THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 964 JR]

BETWEEN

NEWBRIDGE TYRE AND BATTERY CO LIMITED T/A FLEET SERVICE CENTRE

APPLICANT

AND
COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

AND
CORCORAN AUTOBODY WORKS LIMITED

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 21st day of June, 2018

1. These proceedings arise from a competition run by An Garda Síochána for the provision of towing and garaging services of vehicles recovered, seized, or retained by An Garda Síochána following traffic collisions, or for the purpose of the investigation of crime.

2. The service is currently operated by the applicant, Newbridge Tyre and Battery Co. Ltd. ("Newbridge"), which was unsuccessful in the competition, and has commenced proceedings for judicial review.

3. The competition being one for the procurement of services by a public authority is governed by the European Union (Award of Public Authority Contracts) Regulations 2016 (S.I. 284/2016) giving effect to Directive 2014/24/EU of 26 February 2014 on Public Procurement and repealing Directive 2004/18/EC.

4. The relevant provisions of Council Directive 89/665/EEC on the Coordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts as amended by Directive 2007/66/EC, ("the Remedies Directive") were transposed into Irish law by the European Communities (Public Authorities Contracts) Review Procedures Regulations 2010 S.I. No. 130 of 2010 and subsequently amended by S.I. 192 of 2015 ("the Remedies Regulations").

5. This judgment is directed to the preliminary objection of the respondent that the proceedings are out of time under Regulation 7(2) of the Remedies Regulations not having been brought within 30 calendar days after the applicant was notified of the decision.

6. The contract was awarded to Corcoran Autobody Works Ltd. ("Corcoran"), the notice party, which appeared at the hearing of this motion and supports the application.

Relevant Dates
7. The request for tender ("RFT"), published on 22 June 2017, on the "eTenders Website", provided for a deadline for submission of tenders of 10 August 2017. Three completed tenders were received.

8. By letter dated 27 October 2017, the respondent notified all three tenderers of the outcome of the process and identified Corcoran as the preferred bidder, as it had made the most economically advantageous bid. That letter provided for a standstill of 16 days.

9. On 27 October 2017, solicitors for the applicant, Messrs. McDowell Purcell, wrote to the respondent ("the Contracting Authority") saying that Newbridge was "extremely disappointed" and raising "serious questions" regarding the compliance of Corcoran with the requirements of the RFT, its own planning permission, and with relevant Waste Regulations. It was positively asserted that Corcoran did not have the benefit of planning permission or the necessary waste permits to provide the services. The letter requested specific information and documentation, including details regarding the location of the Corcoran primary site and planning permission registration numbers.

10. The Contracting Authority replied by letter of 8 November 2017 and gave detailed answers to each of the eight questions raised. A further letter of 14 November 2017 dealt with a perceived difficulty with Corcoran's certification of registration under the Waste Management Act 1996, as clause 2.6 thereof provided that the site should operate only between the hours of 08.00 and 18.00 Monday to Friday, and 08.00 to 14.00 on Saturdays, but said that Kildare County Council Environmental Section had clarified that the restrictive opening times were a "clerical error" and that the certificate was to be rectified to provide for operations on a 24/7 basis.

11. On 16 November 2017, Newbridge raised further queries regarding the certificate of registration and the storage facility for end-of-life vehicles, pointing out that the other facility intended by Corcoran to operate as a secondary facility had limited capacity and rejecting the contention that clause 2.6 of the certificate of registration contained a "clerical error or oversight" that the imposition of a limitation on the hours of operation was a "standard condition", one "routinely imposed" by Kildare County Council.

12. The point was also made that any change in the condition would involve a rescission of the certificate of registration submitted by Corcoran as part of its tender. The writer noted that clause 4.1 of the RFT requires that the competitor "hold the necessary permits for the activities to be carried out under the tender" and asserted that the preferred bidder did not met the requirements at either its primary or secondary facility.

