of relevant individual and collective marking frames would be in dereliction of the judicial duty objective in this review must involve the court in a degree of judicial scrutiny that may be different at least from a procedural point of view from perhaps the scrutiny of wholly domestic decision makers.'

56. Counsel for the respondent argues the transparency mandated is transparency in the process or the competition itself and transparency is not achieved by the court going beyond its normal rules of procedure in the conduct of the judicial review. I disagree with him to this extent, and consider that transparency in every part of the process of the competition may require that the court engage in a degree of scrutiny which requires the transparent disclosure of documents by the parties to the review litigation, and must involve the court carefully scrutinising the evidence before it. The ultimate purpose of cross examination is to allow the court to scrutinise and evaluate the evidence before it, and I consider that a degree of scrutiny is warranted in this case such as the cross examination of Mr. Corsi ought to proceed.

57. I consider that the principles of Community law and the requirements of the utmost transparency and fairness of process in procurement cases does mandate a higher degree of scrutiny by the court of the available evidence, and does require for the purposes of the review that the court be in a position to ascertain the process and methodology engaged in the assessment. For that reason I consider that the applicants are entitled to cross-examine Mr. Corsi on his affidavit evidence."

13. Ms Butler also very helpfully drew my attention to a number of judgments from England and Wales. These cases emphasise the practical difficulties that can arise for an applicant if they are unable to have sight of the successful tender and the contracting authority's evaluation of same. In particular, I was referred to the judgment in *Roche Diagnostics Ltd. v. The Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC), [28].

"[28] Secondly, and most important of all, I consider that the Claimant is entitled to see all of the documentation produced for and occasioned by the actual evaluation process itself. I consider this to be fundamental. It appears that all of the spreadsheets so far provided are 'after the event' exercises and that, thus far, the Defendant has not provided the documents, including the spreadsheets, which were produced during the evaluation exercise. Yet, at trial, in a procurement case such as this, the court will work carefully through how the evaluation itself was carried out. Conventionally that is done by reference to a file of documents which contains the actual evaluation exercise as it was carried out on both bids. That contemporaneous documentation is critical in a case of this kind and the Claimant has made out a clear entitlement to see that material now. (I understand that in Germany, for example, public authorities are obliged to keep a file in which all the documentation produced as a result of a tender evaluation is retained. At the end of the bidding process, copies of that file are provided to all the tenderers. For the reasons apparent in this Judgment, I consider that that is an approach which has much to commend it.)"

14. Counsel also relied upon *Woods Building Services v. Milton Keynes Council* [2015] EWHC 2011 (TCC), and *Bombardier Transportation UK Ltd. v. Merseytravel* [2017] IEHC 726 (TCC).

15. The judgment in *Roche Diagnostics Ltd*. is discussed in detail in Browne and McGovern, *Procurement Law in Ireland* (Round Hall, Dublin, 2018). The learned authors summarise the effect of the judgment as follows at §15–702 and 15–§703.

> "This decision suggests that once proceedings are issued and the claimant can show a basic case, it is entitled to see documentation relating to how the evaluation process was carried out in order that an informed view can be taken as to its fairness and legality. It is not appropriate for the contracting authority to proffer only documents created after the issuing of proceedings in an attempt to show that its evaluation was carried out correctly. On that basis, those evaluating should be mindful that documents they create at the time of evaluation are disclosable and could be ordered to be disclosed at an early stage in proceedings. Even before proceedings are issued, contracting authorities should consider carefully any request for information and/or documents from a bidder and whether the provision of such information and/or documentation may help resolve a potential dispute without a formal claim having to be made. In *Wealden Leisure Ltd v. Mid-Sussex District Council*, disclosure of the final tenders was ordered to allow the claimant to plead its case that the successful tender may have been abnormally low. However, the High Court of England and Wales (Akenhead J.) refused certain applications for discovery in *Pearson* and *Covanta* although certain elements of discovery/disclosure were agreed or ordered.

Aggrieved tenderers are considered to be in 'the uniquely difficult position' of knowing that they have lost while the reasons for their failure remain 'within the peculiar knowledge of the public authority'. The decision in *Roche* in relation to pre-action disclosure confirms that contracting authorities in England and Wales are under a duty under the Civil Procedure Rules to disclose basic documentation without proceedings having to be issued. This duty to disclose should be construed in conjunction with the Freedom of Information Act and the Environmental Information Regulations."

BACKDROP TO REQUEST FOR DISCOVERY

16. The Minister for Public Expenditure and Reform ("*the Contracting Authority*") executed a Multi-Supplier Framework Agreement for the provision of interpretation services (excluding Irish) on 25 January 2016. Three companies were awarded a place on the framework, namely Word Perfect, Translation.ie, and Language Training and Translating Ltd. These companies are referred to as the "*framework members*".

