

# THE HIGH COURT

[2023] IEHC 396

[Record No. 2019/250JR]

**BETWEEN**

**LIAM O'DUBHGAIN T/A WJ DUGGAN**

**APPLICANT**

**AND**

**MINISTER FOR CULTURE, HERITAGE AND THE GAELTACHT**

**RESPONDENT**

**JUDGMENT of Ms Justice Miriam O'Regan delivered on 11 July 2023.**

## **Issues**

1. On 27 February 2019 the respondent issued a request for tenders (the '2019 RFT') for the provision of a fast ferry passenger service between Tory Island and the mainland for the period of 1 May 2019 to 30 April 2021. Both the within applicant and another company, Slí Mara Thoraí Teo ('the affected party'), submitted tenders pursuant to the RFT aforesaid prior to 29 March 2019, the expressed tender deadline.
2. Under cover letter of 15 April 2019 from the respondent to the applicant, the applicant was advised that the affected party had been deemed to be the most economically advantageous tender. The letter included a table attached thereto

outlining the scores obtained by the applicant and the affected party in what was said to be “a supporting narrative in relation to same.”

3. The applicant through his solicitors sought an extension of the standstill notice identified in the letter of 15 April 2019 aforesaid (which was due to expire on 29 April 2019) however, this request was refused and subsequently the within proceedings were brought on 26 April 2019.

4. Prior to the 2019 RFT there were two prior RFTs issued by the within respondent bearing date 1 November 2018 and 9 January 2019. The applicant was the successful tenderer in respect of the RFT of 9 January 2019, however, the applicant was subsequently advised on 7 February 2019 that the process had terminated.

### **Pleadings**

5. In the statement of grounds of 25 April 2019, the applicant has sought to challenge the decision of the respondent to grant the tender to the affected party, on the basis that the respondent failed to comply with the provisions of Statutory Instrument no. 248/2016 (being the regulations for the purpose of implementing the EU Directive known as Directive 2014/24/EU on public procurement) and on the basis of general EU law, common law and constitutional law. It is argued in this regard that:-

- (a) the respondent failed to provide reasons for the selection of the affected party, for the rejection of the applicant’s tender and further failed to provide a summary of reasons or made a selection otherwise than on the basis of the criteria specified in the 2019 RFT;

- (b) the respondent applied criteria which was not disclosed and/or the decision was vitiated by a manifest error;
- (c) the respondent failed to treat all economic operators equally and wrongfully discriminated against the applicant;
- (d) that the respondent took into account irrelevant considerations and/or failed to take into account all relevant considerations;
- (e) the respondent breached natural and constitutional justice and acted as if possessing an unfettered discretion; and
- (f) the decision was irrational and/or unreasonable and/or flew in the face of fundamental reason and common sense and/or was disproportionate.

The failure to provide reasons as aforesaid was said to arise under five criteria specified in the RFT namely: -

- (1) quality and suitability of vessel;
- (2) risk management criterion;
- (3) security criterion;
- (4) environmental plan criterion; and
- (5) service mobilisation plan.

It is said that the purported reasons were generic and formulaic and in breach of the respondent's obligations under Regulation 6 of the 2010 Regulations and the general principles of EU law.

In addition to the complaint as to reasons aforesaid there is also a complaint that there was a manifest error in the assessment of the criteria in respect of: -

- (1) quality and suitability of the vessel;
- (2) customer service and mobility;
- (3) security;

(4) service mobilisation plan.

Although the statement of grounds refers to three other headings, the applicant's claim in regard to these three other headings was withdrawn at the hearing.

In para. 22 of the statement of grounds relative to reasons and further in para. 40 of the statement of grounds relative to manifest errors, it is stated that the applicant was reserving his right to plead additional infringements if necessary by filing an amended statement of grounds following discovery.

6. Discovery was sought and duly furnished by way of two affidavits respectively dated 4 November 2021 and 28 April 2022. Notwithstanding the foregoing no request for an amendment of the statement of grounds was sought by the applicant, at any time, and the hearing proceeded on the basis of the original unamended statement of grounds as aforesaid.