13. A reply was sent on 23 November 2017 which acknowledged that the certificate of registration furnished by Corcoran did limit the number of crashed and immobilised cars that could be stored on the site to six, and that the letter of 14 November had contained an error. However, the writer rejected the proposition advanced by Newbridge regarding the amendment of the "clerical error". It was also pointed out that clauses 4.1 and 4.2 of the RFT required that a tenderer have "for the duration of the contract" and "prior to the commencement and throughout the contract period" the necessary permissions and permits *etc*. and that Corcoran had satisfied the Contracting Authority that it would have the necessary permits in place for the duration of the contract.

14. An immediate response was sent to that letter on the following day, where issues of the range and scope of activities permitted on the primary site was raised again, further argument made regarding the appropriateness of correcting the "clerical error", and in which information and documentation was requested regarding the consultation between Kildare County Council and the Contracting Authority.

15. The reply letter of 30 November 2017 declined to furnish correspondence between the Contracting Authority and Kildare County Council, and dealt with the nature and scope of the activity permitted. Nothing new was added in that letter, save that the standstill period which had been agreed in earlier correspondences was to thereafter be treated as having expired.

16. The second last letter in the chain was a letter of 1 December 2017 where robust assertions regarding the engagement between the Contracting Authority and Kildare County Council where made, and where it was firmly stated that the applicant disagreed that the requirement of the RFT or the Procurement Regulations had been met.

17. The final letter in the sequence was a letter of 6 December 2017 from the Contracting Authority, which pointed to the 30 calendar day time limit contained in Regulation 7(2) of the Remedies Regulation, and referred to a number of relevant authorities. The writer expressed the view that the time limit had "clearly expired".

18. The application for leave to bring judicial review issued the following day, on 8 December 2017.

19. Thereafter, on 7 March 2018, the respondent sought an order pursuant to O. 63A, r. 4(1) of the Rules of the Superior Courts ("RSC") that the proceedings be admitted into the Commercial List of the High Court, and that order was refused by McGovern J. on 12 March 2018. The matter was then adjourned to the Judicial Review List of the High Court where, on 13 March 2018, Meenan J. directed the application to dismiss the proceedings be heard as primary issue, and that Newbridge be given leave to issue a motion of notice to amend its statement of grounds to seek a necessary extension of time to bring the proceedings.

20. The preliminary objection was then heard by me in the Judicial Review List in Kilkenny on 11 May 2018.

The Remedies Regulations

21. Regulation 7 of the Remedies Regulations makes provision for the time limits for the bringing of applications under the Remedies Directive and Regulation 7(2) provides for a 30 day limit:

> "An application […] shall be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application."

22. The time limits are not absolute, and Regulation 10(2) permits the making of rules of court by which court can grant leave if there is "good reason to do so" that application be made outside the time limit. That Regulation finds expression in O. 84A r. 4 (2) RSC, as inserted by S.I. 420 of 2010.

When did time begin to run?

23. The first positive threat that Newbridge might commence proceedings by way of judicial review was made on the 1 December 2017 and the Contracting Authority says that the applicant was already out of time, and that time had commenced to run when the tenders were notified of the preferred bidder by the letter of 27 October 2017. Time on that analysis expired on 27 November 2017, and the application for judicial review was eleven days late. It is argued that, as Newbridge did not seek an extension of time before the proceedings were issued, that the proceedings must be dismissed.

24. Newbridge argues that time began to run on 6 December 2017, the date of the last letter, and the argument in broad terms is that it was only on that date that it was clear that it was appropriate to bring proceedings, or that that Newbridge could reasonably have known of the alleged infringement which formed the basis of the application to review.

25. The Contracting Authority makes the argument that correspondence does not stop the running, and that the time limit must be interpreted in a strict way having regard to the requirements of certainty and the overriding principle in Art 1 of the Remedies Directive that decisions taken by Contracting Authorities "be reviewed effectively and, in particular as rapidly as possible". It is argued that as the Irish time limits are generous having regard to the minimum requirements time limit of 15 days identified in the Remedies Directive, a strict approach is justified and necessary.