17. The Office of Government Procurement ("*OGP*") issued a Supplementary Request for Tenders ("*SRFT*") to the framework members for the purposes of conducting a mini-competition in respect of what is described as "Lot 2" under the Framework Agreement. Lot 2 refers to the provision of interpretation services to An Garda Síochána. The tender deadline was 20 March 2018, and the proposed term of the contract was to be one year.

18. The details of the mini-competition for interpretation services were issued on 13 February 2018. It was stated that the Contracting Authority intended to award a contract to the Most Economically Advantageous Tender ("*MEAT*").

19. The SRFT specified various criteria which were to be met by the tenderers. The marks available under each category were also identified. The award criteria were divided into qualitative award criteria, for which 400 marks were available, and cost criteria, for which 600 marks were available.

20. It may assist in better understanding the nature of the legal challenge (discussed under the next heading below), if I set out a summary of the key criteria at this point.

21. Under the heading "*Interpreter Support*", it was stated that, from time to time, there may be a requirement to support an interpreter who may have been involved in a traumatic interpretation session. Tenderers were to outline and demonstrate the assistance and/or support they would make available to their interpreters in these circumstances.

22. Under the heading "*Very Urgent Requests for Service*", it was stated that all very urgent requests for service must result in an interpreter being confirmed and assigned no later than 60 minutes from time of request. This confirmation was to include an anticipated arrival time at the interpretation assignment location.

23. Under the heading "*Management Information*", it was stated that the contractor must provide management information reports under [the headings] "spend", "usage" and "quality assurance". It was indicated that the OGP would require summarised quarterly framework reports relating to all contracts awarded under the Framework Agreement. An Garda Síochána would require monthly reports relating to their own contract spend. It was further stated that two reports must be supplied with the tender, and must provide information with entries under specified column headings. As explained presently, the Word Perfect tender mistakenly included information in a quarterly, not a monthly, format.

24. On 12 October 2018, the Contracting Authority informed Word Perfect that its tender had not been identified as the successful tender. Overall, Word Perfect was awarded 848.37 marks, and the successful tenderer was awarded 949.15 marks. The difference between the two tenders was 100.78 marks, of which 57.7 marks were attributable to the costs criteria.

25. The formal notification included, as an appendix, a table setting out the respective scores of Word Perfect and the successful tenderer under the various award criteria ("*the comparative table*"). The table also included a column entitled "*Feedback to Tenderer*". This contained a brief summary of the evaluation of Word Perfect's own tender. In those instances where the successful tenderer had been awarded *higher* marks, a summary of the reasons for this was also given.

26. The following passage provides a useful example of the nature of the "Feedback to Tenderer" provided by the Contracting Authority.

> "Very urgent requests for service
>
> The evaluation panel deemed Word Perfect Translations response demonstrated their ability to meet the requirement for very urgent requests for service at short notice meeting the service levels set out in the sRFT. The evaluation team noted that where there are very urgent requests at short notice Word Perfect Translations will confirm and assign an interpreter within 60 minutes, with the requester being advised the expected time of arrival of the interpreter. Word Perfect Translations will utilise their automated system to identify in real time the location of the most suitable interpreter. The system also has a built in alert system that repeats every 2 minutes until an interpreter has been assigned to an urgent request.
>
> The response outlines Word Perfect Translation's IT system has the facility to share information and documents allowing

interpreters to prepare for their assignments, however this requirement is for face to face interpretation and preparation should generally not be required.

A higher mark would have been awarded if the proposal had more clearly outlined the interpreter's arrival times to assignments. The proposal outlines that Word Perfect Translations can determine potential conflict of interests, but it did not expand whether such conflicts of interest would delay the time of arrival of interpreters to clients' very urgent requests.

Whereas, the evaluation panel deemed the Successful Tenderer's response demonstrated their approach to meeting the requirement for very urgent requests for service at short notice meeting the service levels set out in the sRFT. The successful tenderer provided a clear demonstration of their approach to prioritising and establishing the urgency, selecting the most suitable interpreter, dispatch and arrival times and also they offered an alternative solution in the event of anticipated delays. Their proposal outlined their commitment to:

- Establish urgency, timeframe and required duration of request.
- Immediately confirm urgent requests
- Automatically calculate distance to the location for all qualified interpreters
- Select the closest and most suitable interpreter for each task based on the manager's personal knowledge of each interpreter
- Dispatch 95% of interpreter requests within 10 minutes

The proposal further outlined that 100% of Interpreters will be on site within ninety (90) minutes which was deemed significantly greater than the requirement outlined in the sRFT, where interpreters must be confirmed and assigned within 60 minutes."

