IN THE HIGH COURT OF JUSTICE No. HT-2017-000117

QUEEN'S BENCH DIVISION

TECHNOLOGY & CONSTRUCTION COURT

[2017] EWHC 1584 (TCC)

Rolls Building

Tuesday, 6th June 2017

Before:

MR. JUSTICE STUART SMITH

B E T W E E N :

ALSTOM TRANSPORT UK LIMITED Claimant

- and -

(1) LONDON UNDERGROUND LIMITED
(2) TRANSPORT FOR LONDON Defendants

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

MISS S. HANNAFORD QC and MISS E. HEALISS (instructed by Hogan Lovells International LLP) appeared on behalf of the Claimant.

MR. J. COPPEL QC and MR. J. BARRETT (instructed by TfL Legal) appeared on behalf of the Defendants.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE STUART SMITH:

1 The background to this ruling is set out in [6]-[13] of the Claimant's skeleton argument. In briefest summary, the Claimant is the aggrieved under-bidder in a procurement for the supply of a new traction system for the Defendants' Central Line trains. The procurement was subject to the Utilities Contracts Regulations 2006. On 13th March 2017 the Defendants announced by letter that the successful tenderer was Bombardier Transportation UK Limited. The letter made clear that Bombardier's scores had fallen short of a number of thresholds laid down by the ITT. The Claimant promptly started asking questions about the conduct of the procurement with a view to challenging the outcome. On 8th May 2017 the Defendants gave 3 working days' notice of their intention to enter into a contract with Bombardier. The Claimant then issued these proceedings on 11th May 2017. It issued its Particulars of Claim on 18th May 2017. Coulson J gave directions on 26th May 2017, including that an application for specific early performance should be heard today, 6th June 2017. At the end of the hearing I gave my decision with ex tempore reasons. This is a revised version of that decision and reasons.

2 It is now apparent that in the course of correspondence a number of assertions have been made by the Defendants that were either internally inconsistent or apt to mislead the Claimant, or both. The misleading nature of the information that was given in the correspondence was continued by the first witness statement of Mr. Peter Campbell, a senior procurement manager who was directly involved in the procurement process. His first witness statement, which was made on 18th May 2017, was subject to significant amendment by his second, which was made on 1st June (last Thursday).

3 In general terms, I accept Miss Hannaford's submission that the Defendants' explanations and case have continued to change right up to and including Mr. Coppel's oral submissions today.

4 As I have said, the matter was before the court on 26th May 2017. On that date Mr. Justice Coulson gave directions, which included that the Defendants' application to lift the automatic suspension should be fixed for 15th June, with a day set aside for that, including judgment. He also directed as follows:

> "1. The Claimant's application for specific disclosure is to be heard before the Defendants' application to lift the automatic suspension.
>
> 2. The Claimant's application for specific disclosure is to be fixed for 6th June 2017, the hearing not to exceed 1 day of Court Time (including judgment)."

There is nothing in his order to suggest that he intended that the application should be limited to documents relevant to the forthcoming application to lift the automatic suspension. There is nothing to that effect in the application itself and it has been presented on a broader basis, as set out in para.19(4) of the Claimant's skeleton which says:

> "… the documents are needed both to complete the pleading expeditiously and to ensure that there is equality of arms in fighting the Defendants' imminent application to lift the suspension".

I accept that as being a reasonable statement of the basis upon which this application is made.

5 In those circumstances, I see no justification for restricting any order that I might make to documents relevant only to the application to lift the automatic suspension. At the same time, I accept Mr. Coppel QC's submission that it is inappropriate to order what would amount to standard disclosure at the present point in the litigation, not least because (a) the Claimant has confirmed that amendments are underway in the light of the materials that have been disclosed so far and (b) the Defendants have until about 16th June 2017 to produce their defence, the purpose of which is to define and limit issues and thereby reduce the scope of disclosure.