26. Counsel for Corcoran support this proposition, and argues that the time limits and Regulation 7(2) of the Remedies Regulations are mandatory and that even if time commenced to run at a date later than the regret letter, it is clear that on that date Newbridge knew that it was not the preferred bidder and had sufficient information regarding the operations of Corcoran to raise specific and focussed enquiries regarding compliance with the requirements of the RFT.

Discussion

27. The starting point for consideration of compliance with time limits in procurement reviews is the proposition found in the *dicta* of Fennelly J. in *Dekra Éireann Teoranta v. The Minister for the Environment* [2003] 2 IR 270 at p. 304, that:

> "The strictness with which the courts approach the question of an extension of time will vary with the circumstances. However, public procurement decisions are peculiarly appropriate subject matter for a comparatively strict approach to time limits. They relate to decisions in a commercial field, where there should be very little excuse for delay."

28. The Supreme Court allowed an appeal from a decision of the High Court which had extended time and was concerned with the question of whether "good reason" for the delay had been shown. Fennelly J. said that the applicant in that case was "acutely aware of its legal position and of its legal remedies" at a sufficiently early date, had not been "prevented by concealment from learning the reasons for the failure of its bid", and was, therefore, in a position to commence the proceedings in time. Fennelly J. noted that the applicant was so aware of its legal remedies of complaint that it was in a position to give and did in fact give statutory notice to the respondent but did not, nonetheless, commence the proceedings in time.

29. That judgment and the approach of Irvine J. in *Forum Connemara Ltd. v. Galway County Local Community Development Committee [*2016] IECA 59 concerned the matters to be engaged when an application was made for an extension of time to bring proceedings under O. 84A RSC. Nonetheless, the strictness with which the court must approach time limits in procurement matters is well established and must, in my view, inform the approach to the interpretation of Regulation 7(2) of the Remedies Regulations.

30. Furthermore, for the purposes of ascertaining the correct approach to time, some assistance can be gleaned from the jurisprudence surrounding an application for extension of time including *Forum Connemara* and *Dekra Éireann Teoranta*, and the *dicta* of Denham J. in the latter, that a plaintiff has to show that there are reasons which "both explain the delay and afford a justifiable excuse for the delay", at p. 289. The test then is to be objectively assessed, the burden to explain and justify is on the person who has delayed, and the reasons must be sufficient, justifiable on the facts of the case, and the test is not readily satisfied by general assertions.

Flexibility in Art 7(2)?
31. The central question for determination in the present case is how a court is to interpret the apparent flexibility, characterised as "subjectivity" by counsel for the Contracting Authority, contained in Regulation 7(2) of the Remedies Regulations, by which the commencement of the time limit is to be assessed, either by reference to the date of notification, which is a date in all cases probably readily ascertainable, or the date when an applicant knew or ought to have known of the infringement alleged in the application.

32. While I do not accept the proposed characterisation of the rule as importing a subjectivity to the test, I consider that the assessment of the date from which time runs is not always straightforward, and may be linked to the state of knowledge objectively understood of an intended applicant in the light of the circumstances of the case.

33. The matter was considered at some length in the judgment of Finlay Geoghegan J. in *Gaswise Ltd. v. Dublin City Council* [2014] IEHC 56, [2014] 3 IR 1, where she addressed the question of the point at which the applicant possessed sufficient knowledge of facts to enable it to consider that it had reasonable grounds to challenge a confirmed decision:

> "Applying those principles to the present facts, the question is when did Gaswise possess sufficient knowledge of the facts to enable it consider that it had reasonable grounds to challenge the decision of DCC that BM Services had passed the Turnover Requirement in the selection criteria", at para. 53.

34. Her decision is consistent with the decision of the CJEU in *Uniplex (UK) Ltd. v. HNS Business Services Authority*, Case C 406/08, ECLI:EU:C:2010:45, and with the judgment of Peart J. in *Baxter Healthcare Ltd. v. Health Services Executive* [2013] IEHC 413. Peart J. correctly noted, however, that the judgment of the CJEU did not provide assistance as to the level of knowledge required.

