Neutral Citation Number: [2015] EWHC 2172 (TCC)

Case No: HT-2015-000058

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2015

Before:

MR JUSTICE COULSON

- -

Between:

WOODS BUILDING SERVICES	**Claimant**
- and -	
MILTON KEYNES COUNCIL	**Defendant**

- -
- -

Mr Joseph Barrett (instructed by **Salvus Law Ltd**) for the **Claimant**
Ms Ligia Osepciu (instructed by **Freeths LLP**) for the **Defendant**

Hearing Date: 14 July 2015

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE COULSON

[No 2: Remedy]

Mr Justice Coulson:

1. On 14 July 2015, I handed down my substantive Judgment in this case ([2015] EWHC 2011 (TCC)). For the reasons set out there, I concluded that the Council's tender evaluation process was fundamentally flawed. My adjustments significantly reduced the score awarded to the successful bidder, EAS, and marginally increased the score awarded to Woods. In consequence, the parties agreed that it was Woods who, based on that process, provided the best tender.

2. Following the handing down of the Judgment, there was a debate about the appropriate remedy that should be granted to Woods. The parties were agreed that I should set aside the Council's original decision, and that the Council's records should be amended by reference to my adjusted scores. I also considered that, in all the circumstances, and given the extent of the continuing disagreements between the parties, I should formally declare that the Woods tender was the most economically advantageous tender provided to the Council. But that still left two live issues.

3. First, Woods said that I should order the Council to award the contract to them. Secondly, Woods said that, in the alternative, they were entitled to an order for damages, to be assessed if they could not be agreed. The Council disputed both applications. I gave brief reasons at the hearing for rejecting Woods' submissions on the first issue, and accepting their case on the second. But I said that I would provide written reasons for my decision, particularly because of the importance which I know is accorded to the first issue by those who specialise in public procurement law.

4. In support of his argument that I should order the Council to award the contract to Woods, Mr Barrett relied on three cases: ***Marshall v Southampton and South West Hampshire Health Authority*** [1993] 3 WLR 1054 (a decision of the European Court of Justice); ***Berkeley v Secretary of State for the Environment & Anr*** [2000] 3 WLR 420; and ***Google Inc v Judith Vidal-Hall and Others*** [2015] EWCA Civ 311. Those were all cases in which, in one way or another, the court emphasised the importance of providing a remedy which ensured substantial compliance with the relevant Directive or Regulation. None of them were procurement cases. None of them were authority for the proposition that, if the court found that the evaluation process was flawed, such that the claimant would otherwise have won the competition, the court could or should order the defendant authority to enter into a contract with the claimant.

5. Mr Barrett fairly accepted that he was unaware of any authority in which the court had done what he was asking me to do. My further research has turned up two procurement cases in which the point was considered. But they were both cases involving Framework Agreements, so that the most that would have happened would have been the addition of the successful claimant to the list of other contractors who had already bid successfully and might, in the future, receive work pursuant to the Framework. They were not cases were there was a single contract with a single contractor. Moreover, in the first (***Lettings International Ltd v London Borough of Newham*** [2008] EWHC 1583 (QB)), Silber J said that the possible addition of the claimant was simply "a suggestion" and he stressed that he had not heard argument on the point; whilst in the second (***McLaughlin & Harvey Ltd v Department of Finance and Personnel (No 3)*** [2008] NIQB 122), the judge raised the point but instead decided to set aside the Framework Agreement altogether.

6. For the five reasons set out below, I have concluded that it would be inappropriate to order that the Council must enter into a contract with Woods.

7. First, such an order formed no part of Woods' pleaded case. It would be wrong to grant Woods a remedy which they had not formally claimed.

8. Second, Regulation 47I of the Public Contracts Regulations 2006, which sets out the remedies available to the successful claimant where the underlying contract has not been entered into, provides three possible options, including the setting aside of the decision and amending the record, both of which I have ordered. The Regulation does not identify as a remedy the ordering of the contracting authority to enter into a contract with the successful claimant.

