



Neutral Citation Number: [2017] EWHC 575 (TCC)

Case No: HT-2017-000009

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

Royal Courts of Justice,
Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 24 March 2017

Before:

THE HON MR JUSTICE COULSON

Between:

Bombardier Transportation Limited
- and -
Merseytravel

Claimant

Defendant

Mr Rupert Paines (instructed by **Bond Dickinson LLP**) for the **Claimant**
Ms Valentina Sloane (instructed by **DLA Piper**) for the **Defendant**

Hearing date: 17 March 2017

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.

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THE HON MR JUSTICE COULSON

The Hon. Mr Justice Coulson :

1. This is a procurement dispute in which the claimant makes various allegations against the defendant arising out of a tender process undertaken by the defendant for the award of a number of contracts which form the Merseytravel Rolling Stock Programme. The contract has now been awarded to the successful bidder, Stadler, so this is a claim for damages only. An issue has now arisen as to the balance to be achieved between open justice and confidentiality in public procurement disputes.
2. The issue arose in a rather unusual way. On 21 February 2017, Stephenson Harwood LLP wrote to me, as the judge in charge of the TCC, saying that they had read in the Press an outline of the claimant's claim in these proceedings. They said that they acted for another unsuccessful bidder for the same contract and were therefore interested in the case. They said that they had sought to obtain copies of the documents on the court file and had been told that the whole of the court file had been marked 'private', and that copies would not therefore be made available. The letter from Stephenson Harwood went on to set out the reasons why they said that this was wrong in principle.
3. I caused further enquiries to be made. As a result, I learned that all public procurement claims were being marked on the court file as "private", so that access to the court file in such cases was being routinely denied. I was not at all sure that that could be right in principle. Simultaneously, the claimant in these proceedings then made an application for an order pursuant to CPR 5.4C that neither the Particulars of Claim, nor the confidential annexes attached to it, should be provided to non-parties. I heard that application on 17 March 2017. A number of general principles were discussed. I am very grateful to both counsel for their significant assistance.
4. I consider that the starting point is the principle of open justice. Unless there is a good reason why not, all civil claims in the United Kingdom should be heard in open court. As part of that process, all the documents on the court file should be publicly available. Thus, merely because the case in question is a procurement dispute is no reason for the case to be labelled as "private", with all of the documents on the court file being kept secret and not made available to non-parties. Both counsel agreed with that proposition.
5. The balancing act between open justice, on the one hand, and confidentiality, on the other, is a fine one, and particular difficulties can arise in procurement disputes. How should the court go about dealing with them? Happily, there is what seems to me to be a detailed answer to that question. Recently, the public procurement bar and some of my judicial colleagues in the TCC have worked together to produce a draft 'Guidance Note on Procedures for Public Procurement Cases'. I stress that, although the draft has now been finalised, it requires the approval of the Master of the Rolls before it can be utilised across the board, and so presently remains a draft only.
6. However, because it seems to me that the draft Guidance Note provides a clear and practical answer to the balancing exercise to which I have referred, I should set out the relevant parts. Confidentiality is dealt with at paragraphs 27-31 of the draft as follows:

- “27. Public procurement claims frequently involve the disclosure of, and reliance upon, confidential information. Confidentiality is not a bar to disclosure.¹ However, the need to protect confidential information needs to be balanced by the basic principle of open justice. Managing the use of confidential information in the proceedings tends to increase both the cost and complexity of the litigation. The Court will seek to manage the proceedings so that confidentiality is protected where genuinely necessary but ensuring that the issue of confidentiality does not give rise to unnecessary cost or complexity. Assertions of confidentiality should only be made where properly warranted.
28. Once a case has been allocated to a particular TCC judge, papers and communications, particularly those which are to be treated as confidential, should generally be passed through the relevant Judge’s Clerk to limit the risk of inadvertent disclosure.
29. Papers delivered to and communications with the Court and the Judge’s Clerk should be marked as “Confidential” if they are confidential.
30. It is recommended that documents containing confidential material are provided on coloured paper so that their confidential status is immediately apparent (practitioners are asked to take care that the print remains legible when printed on a coloured background). Where relevant, the level of confidentiality should be identified either by a stamp or mark (e.g. “Confidential 1st Tier”²) or by a particular colour of paper.
31. Where necessary to protect confidential information the Court may, if requested, make an order restricting inspection of the Court files. Requests to restrict inspection should only be made where necessary. Any member of the public may seek an order from the Court varying any such restrictions. Consideration should be given to providing appropriately redacted pleadings for the Court file so as to permit public access to them. As to the management of confidential information in pleadings generally, see paragraph 11 above.”
7. I respectfully agree with the draft Guidance Note on this issue. It seems to me that this is how potentially confidential information should be dealt with in procurement

¹ *Science Research Council v Nasse* [1980] AC 1028.

