Neutral Citation Number: [2021] EWHC 1764 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Case No: HT-2021-000127

7 Rolls Building
Fetter Lane
London
EC4A 1NL

1.30pm – 2.30pm
Friday, 28th May 2021

Before:

THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

B E T W E E N:

BIFFA WASTE SERVICES LIMITED

and

LEICESTERSHIRE COUNTY COUNCIL

MR J COPPEL QC (instructed by CMS CAMERON MCKENNA NABARRO OLSWANG LLP) appeared on behalf of the Claimant
MR J BARRETT (instructed by BEVAN BRITTAN LLP) appeared on behalf of the Defendant

JUDGMENT
(APPROVED)

MRS JUSTICE JOANNA SMITH DBE:

1. This is an application made on 11 May 2021 by the Claimant, Biffa Waste Services Limited, for summary judgment against the Defendant, Leicestershire County Council, in relation to certain identified paragraphs of its Particulars of Claim.
2. The background to the application is as follows.
3. By a claim issued on 8 April, the Claimant alleges breach by the Defendant of, amongst other things, the Public Contracts Regulations 2015 (the "**PCR**"), in its conduct of a tender process for the award of a contract for services (the "**Contract**") consisting of the treatment of residual waste arising within Leicestershire and, potentially, within other local authority areas in the Midland region. The Contract would begin between April 2021 and April 2023, and would continue until at least 2031. It had a value of between £150 million and £465 million.
4. The Defendant is a Contracting Authority under the PCR and the Claimant is an Economic Operator. The procurement process was subject to the competitive dialogue procedure, which comprised various stages, including, in the latter part of the process, an Invitation to Submit Detailed Solutions stage ("**ISDS**"), a formal dialogue phase, and then an Invitation to Submit Final Tender stage ("**ISFT**").
5. The rules of the competition were set out in the Defendant's Descriptive Document which, amongst other things, stated that the procurement would "follow a clear, structured and transparent process to ensure that all Tenderers are treated fairly".
6. In brief summary only, by the ISDS stage of the procurement, the rules provided that bidders could each propose two solutions. Between three and six solutions would then be taken forward to the next stage and this would involve a maximum of three bidders. The solutions that went forward would be those that scored the highest in the evaluation, which was broadly concerned with price and quality criteria. At the dialogue stage, bidders were invited to enter into dialogue on their solutions to identify how each solution would best meet the needs of the Defendant. At the ISFT stage, bidders would be required to submit one solution to be based on discussions during the dialogue stage. The preferred bidder was then to be determined on the basis of the tender that was most economically advantageous, having regard to the best price/quality ratio in accordance with the evaluation criteria.
7. The Descriptive Document provided for the possibility that in the event of one or more bidders withdrawing from the process after the ISDS stage, the Defendant could approach the bidder with the next highest scoring, and reintroduce them into the process, always assuming that their solution had met the Defendant's minimum requirements. The Descriptive Document did not provide that the bidders would be notified or informed in the event of a withdrawal or readmission.
8. The Claimant passed through the early stages of the procurement process and was informed in a letter of 12 October 2020 that it had passed the ISDS stage, and that its two solutions were ranked third and fourth, behind the two solutions proposed by Bidder 2.
9. Pausing there, I note that the process involved each of the bidders being anonymised, or pseudonymised, as the Claimant puts it, so that they were referred to simply as Bidders 1, 2, 3 and so on. The Claimant was Bidder 5.
10. It is the Claimant's case that following receipt of 12 October 2020 letter, which contained a breakdown of the price rankings and quality score of the various bidders, it inferred from market intelligence that Bidder 2, i.e., at this stage the first ranking bidder, was Veolia ES UK Limited ("**Veolia**"). It also inferred that Bidder 3, which had been identified in the letter as unsuccessful and thus not going forward to the dialogue stage, was Viridor Waste

Management Limited ("**Viridor**").