27. As appears, the Contracting Authority attached some weight to the fact that the successful tender exceeded the service level specified under the SRFT. As explained presently, Word Perfect seeks to characterise this as the Contracting Authority relying on undisclosed award criteria.

28. Following the notification of decision to Word Perfect, correspondence ensued between Word Perfect and the Contracting Authority. In particular, Word Perfect had requested, but were declined, a debrief meeting. In the correspondence, Word Perfect also raised a concern that there was no standstill period.

GROUNDS OF CHALLENGE

29. As the case law discussed earlier confirms, an application for the discovery of documents must be determined by reference to the issues in dispute in the pleadings. Accordingly, it is necessary first to identify the grounds of challenge advanced by Word Perfect, before turning to consider the categories of documents in respect of which discovery is being sought.

(i) No standstill period

30. The first main plank of the challenge to the award of the contract is predicated on the failure of the Contracting Authority to observe a standstill period. A standstill period refers to the requirement—applicable in the case of certain award procedures—that a number of days must elapse following the notification of the unsuccessful tenderers before the contract is executed. The Contracting Authority maintains that it was not obliged to observe a standstill period in the context of the mini-competition.

31. Word Perfect alleges that, by failing to observe a standstill period, the Contracting Authority has breached paragraph 1 of the SRFT which, it is said, had incorporated the standstill clause from the framework tender into the SRFT. It is alleged that the Contracting Authority breached principles of EU law in this regard. More relevantly for the application for discovery, it is also alleged that the Contracting Authority breached Word Perfect's legitimate expectation that there would be a standstill period. In this latter connection, a number of *factual matters* have been pleaded by Word Perfect as follows. It is alleged that the Contracting Authority has previously always observed a standstill period when awarding contracts pursuant to the framework agreement. Express reference is then made to other mini-tenders conducted pursuant to the framework agreement. Word Perfect pleads more generally that, as a matter of Irish public policy and the Contracting Authority's custom and practice, a standstill period is generally observed for contracts awarded pursuant to a framework agreement. It is stated that Word Perfect has tendered for many public service contracts in Ireland over many years, and has never come across a situation where a standstill period has not been observed. The Contracting Authority has joined issue with all of this.

(ii) Undisclosed award criteria

32. The next main plank of the challenge involves an allegation that the Contracting Authority relied on undisclosed award criteria. It is said that, in a number of instances, the successful tenderer was awarded higher marks because it had indicated that it would provide a level of service in excess of the prescribed criteria. Word Perfect maintains that if it had known that this higher level of service was required, then it would have included same in its own tender.

33. The first instance cited is in respect of what is described as "*the prioritisation criterion*". Word Perfect claims that the Contracting Authority relied on prioritisation as an undisclosed award criterion. More specifically, the comparison table appended to the notification of decision criticised Word Perfect for not demonstrating an approach to prioritising and establishing the urgency of requests for service. Word Perfect pleads that it understood—as it says any reasonably well informed and normally diligent tenderer would—that all "*very urgent*" requests were to be dealt with within 60 minutes and that any prioritisation would interfere with this approach.

34. Word Perfect also complains that the successful tenderer was rewarded for outlining that all interpreters would be on site within 90 minutes notwithstanding that this was not a specified requirement under the SRFT. (See the extract from the comparison table set out at paragraph 26 above).

35. It is also alleged that there was an undisclosed award criterion in respect of "*the solutions requirement*". It is said that the successful tenderer received higher marks for offering solutions where delays were anticipated; immediately confirming urgent

requests; and dispatching 95% of requests within ten minutes. Again, it is pleaded that the solutions requirement was not specified in the SRFT.

36. Word Perfect received 1.5 marks less than the successful tenderer in respect of interpreter support. As explained at paragraph 21 above, tenderers were to outline and demonstrate the assistance and/or support they would make available to an interpreter who may have been involved in a traumatic interpretation session. The table appended to the notification of decision stated that the successful tenderer had outlined an out-of-hours support service and provided 24/7 support. Again, Word Perfect complains that this was not a criterion which had been specified in the SRFT. It is pleaded that had Word Perfect been aware that this was a requirement, it could and would have amended its tender accordingly.

(iii) Unlawful Evaluation

37. The third plank of the challenge involves an allegation that, under various award criteria, the Contracting Authority conducted an unlawful evaluation of the tenders.

38. Word Perfect was awarded 37.5 less marks than the successful tenderer for its responses to the quality assurance plan. The only reason provided for this significant discrepancy is that the two reports compiled by Word Perfect were for a *quarterly* period, rather than a *monthly* period, as had been specified in the SRFT. It is pleaded that the deduction of marks was manifestly erroneous, irrational and entirely disproportionate.