² As to the use of tiers in confidentiality rings see paragraphs 41 and 42

disputes. Confidentiality rings are of course commonplace in cases of this sort and are in accordance with the decisions in *Mears v Leeds CC* [2011] BLR 155 and *Geodesign Barriers Limited v Environment Agency* [2015] EWHC 1121 (TCC). Moreover, it is sometimes necessary for parts of a procurement trial, which deal with the confidential elements of a tender (whether that of the claimant or that of the successful bidder), to be heard in private: see by way of example *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 3326 (TCC).

8. What about the present case? As noted above, the claimant's stance prior to the hearing was that the Particulars of Claim and the seven annexes attached to it were all confidential, and that none of those documents should be disclosed on the court file.
9. However, at the hearing, Mr Paines did not maintain that position. Instead, he agreed that there was nothing in the Particulars of Claim which was confidential or which should not be capable of being put onto the court file as a document available to the public. He explained that, originally, the claimant had maintained that the Particulars of Claim were confidential, not because they contained any information confidential to the claimant, but because they contained extracts from the defendant's procurement documentation issued to bidders, and the defendant had made it plain, at the time of the tender, that such procurement documentation was confidential.
10. On behalf of the defendant, Ms Sloane made it clear that, whilst that had been the case at the time of the tender, the defendant was not now suggesting that the tender documentation details provided in the Particulars of Claim were or could be confidential. I consider that she must be right about that. Whatever the position at the time of tender, by the time there are court proceedings in which the legitimacy of the tender evaluation is being challenged, the contracting authority cannot hope to argue that there is any sort of confidentiality in the procurement documentation setting out information such as the evaluation regime.
11. Mr Paines put the non-disclosure of the Particulars of Claim down to "an over-cautious approach to confidentiality". In my experience, such an approach by a claimant is too common in these cases: it seems easier for solicitors to decide that a document is confidential and ask for it to be kept secret, than to analyse its content and decide that it is not. It is ironic that this response arises in cases which can only be brought by the claimant in the first place because of the new statutory emphasis on transparency in public contract tender evaluations and awards.
12. That left the question of the annexes attached to the Particulars of Claim. I considered with Mr Paines two random examples of specific complaints set out in those annexes. In my view, the results of that exercise were the same: either the relevant part of the annex did not obviously appear to contain confidential information at all or, where it did, that information was capable of being either redacted or anonymised. Thus, where the evaluation criterion required a minimum capacity figure for passengers on a single train, and the claimant said that its tender identified a figure in excess of that requirement, the figures themselves might be confidential, but the pleading would be equally comprehensible if the evaluation figure was recorded as X and the claimant's tender figure was recorded as X+Y.
13. I recognise, however, that it may be misleading to take random examples because it may be that, depending on a more detailed analysis, and when considered as a matter

of proportionality, it would be more practical if the whole of a particular annex were identified as confidential (as happened to a particular appendix in *Energy Solutions*). In addition, Ms Sloane made the fair point that major contracts of this kind attract the same group of tenderers, who are regularly competing against one another for transport-related contracts across the world. Thus, a piece of information within a tender may look to the court to be of no commercial consequence, but may actually be a meaningful piece of information to a competitor.

14. Ms Sloane also emphasised that confidentiality issues can arise in relation to the successful tenderer, who is not a party to the proceedings but who might find its tender the subject of a detailed comparative analysis. In such circumstances, it needs the opportunity to make submissions before its successful tender is opened up to the world. Although that debate has not arisen here yet, I am told that it very well may.
15. Accordingly, I indicated to Mr Paines that he needed to take further instructions about the annexes, so that the claimant could respond to the confidentiality point in greater detail. It may be that the issue can then be dealt with on paper, without the need for a further hearing.
16. I made plain during argument, and I reiterate, that the TCC is committed to open justice and that, on any application to keep parts or all of a pleading or an annex confidential, the court will start on the assumption that the document should be made publicly available. But the court understands that assessing the material in procurement disputes can be a difficult exercise and that there are sometimes legitimate commercial interests which may point in the other direction. For now, I commend paragraphs 27-31 of the draft Guidance Note to all those involved in procurement disputes in which there are confidentiality issues.