35. McDermott J. also considered the matter in his judgment in *Copymoore Limited v. Commissioner of Public Works of Ireland* [2016] IEHC 709, where having reviewed the judgment of Finlay Geoghegan J. in *Gaswise* and Peart J. in *Baxter*, identified a date which saved the proceedings from the plea that they were statute barred.

36. In *Baxter*, having considered the decision of the CJEU in *Uniplex*, Peart J. considered that, in the light of the principles of transparency and the objective of an effective remedy:

> "[T]his Court must decide at what point did the present applicant possess sufficient knowledge of facts to enable it to consider that it had reasonable grounds to challenge the decision that Beacon Dialysis Services Limited had qualified in the competition. As soon as it had sufficient facts at its disposal to commence its challenge, an effective remedy was available to it, and therefore the clock started to run against it. From that point on, it could not sit on its hands and hold the point over until it saw the final decision on the award of the contract. It was obliged at act immediately", at para. 77.

37. The matter to be ascertained is the date at which sufficient knowledge was available on which an assessment could be made as to the reasonableness of a challenge. As thus formulated, the objective of guaranteeing effective procedures for review, as laid down in Art 1(1) of the Remedies Directive, is met.

The level of knowledge required
38. Unlike *Baxter*, the present case does not concern the reasons for the rejection of applicant's bid, or the alleged deficiencies in the communications of reasons. But I am persuaded by the approach of Peart J. that the test is to ascertain the point at which the applicant might have taken a reasonable view that the preferred bidder had not met the qualifying criteria.

39. Peart J. made it clear that the test was not that all facts be known and he said the following:

> "It is not necessary for the party to know all the facts, and be possessed of all the information which may only emerge during the course of the proceedings from affidavits filed in response, through discovery of documents or through replies to interrogatories. But a party must know or ought to know sufficient to have reasonable grounds for making a challenge to the decision, before the clock begins to run against it.", at para. 83.

40. Peart J. took the view that, because the applicant in that case knew that the preferred bidder had tendered on its own behalf, and not as part of a combined bid, it did not in the circumstances gain further knowledge from the correspondence with the HSE thereafter, and that its concerns as to whether the successful bidder had qualified had crystallised before the correspondence was engaged.

Application to the facts
41. The question, then, is at what point did the applicant have or ought to have had a level of knowledge required to commence the proceedings. In that regard, the context, and not just the facts of the correspondence, are critical, and I consider that the test, therefore, is not whether correspondence was entered into, but whether the enquiries made were matters of substance, whether they were reasonably necessary to enable the applicant to reasonably assess the validity of the decision to award the contract, and, in the light of the correspondence, at what point in time after the first letter sent by Newbridge on 6 November 2017, it could be said that the applicant did possess a sufficient level of knowledge.

42. In that regard, it is important to note that the challenge in these proceedings is not to the terms of the RFT but the choice of tenderer, and therefore, I do not consider that time necessarily began to run at the date when the applicant was informed of its decision by the Contracted Authority. That approach, in my view, is justified by the language of Regulation 7(2) of the Remedies Regulations which, while fixes one possible start date as the date of notification, it does not confine the choice of date.

43. There may be, as in the present case, challenges which arise not from the choice of the preferred bidder as such, but from a perceived frailty in the approach of the Contracting Authority to the assessment of whether the competition criteria were met by the applicant. The time limit provided in the Remedies Regulations, for the reasons explained by Peart J. in *Baxter* and having regard to the principle of effectiveness, contemplates a start date which is linked to the date of knowledge or presumed knowledge having regard to the fact that the basis of the challenge may not be one readily ascertainable from the known facts, as the date of communication of the identity of the preferred bidder. The identification of Corcoran as the preferred bidder in this case, taken alone, did not give Newbridge sufficient knowledge of the pleaded irregularities.