39. It is further pleaded that the reports provided by Word Perfect were of a high quality and well-presented, and complied with all the requirements set out by the Contracting Authority other than that the period covered was quarterly rather than monthly. This has been denied by the Contracting Authority in its Statement of Opposition.

40. Next, it is alleged that the Contracting Authority conducted an unlawful evaluation of the "*Very urgent requests for service*". As summarised earlier, the SRFT had prescribed that all very urgent requests for service must result in an interpreter being confirmed and assigned no later than 60 minutes from time of request. Confirmation had to include an anticipated arrival time, but there was no requirement for an arrival time to be specified. Word Perfect's tender had confirmed that it would meet these requirements, and that its average response time for other public sector clients was approximately 30 minutes. It was also made clear that the duty project manager would contact An Garda Síochána in order to confirm the anticipated time of arrival. Notwithstanding this, Word Perfect scored 2.4 marks less than the successful tenderer in respect of the quality assurance plan. The notification of decision indicated that a higher mark would have been awarded to Word Perfect if arrival times had been outlined more clearly. It is pleaded that arrival times could not have been addressed more clearly, and that the Contracting Authority acted unlawfully in deducting marks from Word Perfect's tender on this basis.

41. The notification of decision also indicated that the Contracting Authority considered that Word Perfect's suggestion that a back-up interpreter would be placed on standby might delay the arrival times. Word Perfect pleads that there was no suggestion in its tender that this would be the case. On the contrary, Word Perfect had provided an unqualified commitment to confirm arrival times within the 60-minute period. It is pleaded that there is no logical reason that the placement of a second interpreter on standby would delay the arrival of the interpreter first assigned to the task.

42. The notification of decision stated that the successful tenderer received marks in respect of the very urgent request for service because it had clearly demonstrated an approach to "selecting the most suitable interpreter, dispatch and arrival times", calculating the distance to location and selecting the closest and most suitable interpreter. Word Perfect had also addressed these issues in its tender. In particular, Word Perfect's tender had included the following statement.

> "The PM will immediately contact the highest-ranked interpreter located within the shortest distance to confirm availability and ascertain his or her likely time of arrival at the relevant location."

43. The successful tenderer received higher marks for offering solutions where delays were anticipated, immediately confirming urgent requests, and dispatching 95% of requests within ten minutes. However, there was no requirement to provide solutions in the event of delays being anticipated, to immediately confirm requests or to dispatch requests within ten minutes. Word Perfect pleads that none of these features of the successful tenderer's tender improve the level of service sought in the SRFT.

44. The notification of decision is also said to indicate that Word Perfect was criticised, and had marks deducted, for explaining how interpreters would prepare for assignments. It is pleaded that it was unlawful for the Contracting Authority to consider such positive actions, which exceeded the requirements in the SRFT, negatively.

45. Word Perfect received 0.5 marks less than the successful tenderer for its response to management structures. The notification of decision indicated that the Contracting Authority regarded Word Perfect's tender as lacking detail in relation to systems and processes. Word Perfect pleads that it had explained systems and processes in detail in its tender, within the restrictions of the applicable word limit. It is further pleaded that there was no basis for the view expressed in the notification of decision that an ISO accreditation provides "convincing assurance" that a high level of service will be provided.

46. It is also alleged that the Contracting Authority conducted an unlawful evaluation of the management escalation process. Word Perfect received 1 mark less than the successful tenderer for its response to the management escalation process. The notification of decision indicated that this deduction was because timelines ought to have been specified. Word Perfect pleads that it was made clear in its tender that matters would be investigated quickly and within a period of not more than three days and that other complaints were to be dealt with "immediately" and implemented "without delay".

47. The notification also indicated that the deduction was because Word Perfect did not explain how serious complaints are handled or how complaints are classified. In response, Word Perfect has pleaded that its tender explained how serious complaints are treated and it distinguished between operational issues, trends or complaints and structural deficiencies, complaints resulting in disciplinary action being taken and complaints that cannot be resolved at an operational level. It is also pleaded that Word Perfect's tender also explained how complaints are eventually addressed, contrary to what was stated in the notification of decision.

(iv) General breach of equal treatment in the evaluation of tenders

48. It is pleaded that the Contracting Authority treated Word Perfect unequally by comparison with the successful tenderer.

(v) Concerns regarding the successful tenderer's scores by reference to additional award criteria

49. Word Perfect pleads that the Contracting Authority has not explained the scores of the successful tender in respect of the following award criteria: (1) Reliability of Service; (2) Bookings; (3) Continuing Professional Development; (4) Management Resources;

(5) Proposal for Resourcing Telephone Interpretation Delivery Plan; and (6) Proposal for Security and Confidentiality of Telephone Interpretation Plan.