### **Manifest Error**

7. In relation to the claim of manifest error under the various criteria headings aforesaid the following arguments were made: -

(1) in respect of quality and suitability of the vessel it is argued that no evaluation under the public procurement rules could possibly have resulted in the affected party scoring maximum marks and the applicant's vessel not scoring maximum marks by reason of the facilities within the applicant's vessel and the fact that it is argued that the applicant's vessel is structurally and mechanically superior to the affected party's. This in my view is a qualitative assessment quintessentially a matter for the

respondent, in particular, in circumstances where there is no challenge to the content of the 2019 RFT. Accordingly, it is not appropriate that the Court would now, in those circumstances, on the basis of the evidence put forward by the applicant, determine that the respondent's decision was wrong because the applicant has a better vessel.

- (2) Insofar as the other complaints identified under the heading of manifest error, the argument was made, in respect of each of the foregoing headings to the effect that each criterion was substantially the same as the criterion identified in the 2019 RFT and the submissions put forward by the applicant are essentially the same as the submissions previously put forward under the 2018 RFT however, inexplicably, the points secured by the applicant under the 2019 RFT were less than those secured under the 2018 RFT.

Given the foregoing one would expect that in order to attempt to establish entitlement to the relief claimed under the heading of manifest error in respect of each of these criteria, the applicant would demonstrate similarities between the 2018 RFT and the 2019 RFT and then go on to demonstrate the similarities between the applicant's 2018 tender and the applicant's 2019 tender. However, no such exercise was undertaken by the applicant and therefore I accept the respondent's argument that the applicant has not identified any basis under which the applicant might succeed in securing the relief claimed under these various criteria.

- (3) Rather than pursue the issue of manifest error in accordance with the particulars identified in the statement of grounds, the applicant argued, without having previously sought clarification from the respondent in

respect of any of the following, that the applicant was entitled to the relief claimed on the basis: -

- (a) an inspection of the vessel was intimated and/or necessary in order to carry out an appropriate evaluation of the vessels of each of the two tendering parties;
- (b) in an examination of the respondent's tender evaluation report there was no consideration of the "relative suitability" of the vessels;
- (c) the number of vessels which either tenderer might have put forward was ambiguous and not sufficiently clear;
- (d) the applicant's photographs and drawings were not properly considered and more weight appears to have been placed on the written description of the affected party's vessel without identifying in the RFT that such an evaluation and methodology would apply;
- (e) the meaning of the word "must" and the word "should" within the RFT was argued to be confusing, ambiguous and insufficiently clear.

Given that the arguments aforesaid were not identified within the statement of grounds and no attempt to amend the statement of grounds was made following the discovery, the foregoing points were not properly before the Court.

In the circumstances the applicant's claim proceeds on the basis of an effective deficit in reasons furnished.

### **Reasons**

8. In considering the claim under the heading of reasons as aforesaid it should be borne in mind: -

- (1) it is accepted that the applicant's tender was more economically advantageous than the affected party's tender;
- (2) in reviewing the respondent's reasons, the only relevant document to identify those reasons is within the table attached to the standstill letter of 15 April 2019 and any additional reasons furnished by the respondent in the statement of opposition, the various affidavits tendered on behalf of the respondent or submissions are not relevant;
- (3) prior to the making of discovery by the respondent the applicant did not have available to him a copy of the affected party's tender accordingly all that was available to the applicant prior to the institution of proceedings was the 2019 RFT with answers to the various queries raised by the tenderers in advance of submission of the applicant's tender.
- (4) Ultimately the affected party scored 20 marks more than the applicant.

9. In respect of the queries raised in advance of submitting the tenders the following queries appear relevant: -

Query 5

What weighing will be applied to the various pieces of information listed in 3A when assessing the marks?

Answer

The assessment of a tenderer's vessel will be made subjectively, taking into account all the listed pieces of information together with passenger facilities, rather than weighing individual pieces of information. The objective will be to make an overall qualitative assessment of a vessel in terms of passenger comfort, age of vessel and quality of service proposed.

Query 6

Since this is intended to a fast ferry service is there a maximum crossing time permitted for the route in smooth sea conditions?

Answer

No set crossing time has been laid down as a requirement.

Query 7

Where a crossing time is provided in the tender of the successful tenderer, and that tenderer, as operator, does not achieve that crossing time, what penalty, if any, will be applied to the operator?

Answer

The service will have to be provided in accordance with the timetable set out in any contract that may arise from the tender competition. The contract will contain performance clauses which include issues such as efficiency of the service as provided for at schedule 1, section 10, and which in consequence may result in a penalty.

**10.** In respect of the table provided under the standstill letter the following matters arise in respect of the award criteria: -

(1) Quality and suitability of the vessel

Of a maximum mark of 200 the affected party scored 200 and the applicant scored 185.