44. The general purpose of effectiveness and certainty and that litigation in the procurement area be resolved with expedition may, on occasion, require to be reconciled. Litigation efficiency is not to be achieved by the commencement of proceedings before a proper evaluation is carried out as to whether they are justified or reasonably likely to succeed. Litigation chaos, the commencement of

poorly pleaded, unjustifiable, or unstateable proceedings are not desirable in the interests of the proper administration of justice, and while procedures exist for the bringing of an application to strike out proceedings which do not meet the necessary standard, such applications engage court time and are costly for the parties. It is in general not desirable that proceedings be instituted in circumstances where an applicant or plaintiff has not sufficiently assessed the nature of the claim or the prospects of success, or does not have requisite information to adequately plead.

45. I am mindful of the judgment of McMahon J. In *McCarthy v. the Irish Prison Service* [2009] IEHC 311, where the excuse advanced by the applicant for the delay in commencement of an application for judicial review was that he was "in correspondence with the respondents and was trying to resolve the matter amicably". While McMahon J. understandably described the approach as "laudable" he went to say the following:

> "[I]t cannot be the case that simply by corresponding with the respondents the applicant indefinitely extends the period within which he is obliged to commence proceedings under the Rules of the Superior Courts. If the case were otherwise, then an applicant could extend the time indefinitely, merely by engaging in letter writing. It must be remembered that O. 84, r. 21 (1) is not there simply for the convenience of the parties. It has a public dimension and it has been adopted to ensure the expeditious administration of justice."

46. The approach adopted by McMahon J. was to examine the nature of the correspondence, to see whether it ought to have had an effect on the time periods involved, and I adopt that approach.

47. In *Gaswise,* Finlay Geoghegan J. noted the lengthy and "somewhat unfocused" correspondence between the solicitors for the tenderer, by which clarification was sought as to the identity of the successful bidder, and she took the view that the tenderer was entitled to the information sought and until that was disclosed, it could not be considered to have had sufficient knowledge of facts to enable it to make a decision whether to challenge the award.

48. I adopt that approach to the correspondence in the present case to which I now turn.

The correspondence in the present case

49. The matters raised in the first letter of 6 November 2017 were, in my view, matters of substance regarding *inter alia* the waste collection permit, planning permissions, and details regarding the location of the primary and secondary sites proposed to be used by Corcoran. While planning permission and waste collection permit are matters of public record and could have been obtained by the applicant's solicitors other than through this request, some of the questions raised could not be so characterised, including the request relating to the exact location proposed for some of the contract activities, and details of where the proposed activity was to occur.

50. It is relevant that the response to that letter, which came directly from the Executive Director of Finance of An Garda Síochána, did not criticise the request and answered in substance, although I do not accept the argument that counsel for Newbridge that this fact is of great significance as no argument was made that the approach of An Garda Síochána to the questions might create an estoppel.

51. What I do regard as highly relevant however, is the fact that the initial reply from An Garda Síochána of 8 November 2017 was followed by a letter of 14 November 2017, and further information and documentation was furnished but more critically, it was in this letter for the first time that the alleged "clerical error" in the planning permission was identified.

52. Paragraph 2 of the statement of grounds pleads precisely an "obvious discrepancy" in the apparent restrictions contained in the certificate of registration and the planning permission, and it is specifically pleaded that an amendment of the so-called "clerical error" would amount to "substantive amendments" and would not be a mere formality, and that the grant of the contract to Corcoran *inter alia* amounted to a manifest error in evaluation.

53. Paragraph 3 of the of grounds pleads that the Corcoran facility could accommodate a maximum of six crashed or immobilised vehicles and that the Contracting Authority had erroneously awarded the contract as the Corcoran facility did not have the necessary capacity to fulfil the contract.

54. The correspondence therefore was material to the case as pleaded.

55. Queries continued to be raised by Newbridge through its solicitor thereafter and the Chief State Solicitor's Office commenced communicating with McDowell Purcell on 23 November 2013 and agreed that the certificate of registration furnished by Corcoran limited the number of crashed and immobilised cars to six, again repeated the proposition that Kildare County Council would correct the "clerical error" and expressed a view that the test of whether the contract was lawfully awarded must be assessed in the light of clause 4.1 and 4.2 of the RFT, both of which required that the necessary permits and authorisations be in place prior to the commencement and throughout the contract period. Para. 7 of the grounds expressly pleads that sufficient planning permission to enable the performance of the contract is a "condition precedent to the award of the tender" and the approach adopted by the Contracting Authority is incorrect at law.