11. The Claimant progressed through the dialogue stage and alleges that the Defendant made various representations to it during that stage, on which it relied, as to the need to focus on the price aspects of its bid.
12. The Claimant's case, as set out in paragraph 30 of its Particulars of Claim, is that the information provided in the 12 October letter, together with the representations made during the dialogue phase, materially influenced it in the preparation of its ISFT solution, such that it reduced its price by over £6 per tonne, but chose not to pursue certain options in relation to the quality aspects of the bid.
13. The Claimant submitted its ISFT bid on 18 December 2020. On 11 March 2021 the Defendant wrote to the Claimant informing it that it had been unsuccessful in the procurement process, and that it had lost to Viridor. The margin of difference was very small, being only 1.18% (the Claimant had achieved 90.75% and Viridor had achieved 91.93%). The Claimant had achieved the highest price score, but Viridor had achieved a higher quality score.
14. The Claimant was surprised by this information as it had inferred from the letter of 12 October 2020 that Viridor was no longer in the running. However, it now transpires that two bidders had, in fact, withdrawn from the procurement shortly after the 12 October letter, including Veolia, and that the Defendant had therefore readmitted Viridor to the process in accordance with the tender documents.
15. Against this background, the Claimant alleges that the Defendant breached the PCR, its obligations in EU law, and its public law duties under UK law, in that it failed to act consistently with the principles of transparency and equal treatment.
16. The application seeks summary judgment in respect of the breaches set forth in paragraphs 45 to 48 of the Particulars of Claim. However, at the close of his oral submissions, Mr Coppel QC, acting on behalf of the Claimant, refined the extent of the application to include only paragraphs 45(1), (2) and (4) and paragraph 46(1). Thus the application is no longer advanced in respect of paragraphs 45(3), 46(2) to (4) and paragraphs 47 to 48. I observed that it is a shame that this was not made clear in Mr Coppel's skeleton argument.
17. In summary, the paragraphs that continue to be the subject of the application assert that in breach of its obligations:
    a. the Defendant made representations and provided information in the 12 October letter, from which the Claimant inferred correctly, that Bidder 2 was Veolia and that it was the Claimant's nearest competitor and leading bidder following the ISDS stage, but that at no stage did the Defendant inform the Claimant that Bidder 2 had withdrawn, that Bidder 3 (i.e. Viridor) had been readmitted and hence that the Claimant would be competing against Viridor at the ISFT stage (paragraph 45(1)(2) and (4)); and
    b. that it is to be inferred that the Defendant informed Viridor that Bidder 2 had withdrawn from the procurement (and/or that one of the other Bidders had withdrawn) (paragraph 46(1)).
18. Pausing there, I note that many of the issues raised by these allegations appear primarily to be issues of fact which one would conventionally expect would need to be dealt with at trial. I note, in particular, the extent to which the pleading at paragraph 45 ties together the representations allegedly made in the 12 October letter (paragraphs 45(1) and (2)) with the representations allegedly made by the Defendant during the dialogue stage (paragraph 45(3)), and I shall come back to this later in this judgment.
19. Returning to the Particulars of Claim, the application also seeks summary judgment in respect of paragraphs 57 and 58, which in summary:

a. assert that by reason of the breaches pleaded, the Claimant has suffered, or risks suffering, loss and damage, and the Claimant has been, and/or risks being, deprived of the Contract (paragraph 57); and
b. seek relief in the form of an order that the Defendant's decision should be set aside, that the Contract should be awarded to the Claimant and that the Court should declare that the procurement and/or the decision was unlawful and that the Defendant was in breach of its legal obligations (paragraph 58).

20. In response to questioning from me during the course of the hearing, it transpired that the Claimant in fact seeks a form of relief which is not presently pleaded in paragraph 58, namely that the Defendant's decision should be re-wound. Mr Coppel explained this by reference to the fact that the pleading had been overtaken by events, namely the Defendant's decision to re-evaluate the procurement process. However, it is to my mind surprising that relief sought on a summary judgment application is entirely missing from the pleaded case and all the more surprising that it was not even mentioned in the Claimant's skeleton argument for the application.

21. As at the date of the application, the Defendant had not filed a defence. However, this morning a Defence has been provided in a supplementary bundle, which I am told is in the final form and will be served today (even assuming that this has not already occurred as at the time I am giving judgment).