The comment/reasons were as follows: -

“The SMT response was excellent; there was good detail provided in relation to the proposed vessel and in relation to passenger facilities.



The Evaluation Committee considered the WJD response to have provided some detail in regard to the vessel tendered. Whilst photographs and a diagram were provided in relation the vessel, there was not significant detail provided in regard to passenger facilities as per the requirements of the RFT”.

(2) Customer service and proposals for dealing with customer complaints and consultation; mobility

Of a maximum number of points of 100 each tenderer scored 80 points.

The comments/reasons were as follows:

“Both responses were deemed very good; a lot of detail was provided by SMT in relation to customer complaints processes and for consultation with the island community. Proposals in relation to catering for passengers with reduced mobility were not considered to be detailed.

The WJD response provided a lot of detail in relation to customer complaints. In relation to consultation, while there was an outline of procedures, there was no detail on regularity. Proposals in relation to catering for passengers with reduced mobility that are unaccompanied was unclear.”

(3) Risk Management

Of a total of 100 marks the affected party scored 100 and the applicant scored 85.

Under the heading of comments/reasons the following is stated: -

“The SMT response was considered to be excellent. The WJD was very good but some areas of risk which are considered quite important were not covered in the submission.”

(4) Service Mobilisation Plan

Of a total of 60 marks the affected party scored 60 and the applicant scored 50.

Under the heading of comments/reasons the following is stated: -

“The SMT response was considered to [be] excellent. The submission was very detailed with specific milestones mentioned. The WJD response was considered to be very good. However, the submission was not considered to be specific in relation to some timelines.

(5) Security

Of a total of 80 potential marks the affected party scored 80 marks and the applicant scored 70 marks.

In the comment/reasons column it is recorded: -

“The SMT response was considered to be excellent with a lot of detail in relation to both security onshore and at sea. The WJD was very good but lacked detail as to how security at sea will be handled.”

**Jurisprudence**

11. In *RPS Consulting Engineers Limited v Kildare County Council & Ors.* [2017] 3 IR 61 Humphreys J was dealing with the complaint of an unsuccessful tenderer in respect of public procurement and in particular the duty to give reasons together with the level of reasons required. The Court undertook a review of both domestic and EU jurisprudence on the topics.

In applying the Court of Justice case of *Dynamiki* T-447/10 the Court was satisfied that while brief statements or succinct comments might be sufficient in particular circumstances, the contracting authority's comments had to be sufficiently precise to enable an unsuccessful applicant to ascertain the matters of fact and law on the basis on which the contracting authority rejected his offer and accepted that of another tenderer. The statement of reasons had to be sufficiently detailed to explain how the preferred tenderer was advantageous by reference to particular matters, respects, examples or facts supporting a general assertion of relative advantage.

At para. 7 of *RPS* the Court indicated that the respondent's notification informed the applicant that he was unsuccessful and identified the successful tenderer and the marking scores together with purported reasons. The Court was satisfied that the reasons were a combination of repetition of the criteria, a repetition of the scores but phrased in terms of "good", "very good", and so on, and a handful of additional words containing a vague and general reference to the manner in which the preferred tenderer was superior. In that matter, also, the applicant was ahead on price and behind on quality by a relatively narrow margin.

At para. 86 the Court indicated that the effect of European decisions appeared to the Court to clearly indicate that the awarding authority must make reference to specific facts and matters by reference to which the successful tenderer was preferable.

At para. 88 the authorities were said to be to the effect that in a case where qualitative factors are crucial, and particularly where an unsuccessful tenderer offered a lower price, it is insufficient to refer generally to the manner in which the successful tenderer was superior without also referring to specific respects, examples or facts supporting this general assertion of superiority.

The Court went on at para. 89 to summarise the position to the effect that the authority must give reasons as to the relative advantages of the preferred tenderer on the basis that there is a legal requirement for a bespoke statement of reasons which must be sufficiently precise to enable the applicant to ascertain the matters of fact and law which resulted in the rejection of his offer and the acceptance of another. It is a requirement that the authority must at least mention the matters which should have been included in the applicant's tender and the matters contained in the successful tenders. Therefore, the statement of reasons must be sufficiently detailed to explain how the preferred tender was advantageous by reference to particular matters, respects, examples or facts supporting a general assertion of relative advantage.