56. The approach to the planning and other regulatory requirements is a matter of substance in the application for judicial review.

57. Counsel for the Contracting Authority argues that, in essence, Newbridge was in the course of the correspondence seeking to ascertain the strength of the case before taking the risk of commencing the application for judicial review. It is argued that this is an example of a tenderer deliberately delaying proceedings, what was described by Dyson L.J. in *Jobsin.Co.Uk Plc. (trading as Internet Recruitment Solutions) v. Department of Health* [2002] CNLR 44, para. 38, as an attempt to "have his cake and eat it", a statement quoted with approval by Kelly J. in *SIAC Construction Limited v. The National Roads Authority* [2004] IEHC 128.

58. I reject that argument primarily because the challenge is not made on the validity of the selection criteria, but on whether an error was made in the award to Corcoran. The factors giving rise to that challenge where not in my view reasonably ascertainable before the correspondence was entered into, although I do consider that by 23 November 2017, after two letters of clarification, Newbridge did have sufficient information to be in a position to reasonably assess whether it is was appropriate to bring proceedings.

59. I note too that the affidavit of Colin O'Brien sworn on 7 December 2017 which grounds the application for judicial review avers that the notification of 8 November 2017 was the first notification that Newbridge received that some part of the Corcoran operation was proposed to be carried out in a site other than the "dedicated facility" at Naas, Co. Kildare, and the restricted number of vehicles capable of being accommodated in that site gave rise to the questions then raised in correspondence.

60. The test of whether sufficient knowledge existed for the purpose of Regulation 7(2) of the Remedies Regulations must be objectively ascertained, and this means that, objectively speaking and having regard to the nature of the challenge brought, the information was reasonably necessary, both to the making a judgement whether to commence proceedings and to the framing of the legal and factual basis for the application.

61. In *Baxter*, Peart J. took the view that the burden was on the applicant to seek further information at an early stage, and that it was in a position to raise the queries far earlier than it did. I consider that Newbridge did move with expedition, and that the correspondence was focused from its commencement and is not readily characterised as a holding device as the Contracting Authority contends.

62. I consider that time had not run for the purposes of the test in Regulation 7(2) of the Remedies Regulations until the letter of 23 November 2017, and the application is not out of time.

Possible Prejudice
63. The notice party appeared through counsel and argued with some elegance that Corcoran now has in place all of the necessary permits and authorisations, and is therefore significantly prejudiced by the delay in commencing these proceedings. An affidavit of Anne Corcoran was filed and she described the contract as "highly prestigious" and one of the largest contracts the company has had. She says that the facilities, equipment and staff are ready and prepared and willing to commence performance of the contract immediately.

64. Counsel describes a "blind panic" amongst practitioners deriving from the strictness of the time limits in procurement judicial review, and that this is justified and has resulted in a degree of specialisation among solicitors and counsel in the area.

65. Whilst I accept that the complexity of the area and the imperative of expedition are factors, to focus on those factors would be to disregard the jurisdiction express in Regulation 7(2) of the Remedies Regulations by which the court must assess on the facts the date at which sufficient knowledge existed, and the clear provisions of Regulation 7(2) to not admit of an interpretation that the date of notification is the only relevant start date.

66. Furthermore, it seems to me that the prejudice to Corcoran derives from the judicial review and the effect that it has now had on the award of the contract, and not by reason of any delay by Newbridge, and in that regard it must be noted that if the start date is to be regarded as the date of notification, time had run a mere eleven days before the proceedings were commenced. I am not satisfied that any real prejudice has occurred as a result of that short delay.

67. For the reasons stated, I consider that the relief sought in the motion that the proceedings be dismissed as being out of time is to be refused. For those reasons I do not propose considering the application of Newbridge to amend its statement of grounds to add a prayer for an extension of time to bring the application for review.