The Evidence

22. The application is supported by the witness statement of Mr Hilliard, a waste management consultant, engaged by the Claimant. In response, the Defendant relies on the witness statement of Dr Braker, a Senior Contracts Manager employed by the Defendant.

The Approach to an Application for Summary Judgment

23. The test on an application for summary judgment under CPR 24 is set out in CPR 24.2. Essentially, I may order summary judgment if I consider that the Defendant has no real prospect of successfully defending those parts of the claim to which the application relates, and that there is no other compelling reason why the case, or issue, should be disposed of at trial. The principles are well known and not in dispute. They are conveniently summarised in *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339 Chancery, at paragraph 15 by Lewison:

> "As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91 ;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly

if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725".

The Competing Arguments

24. The Claimant points me to the obligations of transparency and equal treatment. In paragraph 12 of its skeleton argument, it relies on Regulation 18 of the PCR:

> "18. **Principles of Procurement**
>
> (1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate

manner.

(2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.

(3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators".

25. The Claimant points to the fact that the principles in Regulation 18 are:

> "Fundamental principles which underpin the whole of the law governing procurement, material failures by an authority in a procurement competition to comply with these obligations will lead to the competition in question being unlawful".

(See *Energy Solutions EU Limited v Nuclear Decommissioning Authority* [2016] BLR 625 at [243] ("**Energy Solutions**"), per Fraser J).

26. The obligation imposed by the duty of transparency is, says the Claimant, an entirely straightforward one. It is an obligation "to act in a transparent way": *Lion Apparel Systems Limited v Firebuy Limited* [2007] EWHC 2179 Chancery at [27]. This, says the Claimant, is a hard-edged, objective obligation. There is no room for the application of discretion by the contracting authority, or for excuses presented by reference to an authority's subjective understanding at the time. The obligation, says the claimant, requires, *inter alia*, that:

> "The contracting body must comply at each stage of a tendering procedure, not only with the principle of equal treatment of tenderers, but also with the principle of transparency. Therefore a company which is closely involved in the tendering procedure and which has even been judged to be the successful tenderer, must receive, without any delay, precise information concerning the conduct of the entire procedure".

(See *Embassy Limousines and Services v European Parliament* [1999] 1CMLR 667).

27. During oral submissions Mr Coppel also took me to paragraphs 181 to 184 of *Energy Solutions*. These paragraphs deal with an issue of consistency and I shall return to them in due course.

28. As to the obligation of equal treatment, the Claimant directs my attention to the case of *Woods No 1* [2015] EWHC 2001 (TCC) at [9]-[10]:

> "9. The duty of equal treatment requires that the contracting authority must treat both parties in the same way. Thus "comparable situations must not be treated differently" and "different situations must not be treated in the same way unless such treatment is objectively justified": see *Fabricon v Belgium* [2005] ECR1-01559 at paragraph 27. Thus the contracting authority must adopt the same approach to similar bids unless there is an objective justification for a difference in approach.
>
> 10. Morgan J's observation in Lion Apparel, noted above, is equally applicable to the duty of equality: again, when considering whether there has been compliance, there is no scope for any 'margin of appreciation' on the part of the contracting authority".

29. On the question of what Mr Coppel described as 'standing and relief', which I shall refer to

in this judgment as causation, the Claimant draws my attention to Regulation 91(1) of the PCR:

> "91. **Enforcement of duties through the Court**
>
> (1) A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage…".

