

THE HIGH COURT

[2017 No. 285 J.R.]

IN THE MATTER OF COUNCIL DIRECTIVE 2004/18/EC AS AMENDED

AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES CONTRACTS) REGULATIONS 2006 (S.I. 329 OF 2006)

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

AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (S.I. 130 OF 2010) AS AMENDED

BETWEEN

EMOVIS OPERATIONS IRELAND LIMITED

APPLICANT

AND

NATIONAL ROADS AUTHORITY

(OPERATING UNDER THE NAME TRANSPORT INFRASTRUCTURE IRELAND)

RESPONDENT

AND

TURAS

NOTICE PARTY

Ruling of Mr. Justice Robert Haughton delivered this 20th day of June, 2018.

Discovery by the Respondent

1. The categories of discovery sought by the applicant from the respondent by letter dated 3 October, 2017, as modified in subsequent correspondence, the Notice of Motion filed on 12 October, 2017, and at hearing, will be refused and reasons for such refusal will be given at a later date at which time the order refusing same will be made and perfected.

2. In lieu of the discovery sought the following categories of discovery to be made by the Respondent are hereby ordered:

A. All documents created by or issued to the Evaluation Committee evidencing

- the use, in the course of the Evaluation Committee's evaluation of the applicant's tender, of any employee data supplied by the applicant to the respondent in response to or in connection with the request for information "RFI 25";
- the calculation of the figure of 187 FTE referred to in the Notification sent to the applicant;
- the calculation of the figure of 155 FTE referred to in the Notification sent to the applicant.
- the calculation of the figure of 116 FTE referred to in the Notification sent to the applicant.

B. All documents created by or issued to the Evaluation Committee evidencing the Evaluation Committee's evaluation of the applicant's intended resources for printing and postage service under Operations Plan – Criterion B which refer to arrangements under the existing contract.

C. All documents created by or issued to the Evaluation Committee evidencing the Evaluation Committee's evaluation of the applicant's intended financial management processes under Operations Plan – Criterion A which referred to the processes under the existing contract.

D. All documents created by or issued to the Evaluation Committee evidencing the Evaluation Committee's evaluation of the applicant's sufficiency of resources under Operations Plan – Criterion B in relation to multi—point tolling and/or additional toll points.

3. The discovery so ordered shall be sworn within 8 weeks by a person whose name is to be furnished to the Commercial Court Registrar. The respondent shall have liberty to apply on 10 September, 2018 in respect of any extension of the period required to make discovery.

4. The parties shall agree a 'Redaction Protocol' with regard to protection of commercially sensitive information in documents to be discovered. In default of agreement on the terms of the protocol on or before 29 June, 2018 this will be determined by the court and for this purpose only the matter shall be listed in the Commercial List on 2 July, 2018 and may be addressed on the basis of existing documents and the further exchange of correspondence, and without the need for affidavit evidence unless it appears that it is required.

Discovery by the Applicant

5. In relation to the discovery sought by the respondent from the applicant, by reference to the Schedule to the Notice of Motion dated 12 October, 2017, and in lieu thereof, the court makes the following orders for discovery for the reasons given:

Category 1

[Agreed revised category]

- All documents created on or after 15 July 2015 evidencing the information provided by the Applicant to the Respondent about the staffing of the existing operation
- All documents evidencing the Applicant's interpretation of the purpose of RFI0004, RFI0018 and RFI0025.

Category 2

[Agreed revised category]

All documents evidencing and/or recording the discussions and/or content of the dialogue meeting of 21 June 2016, including, without limitation, minutes of that meeting and/or subsequent documents referring to the discussions and/or content of that meeting.

Category 3 – no order, as this category was withdrawn.

Category 4

[Agreed]

All documents evidencing and/or recording the discussions and/or content of the Debrief Meeting, including (without limitation) minutes of the Debrief Meeting and/or subsequent documents referring to the discussions and/or content of the said Debrief Meeting.

Category 5 – this is refused for the following reasons:

Category 5 sought:

"All documents evidencing the number of FTEs tendered by the Applicant for its Operations Plan and/or calculations of the said number and/or the Applicant's understanding of the Respondent's calculation of the said number."

(a) The number of FTEs tendered by the Applicant for its Operations Plan is in the Tender documentation - see Section 4, sub-section 1.5.3.7 and para.67 of the Affidavit of Miguel Ainsa sworn 28 March, 2017. There is no dispute as to what was, or was not, tendered.

(b) As to "calculations of the said number", this is apparent from Section 4 sub-section 1.2.2 of the Applicant's Operations Plan in the Tender which states 146 FTEs reducing to 103 FTEs by 2024 - see also para. 68 of the said Affidavit of Miguel Ainsa.

(c) Further the Applicant does not dispute that the Operations Business Model contains a higher figure of 146 (as averred to in para. 298 of the Affidavit of Cathal Masterson sworn 29 May, 2017). The difference between the figures 146 and 143 was explained by the Applicant through a clarification response (it is down to an indexation factor) – see para. 42 of the second Affidavit of Michael Ainsa sworn 18 July, 2017. There is no dispute of fact that warrants discovery.

(d) As to the calculation of the figure of "approximately" 155 FTEs reducing to "approximately" 116 FTEs, these are the Respondent's own calculations referred to in the Notification and the Applicants only know what they were informed or told at the Debrief, documents from which come within Category 4. This is not therefore a matter for discovery by the Applicant.

(e) Further the Applicant's subjective "understanding" of the Respondent's calculation of the foregoing numbers is not relevant to any issue. Nor in the court's view is such discovery necessary to determine any issue in the proceedings.

Category 6 - this category is refused for the following reasons:

Category 6 requests:

"All documents evidencing the Applicant's understanding of the Evaluation Criteria, Table 3 and the Scoring Comments."

(a) The Applicant's "understanding" of Evaluation Criteria, Table 3 and Scoring Comments is suggested to be relevant to eligibility to challenge the decision, or the issue of harm.

(b) As to eligibility, such subjective understanding is not relevant to the core issue of how a RWIND tenderer would have understood the criteria. Were it otherwise even in a case where a decision-maker failed to follow its stipulated criteria or methodology every challenger could be forced to make discovery of its "subjective understanding" in order to show eligibility to challenge. This cannot have been the intention of the Public Contracts Regulations, the Public Contracts Directive and the Remedies Regulations which are concerned with the *lawfulness* of decisions. Equally I fail to see how discovery of the Applicant's subjective understanding of the Scoring Comments is relevant to the issues that the court will have to determine.

(c) The Respondent argues that this category is relevant to Ground XIII.1(3), where it is pleaded "...had the

Applicant been aware that these undisclosed criteria/sub-criteria, or any of them, would be applied to its tender, it could and would have adapted its tender accordingly." However this was not a reason given for discovery under this category.

(d) As to harm, it is possibly relevant to a damages claim, but without determining whether it could or could not be relevant to damages or remedy, I will refuse discovery at this time.

Category 7

This sought - "All documents which refer to and/or evidence the loss and/or damage which the Applicant has allegedly suffered as a result of the alleged infringements and/or which refer to and/or evidence efforts made by the Applicant to mitigate the alleged loss and/or damage."

The Respondent did not pursue this category at this time.

6. The discovery so ordered shall be sworn within 8 weeks by a person whose name shall be furnished to the Commercial Court Registrar. The applicant shall have liberty to apply to the court on 10 September, 2018 in respect of any extension to the time required to make such discovery.