(vi) Unlawful acceptance of abnormally low tender

50. Word Perfect pleads that the Contracting Authority acted unlawfully in accepting an abnormally low tender and/or erred in failing to identify that the successful tender was abnormally low and/or failed to take any and/or adequate steps to satisfy itself that the successful tenderer's tender was not abnormally low and/or erred in not complying with the obligations applicable to abnormally low tenders and/or in not excluding the successful tenderer's tender.

51. One of the unusual features of this case is that Word Perfect expressly pleads that it tendered its own tender at cost, and that it did not tender in order to derive a profit from the performance of the contract. Notwithstanding this, it is said that Word Perfect's score in respect of the cost criterion was much lower than that of the successful tenderer.

52. Word Perfect has explained its rationale for tendering at cost by way of a *supplemental* affidavit filed by its principal. In brief, Mr Jimmy Gashi maintains that the spinoff or collateral work generated by Word Perfect being the official translator for An Garda Síochána is very valuable. Reference was made in this regard to the work that is available from solicitors.

53. It is suggested that Word Perfect is aware from its experience of the marketplace and of tendering that its own costs are competitive. For example, in a recent tender competition for the Legal Aid Board (in which the successful tenderer in these proceedings was also successful), Word Perfect was the lowest priced tenderer. Word Perfect also says that it is aware that the hourly rate it pays its interpreters is lower than the rate paid by other market participants. Notwithstanding this, Word Perfect's score in respect of the cost criterion was much lower than that of the successful tenderer; 542.12 to 600. It is pleaded that such a significant score differential causes Word Perfect to apprehend that the only explanation can be that the successful tenderer has tendered below cost.

54. Word Perfect objects to what it describes as a serious allegation of bad faith made against it by the Contracting Authority. More specifically, the Statement of Opposition filed on behalf of the Contracting Authority alleges that Word Perfect's complaint as to the lack of equal treatment in the evaluation of its tender is "evidently designed to obtain a rival tenderer's tender documentation by way of discovery" (Statement of Opposition, para. 44). Word Perfect objects that this is a serious allegation of bad faith, which has not been supported by any averment sworn by Mr. Randel McDonnell in his verifying affidavit sworn on behalf of the Contracting Authority.

(vii) Failure to provide adequate reasons and/or provide characteristics and relative advantages of the successful tenderer's tender and/or additional information

WORD PERFECT'S APPLICATION FOR DISCOVERY

55. Word Perfect's application for discovery is made by way of Notice of Motion dated 1 February 2019. The application is grounded on the affidavit of Aonghus McClafferty. Mr McClafferty sets out the exchange of correspondence between the parties in relation to discovery. Mr McClafferty then very helpfully sets out in his affidavit the rival positions of the parties in relation to each of the categories.

56. The categories of documents sought are set out as a schedule to the Notice of Motion as follows.

> Category 1
>
> All documents relating to the evaluation of tenders by reference to Criterion 4.1(b) – "Very Urgent Requests For Service".
>
> Category 2
>
> All documents relating to the evaluation of tenders by reference to Criterion 4.1(e) – "Interpreter Support".
>
> Category 3
>
> All documents relating to the evaluation of tenders by reference to Criterion 4.3 – "the Quality Assurance Plan".
>
> Category 4
>
> All documents relating to the evaluation of tenders by reference to Criterion 4.2(b) – "Management Structures".
>
> Category 5
>
> All documents relating to the evaluation of tenders by reference to Criterion 4.2(c) – "Management Escalation Processes".
>
> Category 6
>
> The Successful Tenderer's Tender and all documents submitted by the Successful Tenderer in response to the SRFT and/or in response to any requests for clarification, including any communications between the Successful Tenderer and the Respondent during the course of the competition.
>
> Category 7
>
> All documents relating to the evaluation of the Successful Tenderer's Tender.
>
> Category 8
>
> All documents relating to the evaluation of the Applicant's Tender.
>
> Category 9
>
> All documents relating to the Respondent's failure to observe a standstill period.

57. Category 10 is no longer in dispute.

58. The Contracting Authority has offered to allow the applicant sight of the final evaluation of its own tender. The Contracting Authority is refusing to provide any documentation in relation to the earlier evaluations and, further, is refusing to provide any material in relation to the assessment of the successful tenderer's evaluation or tender.

DISCUSSION

59. The grounds of challenge advanced by Word Perfect have been summarised in detail at paragraph 29 *et seq*. above. As appears, Word Perfect has identified what it says are a series of legal errors in the conduct of the tendering process. In particular, it is alleged that the Contracting Authority relied on undisclosed award criteria; carried out an unlawful evaluation of the tenders; made an award to an abnormally low tender; and—following the conclusion of the process—failed to observe a standstill period.

60. There is no doubt that the categories of documents in respect of which discovery is sought satisfy the requirement of *relevance*. They are all directed to issues which are in dispute on the pleadings. In this regard, it is to be noted that the Contracting Authority has filed a Statement of Opposition that constitutes a full traverse of the claim.