30. In a nutshell, the Claimant says that the breach of transparency duties in this case is clear. The Defendant provided the bidders with detailed information as to competitors' bids at the ISDS evaluation, thereby enabling them to identify their competitors. The Claimant says it is obvious that a reasonable, well-informed and normally diligent bidder (an "**RWIND**"), would take this information into account in formulating its bid, and that the Claimant did so. Mr Hilliard's evidence supports this proposition. The Claimant says that in failing to update that information upon the withdrawal of some of the bidders and the readmission of Viridor, there was a failure to act transparently, which was unlawful.
31. Insofar as the allegation of breach of the principle of equal treatment is concerned, the Claimant now accepts, for the purposes of this application only, Dr Braker's evidence that the only information provided to Viridor was that the Council wished to readmit it to the procurement process; but it says that, nonetheless, Viridor had access to information that the Claimant did not, namely the information that one of the three successful bidders who had been taken forward to the dialogue stage was no longer in the running and must have withdrawn, and that that is why Viridor had been invited to take part again in the procurement process.
32. The Claimant's skeleton then asserts that in light of the approach that the Claimant took to evaluating the bids of its competitors, it is reasonable to assume that Viridor took a similar approach. Thus, says the Claimant, there was significant unequal information.
33. As to causation, the Claimant points to Mr Hilliard's evidence as to the steps that the Claimant would have taken, had it not been misled by inaccurate and obsolete information. The Claimant says in paragraph 22 of its skeleton argument, that it gets over the low bar of establishing causation set by Regulation 91(1), and identified in the case of *Mears v Leeds City Council* [2011] EWHC 1031 (TCC) per Ramsey J at [206]:

> "…the correct test, in the context of this case where I am not considering the detail of the loss, is whether there is a real or significant, as opposed to a fanciful chance that [loss would have eventuated]".

34. Mr Barrett, on behalf of the Defendant, responds to these points robustly saying, essentially, that this case is not suitable for summary judgment, that the general principle of transparency does not impose any obligation of the sort identified by the Claimant, that the Claimant knew at all times that there was scope for bidders to withdraw but never requested information from the Defendant as to any such developments, and that there is, in any event, a dispute in respect of the factual premise for the claim.
35. The Defendant submits that there is evidence that the Claimant did, in fact, try to improve its quality submissions. It denies the alleged representations made by it at the dialogue stage (as pleaded in paragraph 45(3) of the Particulars of Claim), and it casts doubt on the Claimant's case that it developed its ISFT on the basis of guesswork as to the identity of other bidders, or indeed that this is the course of action that a reasonable, well informed and normally diligent bidder would take.
36. The Defendant also points out that it is surprising that the Claimant argues that it would have tried harder to improve its technical proposals if it had been in a position to guess that it was competing against a lower rather than a higher ISDS bidder. This is now a point that

I note is also identified in the Defence at paragraph 43(a)(iv).

Decision

37. In my judgement, the Claimant is not entitled to summary judgment on the paragraphs in its Particulars of Claim in respect of which it now pursues this application for the following reasons.

38. Taking an overarching point at the outset, the issues raised by those paragraphs plainly raise questions of fact which I cannot possibly determine on a summary judgment application. To determine those issues the Court would have to make findings of fact, amongst other things, as to:

    1. how and why the Claimant developed the ISFT bid that it in fact submitted;
    2. what, if any, difference it would have been likely to make to the Claimant's approach if the Claimant had been informed that one anonymised bidder had withdrawn and another had been readmitted (i.e. what the counterfactual would have been; a notoriously difficult question which is, in my judgement, rarely suitable for summary judgment);
    3. whether the Defendant made the representations that it is alleged to have made to the Claimant during the dialogue stage, encouraging it not to improve its quality submissions;
    4. whether the Claimant did in fact seek to improve its quality submissions at the ISFT stage;
    5. the information that was in fact provided to Viridor; and
    6. the extent to which the representations made during the dialogue stage and/or in the letter of 12 October 2020 impacted upon any change of position that would otherwise have taken place in the counterfactual.

39. I agree with Mr Barrett that these are not matters on which I can make determinations on an application of this sort and I, again, note the extent to which, in the pleaded allegations, the information gleaned from the 12 October 2020 letter is inextricably linked with the representations made by the Defendant.

40. The Claimant described Dr Braker's evidence about the dialogue stage as "tactical" and designed to paint the issue as a matter of fact for trial. But to my mind Dr Braker is right about this - it is a matter of fact for trial. Indeed this has been tacitly acknowledged (albeit belatedly) by the Claimant's decision to abandon its application in respect of paragraph 45(3) of the Particulars of Claim. Paragraph 45 of the Particulars of Claim pleads details of the representations that it is alleged were made by the Defendant, which allegations are expressly refuted by Dr Braker. They are now also refuted in the Defence in paragraphs 26(b) and 26(d). I note also paragraph 41 of the Defence which expressly responds to paragraph 45 of the Particulars of Claim.