9. Of course, Regulation 47I makes plain that it "does not prejudice any other powers of the Court". Thus, in principle, it might be open to the Court to order a mandatory injunction requiring the Council to enter into a contract with Woods. But it is trite law that a mandatory injunction, which would here require the Council to enter into a contract which would last for many years, will only rarely be granted. This is for the four reasons set out by Lord Hoffmann in ***Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*** [1998] AC 1: the need for constant supervision, the expense of enforcement, the need for precision and the unjust enrichment of the claimant. The first three of those difficulties would plainly apply here.

10. There are related considerations. A mandatory injunction will never be granted to require an employee to carry out work under his contract of employment (see ***Warren v Mendy*** [1989] 3 All ER 103); or to require an employer to employ someone in whom he no longer placed his trust and confidence (see ***Page One Records Ltd v Britton*** [1968] 1 WLR 157). It will not usually be granted to restrain an employer from terminating an employee's contract (see ***Chappell v Times Newspapers*** [1975] 1 WLR 482). Each of these propositions could be said to be at least potentially relevant to the situation in which these parties currently find themselves.

11. Thus, by reference to the authorities dealing with mandatory injunctions, I conclude that requiring A to contract with B, in respect of a contract which might last for years, would be an exceptional order for the court to make. That is therefore the third reason why I decline to make the order sought by Woods in this case. Whilst I do not suggest that a mandatory injunction of the type which they seek would *never* be granted in a procurement case, I am satisfied that it would only be granted in exceptional circumstances, and there are no such circumstances here. There is therefore no basis for the mandatory injunction now sought by Woods.

12. Fourthly, a consideration of the balance of convenience also leads me to the conclusion that such an order would be inappropriate. I have found that, because of the mistakes made by the Council, the tender evaluation process was flawed. It must follow, therefore, that any success that Woods might now have achieved has to be tempered by the knowledge that the entire process was unsatisfactory. It would, I think, be inappropriate to award Woods a contract arising out of a process which I have found to be flawed.

13. Fifthly and finally, I consider that damages are an adequate remedy in this case. Mr Barrett did not suggest to the contrary: indeed, it was his alternative submission that I

could and should order damages to be assessed. Sometimes in procurement cases it is difficult to say that damages are an adequate remedy, particularly at the outset (at the suspension/interlocutory injunction stage). But on the facts of the present case, having heard the issues through to Judgment, I am in no doubt that Woods could, if they needed to, identify both their wasted costs and their loss of profit arising from the flawed procurement. Because damages are an adequate remedy, that is another reason why it would be wrong in principle to grant an injunction.

14. Accordingly, for these five reasons, I decline to make an order requiring the Council to award the contract to Woods.

15. I turn to consider the alternative claim for damages to be assessed. The Council maintained that I should not make such an order, and submitted that the appropriate analogy was with a tender process which the contracting authority had terminated. Ms Osepciu argued that contracting authorities enjoyed a broad discretion to abandon or terminate procurements without making any financial award: see case C-27/98 ***Metalmeccanica Fracasso*** ECLI:EU:C:1999.420 at paragraph 23.

16. I do not accept that this situation is at all analogous to a voluntary termination of the procurement by the Council. On the contrary, the Council maintained throughout the trial that its tender evaluation process was in accordance with the Public Contracts Regulations. I have found that, for numerous reasons, they were in breach of the Regulations. Woods were right to challenge the procurement and, all other things being equal, they would have been awarded the contract. In those circumstances, it would be absurd if, having lost so badly, the Council could then avoid the natural consequence of those breaches, namely an award of damages in favour of Woods.

17. Mr Barrett said that I should stipulate that the damages would be in respect of Woods' loss of profit. I cannot do that: there has been no formulation of the damages claim, and there is currently no evidence on which the damages claim could be assessed. There may or may not be a loss of profit. There may be wasted costs as well. Moreover, as I pointed out to counsel, the assessment of damages will have to await the re-run of the procurement exercise, because it is perfectly possible that this could affect the quantum of any claim made by Woods for loss of profit.

18. Accordingly, I order that Woods are entitled to damages as a result of my substantive Judgment, with the quantum of those damages to be assessed at an appropriate time.