6 The appropriate principles, while taking due account of a number of decisions of Mr. Justice Akenhead about the restrictive approach to apply in an application for disclosure which is targeting only a s.47(H) hearing, are the rather less restrictive principles summarised by Mr. Justice Coulson in *Roche Diagnostics Limited v The Mid Yorkshire Hospitals NHS Trust* at [16]-[20].

7 Before returning to those principles, it is convenient to identify the most relevant paragraphs of the ITT which set the framework for the procurement and to identify what appears to be the two prime issues that the Claimant has relied upon as underpinning its claim. The ITT, it is common ground, proceeds on the basis that the evaluation of tenders will take place in four sequential stages. I here refer to and rely upon the first two paragraphs of Part 5.1, the terms of Parts 5.2 and 5.3 (to which I will refer in a moment), the terms of Part 5.6, the terms of 5.7 down to the end of the third paragraph, the last two paragraphs of 5.7, and from 5.8 the second, third, fourth and fifth paragraphs, and also Part 5.10.

8 There is then, at Part 6.5.9, a definition of the thresholds, which have proved to be contentious in this litigation, and also at Part 7.1 a notice to bidders about abnormally low tenders, which I note.

9 I can summarise the respective positions of the two parties, as they appear to be at the end of a day's submissions. For the Claimant, Miss Hannaford QC says that Part 5.3 sets out a procedure that should be followed and there is prima facie evidence that it was not. It is therefore, she submits, necessary for the Claimant to understand precisely what was done by the Defendants in order to enable to Claimant to plead its case properly and without the expectation of a need for further amendments as further information comes out in dribs and drabs.

10 The basis of Mr. Coppel's response is that Part 5.3 is, as he put it, "replete with discretions". I do not rule upon whether Mr. Coppel is correct in his interpretation, but it is important to record that as having been his case. It is more elegantly set out in a transcript of his submissions but, if I can attempt to summarise it most briefly, his case today is that in law the Defendant had a discretion as to whether to take any of the steps that it was empowered to take under Part 5.3 before proceeding to stage 4 and that, as a matter of fact, it decided not to do so. That decision, the decision not to take any of the steps which, on his interpretation of the contract, his clients were permitted to take by Part 5.3 but not obliged to take, is said to be evidenced by para.3.19 of what has been referred to as the July 2016 report. The Defendants' position, as it stands today, has been clearly set out by Mr. Coppel in the course of oral submissions and will be available on the transcript should anyone be in any doubt about what he said.

11 There is a second issue which is before the court, and that is that Miss Hannaford says there is no evidence of a two-stage evaluation of the question of abnormally low tendering.

12 Returning to *Roche,* I think it is sufficient if I make the following brief observations, making it clear that I shall attempt to bear in mind the summary and the principles that underline some of the summary given by Mr. Justice Coulson. I note at the end of [17] a citation from Lord Justice Rix in *Black v Sumitomo,* which should be afforded the respect that any citation from that great judge deserves. Secondly, I accept and endorse Mr. Justice Coulson's description that the position of an aggrieved tenderer in the position of the Claimant is "uniquely difficult" for the reasons he gave. Thirdly, it is important to remember that what Mr. Justice Coulson said was that a person in that position should be provided promptly with the essential information and documentation relating to the evaluation process actually carried out so that an informed view can be taken of its fairness and legality. Fourthly, from the material that I have seen, I am not prepared to characterise the Claimant simply as an aggrieved tenderer who appears to have little or no grounds for disputing the result. I do not characterise this application as a whole as simply a fishing exercise. Fifthly, without in any way binding any court that may come after, the picture that appears on the materials presented today is similar to the

situation that was said to prevail in [22] of *Roche* and which led Mr. Justice Coulson to find that there was an impression of potential muddle and confusion.

13 This appearance of muddle and confusion, and Mr. Campbell's acceptance in his second witness statement that information that had previously been provided was apt to mislead, serves to emphasise the uniquely difficult position in which the Claimant finds itself and naturally reinforces the instinct of the court to require the Defendant to make clear what has previously been opaque by a combination of a refusal to disclose any documents until the very last moment and the provision of inadequate or misleading information.