61. The discovery sought is also *necessary*. The application for discovery is not—as suggested by the Contracting Authority—a fishing expedition. The categories of documents sought are predicated on the grounds as pleaded in the Statement of Grounds. The grounds of challenge, in turn, are not speculative in the sense that that term is used in the case law discussed earlier. Rather, the grounds of challenge derive from the very limited information which the Contracting Authority has, to date, made available to Word Perfect. For example, the table appended to the notification of decision ("*the comparison table*") purports to identify, in summary form, how it is that the successful tenderer came to be awarded higher marks than Word Perfect. This comparison table indicates that, in some instances, the successful tenderer was awarded marks for offering to provide a higher level of service than that actually prescribed under the SRFT.

62. Word Perfect wishes to advance an argument to the effect that this approach to marking entailed the Contracting Authority placing reliance on undisclosed award criteria. Counsel on behalf of the Contracting Authority, Mr Beck, BL, submits that discovery is not necessary to advance this argument. (See also §2.12 of the Contracting Authority's written legal submissions of 20 February 2019). More specifically, it is suggested that Word Perfect is already in possession of all the documents necessary to make this argument, namely the comparison table and the SRFT. It is suggested that Word Perfect can point to the reasons in the comparison table as indicating that marks were awarded for particular items, and can then take the trial judge to the terms of SRFT, with a view to demonstrating that such items are not expressly referenced in the table. Thereafter it is a matter for legal submission as to whether this involves undisclosed award criteria.

63. With respect, I think that this argument involves an oversimplification of what is likely to occur at the trial of the action. It appears from the Statement of Opposition that the Contracting Authority intends to argue at the full hearing that what Word Perfect seeks to portray as undisclosed award criteria are, in truth, no more than examples of characteristics and relative advantages of the successful tenderer. It is further suggested that Word Perfect has simply taken the reasons disclosed in the comparison table for why the successful tenderer received higher marks, and "mechanistically converted" these into alleged undisclosed award criteria.

64. Indeed, this argument was presaged to some extent at the hearing before me in that counsel made express reference to the judgment in *Baxter Healthcare v. HSE* [2013] IEHC 413. That case involved a challenge to the award of a contract for a renal dialysis service. On the facts, the High Court rejected an argument that a favourable comment in the evaluation of successful tender, to the effect that the physical layout of the renal dialysis unit proposed by the successful tenderer would involve less noise and disturbance for patients, meant that noise had been introduced as an undisclosed award criterion. It was submitted by counsel that a similar analysis should be applied to the facts of the present case.

65. This attempt to rely on *Baxter Healthcare* is consistent with the approach taken by the Contracting Authority in its pleadings. The Contracting Authority has filed a full defence to these judicial review proceedings. More specifically, the Statement of Opposition filed on behalf of the Contracting Authority represents a full traverse of the claims made by Word Perfect. Against this background, it is clear that issue has been joined, and all these matters are in dispute.

66. Given the manner in which the issues have been joined in the pleadings, there is simply no basis upon which Word Perfect can properly advance its case without obtaining an order for discovery. Discovery is indispensable. Word Perfect needs to have access to (i) the successful tenderer's tender, and (ii) the evaluation of same, in order to establish *inter alia* what precise specification the successful tenderer was offering; the extent to which it goes beyond the specified award criteria; and what weight and marks the Contracting Authority awarded for same. To date, Word Perfect only has the benefit of the limited material provided to it by the Contracting Authority. The comparison table is a document prepared *ex post facto*, and is merely a summary of the evaluation process.

67. It may be useful to pause here, and to consider the implications of the Contracting Authority's argument if followed through to its logical conclusion. The essence of the argument is that it is sufficient for the purposes of judicial review that an applicant has access to limited information, *authored by the relevant contracting authority itself*, which purports to provide an *ex post facto* summary of the evaluation process. On this argument, neither the applicant for judicial review—nor ultimately the court when exercising its supervisory jurisdiction—is entitled to examine the contemporaneous documentation. With respect, this is to place too great a premium on the accuracy and reliability of a summary prepared by a contracting authority. Without in any way impugning the *bona fides* of contracting authorities, an *ex post facto* summary is not the best evidence. As the judgment in *Roche Diagnostics Ltd* (discussed at paragraph 13 above) indicates, access to contemporaneous documentation is critical in order to ensure that an unsuccessful tenderer has effective judicial review. More generally, it is also consistent with the approach adopted by the High Court (Baker J.) in *Somague Engenharia S.A v. Transport Infrastructure Ireland* [2015] IEHC 723 (discussed at paragraph 12 above).