At para. 91 Humphreys J indicated that a reasonably intelligent person brought in off the street, handed the scores and the tender criteria, and tasked with manufacturing reasons why the loser was inferior to the winner, could have come up with bland and uninformative but plausible statements along the lines furnished in that case. The Court was satisfied that almost by definition the score of the successful tender was higher it is possible to plausibly assert that the successful tenderer provided more detail, relevant or specific information. Such a bland, anodyne, bureaucratic, uninformative formula provides virtually nothing of value to its recipient, still less to the Court. In para. 92 it was noted that there were no specific respects, facts or matters identified by reference to which sufficient specific detail was lacking.

**12.** In *Sanofi Aventis Ireland Limited v HSE & Anor.* [2018] IEHC 566 McDonald J in dealing with reasons at para. 43 of his judgment identified the very useful and comprehensively summarised principles by Humphreys J in *RPS* aforesaid.

In that matter, as with the RPS matter, there was a finding of failure to provide reasons in respect of a limited number of sub-criteria which resulted in a direction to the authority to provide reasons, in effect, following the decision of Finlay Geoghegan J in *Gaswise Limited v Dublin City Council* [2014] 3 IR 1 where at para. 26 the judge stated: -

“The remedy must also be proportionate and in considering what is proportionate, the court should take account of the position of (the contracting authority) and other participants in the tender process...”

In *Sanofi* the divergence in marks as between *Sanofi* and *Glackso* was not sufficient to make a difference to the award of the contract. The difference identified in respect of the lack of reasons amounted to 5.5 points, however the difference between the competing tenders had a gap of 41 marks. In those events it was considered proportionate to direct further reasons to be furnished as opposed to granting an order of *certiorari*.

**13.** In relation to the various criteria in the 2019 RFT as highlighted above I would address the reasons as follows: -

(a) in respect of quality and suitability of the vessel, in my view, there is nothing which identifies to the applicant why the affected party scored 15 more points than the applicant in that there is no specific respects, examples or facts supporting the general assertion of superiority. Rather, the reason was limited to good detail in relation to the proposed vessel and passenger facilities. Furthermore, as the difference appears to be in relation to passenger facilities, there is nothing to identify why one vessel secured more marks than

the other. The comments in this regard are essentially bland and uninformative.

(b) In respect of customer service and proposals for dealing with customer complaints and consultation; mobility, it appears that part of the reason why the applicant scored 80 out of 100 marks was because proposals in relation to catering for passengers with reduced mobility that are unaccompanied was unclear. In fact, the RFT did not specify the need to address passengers with reduced mobility that are unaccompanied. It does appear that the applicant lost marks for not providing a detail which was not sought, and accordingly this assessment takes into account, as complained of by the applicant, irrelevant considerations.

(c) In respect of risk management, the only detail given about the winning tender was that it was considered to be excellent. This is just such a detail as was deprecated by Humphreys J in *RPS*. Furthermore, in relation to the applicant it was recorded that some areas of risk which are considered quite important were not covered. However, there is no identification of such quite important risks and accordingly is entirely uninformative.

(d) Under the heading of security, the applicant is merely advised that the affected party had an excellent response with a lot of detail in relation to security onshore and at sea, however, the applicant lacked detail as to how security at sea would be handled without identifying to the applicant how or in what respect the winning tender identified security at sea which the applicant failed to identify.

(e) In respect of service mobilisation plan, the affected party's response was excellent with very detailed specific milestones mentioned. As to what

milestones they would be is not clear or identified and the applicant lost marks as the tender was considered to be not specific in relation to some timelines without any example, fact or detail to assist either the applicant or the Court in reviewing the matter.

**14.** I am satisfied having regard to the above that no specific advantages of the winning tender were in fact identified in any one or other of the categories above. In respect of each such category this would be sufficient in itself to make a finding that there were insufficient reasons as to the relative advantages of the winning tender. In addition, in my view, the response in respect of the applicant's vessel is also wanting in respect of adequacy of reasons and further incorporates an adverse outcome for the applicant in respect of passengers with reduced mobility that are unaccompanied which involves the introduction of an irrelevant consideration.

**15.** Given the aforesaid errors as to reasons, identified in the various criteria mentioned, having the potential impact of up to 60 points, with the current differential between the parties standing at 20 points, I am satisfied that this is an appropriate matter in which an order for *certiorari* should be granted.

**16.** As this judgment is being delivered electronically, the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered. In default of such submissions being filed, no order for costs will be made.