14 That said, the balance still remains to be struck between ordering the early disclosure of those documents which are required to enable the Claimant to understand why it has lost and to plead its case properly, on the one hand, and falling into the trap of ordering the disclosure of documentation on a scale that would only be appropriate on subsequent standard disclosure, on the other.

15 With these principles in mind, I come to the categories of documents. In doing so, I bear in mind Mr. Coppel's explanation that the use of phrases such as "formal" minutes or records was intended to demarcate between those documents that were necessary to enable the Claimant to progress and those much wider categorise that would be producible on standard disclosure. I do not think that that explanation provides an entirely full and complete explanation of how the word "formal" has been used in the materials before the court.

16 So I turn to the categories: Category (a) is the documents evidencing the Defendants' decisions (a) to request Bombardier to submit further information in relation to its stage 3 fails and (b) not to reject Bombardier's bid. In the light of the explanation by Mr. Coppel today, I accept that this application is not sufficiently focused or focused in the right direction. On the explanation that has been given today, the decision is encompassed in the terms of the July 2016 document which was then, according to Mr. Campbell, endorsed - there being no formal minutes of that decision. It is said by Mr. Coppel that later there was some negotiation, at a much later stage, after stage 4, and that is all, so far as it is material, in the document known as the tracker.

17 Going on to sub-category (i), which was a request for a copy of the minutes of the evaluation board meeting on 19th July 2016, any papers submitted to that meeting and a copy of the documents evidencing a decision which was endorsed at that meeting, there is no basis upon which I can reasonably go behind the evidence of Mr. Campbell that there were no such documents, surprising though that may seem. That may in the long term prove to be advantageous to Miss Hannaford but it does not assist her in getting an order. I

should note that Miss Hannaford submitted in reply that, in the absence of a formal minute of the meeting, what she would like to see is a report up the line of the decision to endorse the July 2016 report. I have come to the view that that is neither necessary nor desirable in the light of Mr. Campbell's evidence, upon which he can be cross-examined in due course in light of any subsequent disclosure which is made, and the orders that I do intend to make at a later stage in this process. So that deals with (a) and (i) which are rejected.

18 (b) to (d) are requests for further information and responses, correspondence and minutes of meetings in relation to Stage 3 non-compliances."

19 The court has been very clearly told that the sum total of what was material and was discussed or negotiated is in the tracker, and that deals with category (b); and that the responses of Bombardier, which is what category (c) is directed to, are all to be found, so far as they are material, in the tracker that has been disclosed. That seems to me to be a full and complete answer, relying, as I do, on Leading Counsel's assurances to the court, which I am sure were made on instructions, that that is the position and notwithstanding the fact that that articulation of the Defendants' present case differs materially from what has been said in correspondence previously.

20 Turning to category (d), correspondence and minutes of meetings: this has the air of something which goes much wider and the response from Mr. Coppel is that the tracker sets out what was done. If that is right, and I have no reason to go behind his assurance that that is all that the Defendant did, then what is in fact being looked for is material which may well fall within the bounds of standard disclosure at a later stage; but there is no basis upon which an order can properly be made at the moment. That deals with (b), (c) and (d).

21 I come to (e), (f) and (g). (e) is sections D01, D02, D03 and D04 of Bombardier's bid and its contract programme. (f) is the evaluators' and moderators' contemporaneous comments and score sheets in relation to the above sections of Bombardier's bid, and (g) is the minutes and notes of the moderation meeting.

22 I initially thought that this should be categorised as a fishing exercise, but I have been persuaded by Miss Hannaford in reply that when one looks at the terms of sub-para.(5) on p.14 of the bundle of the particulars of claim, and also the terms of [25.4] of the 13th April 2017 letter, there is reason to think that there is material falling within category (f) that should be disclosed. I take the view that to disclose the whole of sections D01, D02, D03 and D04, and its contract programme, would be going well beyond what is called for at this stage, either as being essential to enable the Claimant to know how to formulate a case, if it has one, or, indeed, to deal with the lifting of the suspension.