68. If Word Perfect is to have a meaningful opportunity to properly present its case at full hearing, then discovery of both (i) the successful tenderer's tender, and (ii) the evaluation of same by the Contracting Authority, are necessary and indispensable. The grounds which is pleads cannot be advanced at trial without Word Perfect being able to take the trial judge to the contemporaneous documentation with a view to persuading the judge that marks were indeed awarded in respect of undisclosed award criteria. The compare-and-contrast exercise as between the specifications in the SRFT and the evaluation of successful tender cannot be done without sight documents in category 6 and category 7.

69. I am also satisfied that Word Perfect has an entitlement to discovery of the evaluation carried out of its own tender (category 8). The grounds of challenge clearly identify concerns as to the manner in which both tenders were marked. As noted above, Word Perfect has shown to a non-speculative level at least that marks appear to have been deducted from it for offering a level of service

above that specified in the SRFT, whereas in the case of the successful tenderer, the opposite seems to have happened, i.e. additional marks seem to have been awarded for offering to exceed the specifications. Further, the argument that the deduction of marks in respect of the mistaken inclusion of *monthly* rather than *quarterly* reports was disproportionate or irrational is one which meets any requirement of non-speculation.

70. In circumstances where I have concluded that the discovery sought is both relevant and necessary/indispensable, it remains to be considered whether an order of discovery might nevertheless be *disproportionate*. This is especially important in respect of category 6 and category 7 which seek disclosure of the successful tenderer's tender and the evaluation of same.

71. I have concluded that the making of an order for discovery would not be disproportionate. The detriment to the successful tenderer in disclosure is outweighed by the detriment which would otherwise be suffered by Word Perfect were discovery to be refused. Word Perfect simply cannot advance its case at trial properly without this documentation. The requirement for effective judicial remedies means that this documentation must be disclosed. In seeking to balance the competing rights of the parties, I have attached some weight to the fact that the grounds of challenge are not speculative, and that Word Perfect has made out at least an arguable case by reference to the limited material which has been provided by the Contracting Authority, including, in particular, the comparison table.

72. I am also satisfied that discovery is relevant and necessary in respect of the plea that the Contracting Authority failed to observe a standstill period. As appears from the summary of the grounds of challenge set out earlier, part of the complaint in this regard is that the failure to have a standstill period represents a breach of the legitimate expectation of Word Perfect. This legitimate expectation is said to be based on the previous conduct of the Contracting Authority. The applicant simply cannot advance this case properly at trial without sight of the documentation sought in this category of discovery.

73. In addition to relying on the general point that a court should be reluctant to order discovery given the commercial sensitivities, Mr Beck, BL, also gamely advanced a series of arguments based on what were said to be weaknesses and/or misconceptions in Word Perfect's substantive case. For example, it was submitted that there is no obligation to provide reasons in respect of an individual award criterion in respect of which an applicant for judicial review has *outperformed* the successful tenderer. Reliance was placed in this regard on the judgment of the Court of Appeal in *Word Perfect (No. 3) [*2018] IECA 156, [42]. With all due respect to the eloquence with which these arguments were advanced, I am not convinced that it is appropriate on an interlocutory application for the discovery of documents to attempt to rule on the merits of the case. The court at this stage is not tasked with determining the merits of the underlying dispute between the parties. That is a matter for the trial judge. At this stage of the proceedings, the court is simply required to assess and identify the issues in dispute by reference to the pleadings. As noted above, the Contracting Authority has joined issue with Word Perfect and has filed a full defence in its Statement of Opposition. The issues are, accordingly, joined between the parties. It is no answer to an application for the discovery of documents to say, in effect, that the grounds advanced by an applicant are not well made and will not succeed at the trial of the action.

74. I simply do not know at this stage whether the grounds pleaded are well made. This is a matter for the trial judge. What I can say, however, is that Word Perfect will not be in a position to advance its case without discovery.

CROSS APPLICATION FOR DISCOVERY BY CONTRACTING AUTHORITY

75. The Contracting Authority has brought a cross-application for discovery. This is brought by way of Notice of Motion dated 8 February 2019, and is grounded on the affidavit of Mr Randall MacDonald. The categories of documents sought are set out in the schedule to the Notice of Motion. I will address each of these in turn. In summary, for the reasons set out below, I am satisfied that —save for a modified form of category 1—the Contracting Authority is not entitled to the discovery sought.

Category 1

All documents evidencing all public contracts tendered for by the Applicant limited to those called off under Framework Agreements and limited to the Invitation to Tender in each case and the notification letter and standstill letter from each contracting authority.