41. The Claimant is right that I cannot decide the issue as to the representations made at the dialogue stage of the procurement on a summary judgment application, but it fails to take account of the fact that its own case ties these representations very closely in to the representations that are alleged to have been made in the 12 October 2020 letter for the purposes of causation. Indeed, I note the extent to which Mr Hilliard in his evidence links the 12 October 2020 letter with the representations in paragraph 50 of his witness statement as follows:

> "We understood from the information provided by the Council in the 12 October letter, **and during the dialogue sessions** that the priority for us should be to reduce the price of our bid" (**emphasis added**).

42. Given the way the case is pleaded, I do not see how I can separate out the effect of the 12 October 2020 letter from the effect of the alleged representations made by the Defendant at the dialogue stage, for the purposes of considering causation on a summary judgment application.

43. Returning then to specific issues of breach, causation and loss, I am not convinced that the question of breach of the transparency principle is as straightforward as the Claimant suggests. The Defendant points out that the legal proposition on which the Claimant relies is unsupported by authority and is misplaced. Certainly, the PCR does not contain any provision imposing the legal duty for which the Claimant contends. Indeed, Regulation 30(10) provides:

> "In accordance with regulation 21, contracting authorities shall not reveal to the other participants' solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without its agreement".

44. I agree with the Defendant that, on its face, this appears apt to cover a bidder's decision to withdraw from, or re-join, an ongoing procurement. The Descriptive Document did not provide that information of this sort should be communicated to bidders. I agree that I should be very cautious, particularly on a summary judgment application, of making new law which seeks to impose an enforceable legal obligation on contracting authorities to inform bidders each time one or other anonymised rival bidder withdraws or is readmitted to a procurement process. This is all the more so where I was told by the Claimant that I required only one-hour pre-reading for this hearing, and yet was presented with an authorities bundle containing 29 authorities, together with a further supplemental authorities bundle presented on the morning of the hearing.

45. I note in this regard, paragraphs 38 and 39 of the Defence, which also identify the difficulties in relation to the scope of obligations of transparency:

> "38. Save that it is admitted that the Procurement was subject to the PCR 2015 and that the Council was subject to the obligations which those regulations impose, and only those obligations, paragraph 42 appears to be a vague, incomplete and in some respects an inaccurate summary of the content of certain provisions in the PCR 2015, provisions of EU law and/or domestic public law which are only enforceable in judicial review proceedings. At trial, the Council will refer to the PCR 2015 and the relevant case law for their true meaning and effect. It is averred that the only obligations Biffa is entitled to refer to and seek to enforce in these proceedings are those imposed by the PCR 2015.
>
> 39. As to paragraph 43, the preceding paragraph is repeated. It is specifically noted that Biffa, correctly, does not allege that the PCR 2015 impose any obligation to notify bidders if another bidder in a competitive dialogue procedure, in particular a bidder whose identity has been anonymised, withdraws or is re-admitted from the competition. It is averred that the PCR 2015 do not impose any such legal duty".

46. I am, of course, not saying that the Claimant cannot win on this point at trial, but simply that it is difficult to see how I can properly or safely deal with it on a summary judgment application of this sort.

47. As I have already said, the Claimant relies on *Energy Solutions* in support of its case on breach of the transparency principle, but that case is concerned with a change in the award

criteria, and the particular passage on which Mr Coppel relied at [183] appears to be a concession made by counsel. The only other case on which the Claimant relies is the *Embassy Limousines* case to which I have also already referred, but again, the facts of that case appear to me to be a long way from the facts with which I am concerned here, and I am not satisfied that it is appropriate for me to take the course suggested by the Claimant of finding breach of transparency obligations on a summary judgment application.

48. As to whether there has been a breach of the duty of transparency on the facts of the case, I note, in particular, a number of points made by the Defendant in its skeleton argument:

1. that the Claimant did not challenge the fact that the bidders in the procurement process were to be anonymised and that the Claimant would now potentially be out of time to do so, a point that was not contested by Mr Coppel, and was reiterated by Mr Barrett during his submissions this morning.
2. that the approach of anonymising names made clear that the Defendant did not wish or intend the bidders to have information about each other or to engage in speculation about the identity of other bidders.