23 Mr. Coppel's submission on (e) was that those documents are not necessary for what is in dispute because the non-compliance is accepted. There is force in that. On the other hand, it does seem to me that once the non-compliance is accepted the degree of non-compliance, in the light of a number of apparently conflicting figures being put forward in the documents that have already been disclosed, could be material and that the proportionate and appropriate way to deal with that at the moment is to require the disclosure of the evaluators' and moderators' contemporaneous comments and score sheets. So I will make an order in relation to category (f).

24 Turning to category (g), Mr. Coppel explained what had previously been not entirely clear to me but which is consistent with what is in the documents, namely that the moderators' meeting produced the scores from stage 3 – and I am referring at this stage again to [25.4] of the 13th April 2017 letter. There is then, as it seems to me, a black hole, a gap, in the understanding that anyone, other than the Defendant, might have about what happened between the formulation of those scores and the succinct (to the point of being laconic) terms of [3.19] of the July 2016 report. On a matter of such importance, it does seem to me literally inconceivable that [3.19] can be a full or sufficient exposition of the thought processes or procedures that led to [3.19] going before the meeting in July.

25 I am told that the July report was written under the pen of Mr. Campbell, who clearly has close involvement and has had close involvement throughout. Therefore what I propose to direct, instead of making an order as framed under (g), is that the Defendant will disclose any document in Mr. Campbell's possession, custody or power or for which he was responsible for the production, which evidences the consideration of the reasoning behind [3.19].

26 Then I come to (h). Miss Hannaford submits that the ITT says there will be rankings and that the October report, which is another document to which I have been referred, does not match what was said in the March letter and what is shown in some of the confidential documents already disclosed. To that, Mr. Coppel replies that so far as the formalities of making a decision are concerned, the October 2016 report shows the ranking; it shows the price of the bid; it shows the basis of the decision. To my mind this one is marginal but I am with Mr. Coppel on that submission.

27 Category (i) I have dealt with already. Categories (j) and (k) stand or fall together. I can put this in two ways. Miss Hannaford relies upon [44] of Mr. Campbell's second witness statement. When one reads that with care, it seems to me that it does not, in fact, support what Miss Hannaford wishes to draw from it because if one looks at [43] and [44] they say as follows:

> "43. I wish to make clear that it is not the case that every Stage 3 non-compliance was included in the Deliverability Tracker and subject to further negotiation between LUL and Bombardier. It was only LUL's principal concerns relating to Bombardier's Stage 3 non-compliances that were included in the Deliverability Tracker and subject to further negotiation.
>
> 44. In particular, the Deliverability Tracker does not refer to the Bombardier Stage 3 non-compliances concerning the Supply Chain Management Plan or Maintenance Plan. LUL decided that these matters did not require or justify further negotiation as part of the Deliverability Tracker because …".

He is making it clear that the Defendants' principal concerns were included in the deliverability tracker and were made subject to further negotiation. That appears to me to be consistent with what has been said today about what happened, based upon the evidence that has been provided. On that basis, and since the relevant tracker has been disclosed, I accept the submission of Mr. Coppel that the documents in (j) and (k) would not have been material to the decision to award the contract to Bombardier. At this stage in the proceedings, there is no basis to go behind what Mr. Campbell says in paras.43 and 44 and I am not satisfied that the material which is being sought goes to the decision that was being made.

28 That brings me onto documents (l) and (m). Here Mr. Coppel responds, in [23] of his skeleton, by relying upon a legal submission, on which I do not find it necessary to rule; and upon a factual submission which is based upon [70] and [71] of Mr. Campbell's witness. On the basis of that evidence, there was again a relatively surprising level of informality and, on the basis of what he has said, there is no documentation that is going to represent or fall into the categories that are sought at (l) and (m). I am not in a position to go behind that and therefore the applications for documents in (l) and (m) are unsuccessful.

29 Document (n) was initially formulated long before the Defendant disclosed any documentation at all, late last Friday night. In the light of that documentation I accept the submission that the October 2016 report is effectively the evaluation report. There is no basis for directing disclosure of earlier drafts at this stage and therefore that one goes. That, I think, covers the categories.