76. Before turning to consider this category, it is proper to note that Word Perfect have made the objection that this category is premised on the Contracting Authority impugning Word Perfect's plea and averment that it has tendered for many public sector contracts in Ireland over many years and has never come across a situation where a standstill provision has not been observed. It is said that whilst the Contracting Authority has denied this plea and averment, it offers no evidence at all to support its own position or to suggest that Word Perfect's position is incorrect. It is submitted, therefore, that the very premise of category 1 entails an impermissible challenge to the good faith of Word Perfect. This is said to be in contravention of the approach most recently stated by the Supreme Court in *RAS Medical Ltd. v. The Royal College of Surgeons in Ireland* [2019] IESC 4 at §7.2.

> "Where a party wishes to assert that evidence tendered by an opponent lacks either credibility or reliability, then it is incumbent on that party to cross-examine the witness concerned and put to that witness the basis on which it is said that the witness's evidence should not be accepted at face value. It is an unfair procedure to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned. A party which presents evidence which goes unchallenged is entitled to assume that the evidence concerned is not contested. However, there may, of course, be legitimate debate about whether the evidence, even if accepted so far as it goes, is sufficient or appropriate to establish the facts necessary to resolve the case in favour of the party tendering the evidence in question."

77. Counsel for Word Perfect goes on to say that, notwithstanding this objection, Word Perfect is anxious to move matters on with a view to bringing the case on for hearing. To this end, Word Perfect has adopted the pragmatic approach of agreeing to a modified form of category 1. It is suggested by Word Perfect that it is unreasonable for the Contracting Authority to seek documentation for a period of ten years. Word Perfect has instead offered to provide discovery in the following terms. See letter dated 28 January 2019.

> "All documents evidencing all public contracts tendered for by the Applicant from 2015 onwards limited to the notification letter from each contracting authority."

78. I am satisfied that the time period of four years is a reasonable one. I am also satisfied that it is unnecessary for the Contracting Authority to have sight of the invitation to tender. The dispute between the parties relates to the previous conduct of contracting authorities and, in particular, as to whether they have observed a standstill period in the past. The disclosure of the notification letter from each contracting authority will be sufficient to establish this point. The wider disclosure sought by the Contracting Authority, namely the invitations to tender, is not necessary.

79. I propose to order discovery in the terms offered by Word Perfect subject to a modification to state the period as being between 1 January 2015 to 31 December 2018.

> "All documents evidencing all public contracts tendered for by the Applicant for the period between 1 January 2015 to 31 December 2018, limited to the notification letter from each contracting authority. This category is limited to those tenders called off Framework Agreements."

Category 3

All documents evidencing, discussing or relating to the allegation that the Applicant tendered at cost and did not tender in order to derive a profit from the performance of the contract at issue in these proceedings.

80. Counsel for Word Perfect submits that the terms of category 3 are impermissibly wide; that they are vague and indeterminate; and potentially capture a vast range of documentation relating to its business. Word Perfect has instead offered to prepare a breakdown of costs associated with the performance of the contract, which it will exhibit in its affidavit of discovery. It is submitted that this will provide all of the information required by the Contracting Authority to test Word Perfect's case that it tendered at cost.

81. I think that the category of discovery as sought is disproportionate. There has been no meaningful attempt by the Contracting Authority to narrow the documentation to the issue in dispute between the parties, nor to limit the volume of documentation sought. By contrast , the approach suggested by Word Perfect is reasonable and sufficient to meet the requirements of the case. Accordingly, on the understanding that Word Perfect does file a breakdown of costs as indicated, I will make no order in respect of category 3.

Category 4

All documents evidencing, discussing or relating to any alleged lost profit in respect of the contract at issue in the proceedings.

82. Insofar as category 4 is concerned, I have concluded that discovery of this category is premature. It seems to me that the trial of the action will first proceed by reference to the liability issue. Put otherwise, it will be necessary for the trial judge to determine whether or not there has been a breach of the public procurement requirements in reaching the decision to award the contract. Thereafter, the question of damages can be assessed separately. It is clear from the case law and, in particular, from the judgment in *Word Perfect (No. 2) and in O'Brien v. Red Flag Consulting Ltd*. [2017] IECA 258 that, in some circumstances, it will be appropriate to defer the making of an order for discovery until other issues in the proceedings have been determined.

PROPOSED ORDERS

83. For the reasons set out herein, I propose to make an order directing the Respondent, i.e. the Contracting Authority, to make discovery of the documents in categories 1 to 9 (inclusive) in the Applicant's Notice of Motion of 1 February 2019.

84. I also propose to make an order directing the Applicant to make discovery of the following category of documents.

> "All documents evidencing all public contracts tendered for by the Applicant for the period between 1 January 2015 to 31 December 2018, limited to the notification letter from each contracting authority. This category is limited to those tenders called off Framework Agreements."

85. I will counsel as to the period of time to be allowed for the making of discovery, and as to the identity of the respective deponents.