49. Thus the Defence pleads at paragraph 23 that:

> "…
>
> (1), it was neither appropriate or reasonable in the circumstances, for Biffa to engage in speculation or guesswork of this sort; and
>
> (2) the Council neither intended, nor expected, that a bidder would engage in such speculation or guesswork and/or seek to rely on such speculation or guesswork when formulating its ISFT bid".

50. The Claimant says that this is unreal, but in my judgement the question of whether (i) the Claimant did in fact engage in such guesswork as to the identity of the bidders; (ii) the conclusions it arrived at; and (iii) the extent to which it then tailored its bid to tie in with those conclusions, are all matters that should be determined on the evidence at trial.

51. Very belatedly, on the day before this hearing, the Claimant has produced a small selection of documents which it says supports its case as to the approach it took. This may very well be so, but it seems to me that this is a question that lies at the heart of this case, and must be investigated at trial following proper disclosure and witness evidence. I am not prepared to decide it on the basis of very late disclosure of a handful of documents. I note in this regard that the Defence puts the Claimant's approach and understanding when formulating its ISFT bid directly in issue at paragraph 27(b), which pleads that:

> "(i) It is denied that Biffa reasonably understood, whether from statements by the Council or otherwise, that Bidder 2 was Veolia, or that Veolia was its nearest competitor. Bidder 2 was anonymised and, in the circumstances, it was neither reasonable nor appropriate for Biffa to engage in speculation or guesswork of this sort, or to rely on such speculation or guesswork. Further, the Claimant knew, or should have known, at all relevant times that Bidder 2 may withdraw".

52. Insofar as the Claimant submits that it is obvious that a RWIND bidder would have taken the same approach as it took to the procurement process, I reject the suggestion that such question (if relevant to this summary judgment application) needs no further factual consideration. Mr Coppel took me to *Healthcare at Home Limited v Common Services Agency* [2014] UKSC 49, in support of the proposition that compliance with the

transparency principle is to be tested by understanding what the RWIND bidder would have done in interpreting the tender documentation; but I note that while the Supreme Court in that case made clear that the judge must apply an objective legal standard, nevertheless, it also made it clear that there may be a need to hear evidence as to the context in which the relevant tender documents had to be construed. Mr Barrett says, and I agree, that context is likely to be an issue that will arise in this case where the Court will be required to consider (for example) the context of the anonymisation of the bids.

53. Next in its skeleton, the Defendant submits (and now pleads at paragraph 26(g)(iv) of the Defence) that the Claimant never took any steps to request further clarification or information in relation to the withdrawal of bidders. A relevant feature, it says, in considering a claim of breach of transparency. It submits that the Claimant knew, or ought to have known, of the possibility that bidders might withdraw and be readmitted. I accept, for present purposes, that there is some support for this in *E Vigilo Limited* ECLI EUC [2015] 166, at [56], albeit that I consider that this is another issue on which I would want to hear more argument in the context of a trial, rather than in the necessarily time-constrained conditions of a summary judgment application.

54. Finally I also note paragraph 3 of the Defence, which pleads that insofar as the Particulars of Claim advance pleas of alleged breach of duty relating to Veolia's withdrawal from the procurement process and/or Viridor's readmittance to that process, the Defendant relies on the content of the Claimant's letter of 18 March 2020 and the witness statement of Mr Hilliard on behalf of the Claimant, and avers, based upon the limited information currently available, that the Claimant had actual or constructive notice of the relevant facts and matters more than 30 days before the claim form in these proceedings was issued, such that the claims are subject to a statutory time bar pursuant to Regulation 92 PCR 2015. That is plainly a defence in respect of which factual evidence will be required.

55. As for breach of the principle of equal treatment, I fail to see how the Claimant's case gets off the ground for the purposes of summary judgment in circumstances where it accepts Dr Braker's evidence for the purposes of this hearing, that Viridor was told only that it would be readmitted to the procurement process. It is not appropriate for me to speculate, at this stage, as to what Viridor may or may not have thought about its competitors, and I am not prepared to give summary judgment on the back of such speculation.

56. During his submissions this morning, I understood Mr Coppel to concede that if the Defendant could establish that a reasonable bidder in Viridor's shoes would ignore the information provided to Viridor, then his case could not get off the ground in any event, and this, of course, goes back to the question I have already identified as to the reasonable bidder and the need for factual context.

57. I also note and agree with the plea in the Defence at paragraph 42(1), that the inference the Court is invited to make in paragraph 46 of the Particulars of Claim is presently vague and lacking in particulars.

58. As to causation, I do not consider that the Claimant is in a position to satisfy me that there is no real prospect of the Defendant succeeding at trial in respect of the question of whether the alleged breach of duty caused the Claimant to suffer loss or damage, see *Neology UK Limited v Council of the City of Newcastle-upon-Tyne and others* [2020] EWHC 2958 (TCC) at [72] per Kerr J.

59. I note Mr Barrett's submission that this is a claim in statutory tort, and that causation needs to be established. I agree with Mr Barrett that the Claimant's focus in its submissions on "standing" rather had the effect of masking this requirement. In this regard, I return to the factual issues I have already identified and I note paragraph 49 of the Defence, which denies that any alleged breach of legal duty caused loss. There has, as yet, been no disclosure in

this case and the issues I have identified will need to be determined by reference to disclosure and cross-examination of witnesses at trial.

60. The issues raised by Mr Coppel in his oral submissions this morning as providing me with a clear path to summary judgment, namely (i) the very small margin between the final scores of 1.18% and (ii) the fact that the Claimant was entitled to take account of the identities of the other bidders insofar as it could divine them and exploit the information this provided, seemed to me only to beg the factual questions I have already identified.

61. Next, I agree with the Defendant that I would need to be very careful in giving summary judgment where the bid which it is said the Claimant would have compared itself against had it had full information, was, in fact, weaker than the bid it did in fact compare itself against at the time. This seems to me to make causation rather difficult for the Claimant, although again, I cannot say whether the Claimant will ultimately be able to establish its case on the evidence at trial.

62. Next, I consider that the failure to plead the relief that is sought on summary judgment is itself unhelpful and does not incline me to grant summary judgment on the terms sought.

63. Finally, I note that the Defendant is now engaged in a re-evaluation exercise, which might result in the Claimant being awarded the Contract in any event. If this happens, the Claimant will not have suffered any loss and damage as a result of the alleged breaches, beyond perhaps its costs of this litigation, which can be dealt with by way of an appropriate a costs order. I note paragraph two of the Defence:

> "2. By a decision communicated to the bidders in correspondence dated 19 May 2020, the Council decided that the Procurement should be rewound to the stage at which ISFT tender responses were received and that the Procurement should be re-run from that point onwards, with the ISFT tender responses being considered, evaluated and scored by a new evaluation panel. The relevant correspondence is appended to this Defence at Annexe 1. The contract award decision and scoring decisions made in the course of the previous, now overtaken, ISFT evaluation ("the first ISFT evaluation") have been withdrawn, are not relied on by the Council, and are of no legal effect. Accordingly, it is averred that the decisions and matters relating to the now overtaken first ISFT evaluation that are subject to challenge in the PoC no longer have any legal status or effect and/or have been overtaken by events. The alleged breaches of duty are academic and not actionable as the challenged decision(s) was withdrawn and Biffa has not suffered and/or does not risk suffering, loss or damage as a result of those decisions. In the premises, the Council therefore does not plead further in respect of these matters. Further or alternatively, insofar as they concern the first ISFT evaluation the proceedings are academic and/or Biffa is not entitled to the relief claimed, or any relief. In the premises, the proceedings should be discontinued insofar as they relate to the first ISFT evaluation".

64. In the circumstances set out in this paragraph, it does seem to me that, aside from all the other objections to it identified above, this application for summary judgment is premature.

65. For the reasons set out above, this application is dismissed and I will now hear the parties on any further applications they may wish to make.

End of judgment

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This transcript has been approved by the judge.