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Case No: HT-2020-000270

Neutral Citation Number: [2021] EWHC 1817 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 5 July 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

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Between :

Bop-Me Limited

Claimant

- and –

The Secretary of State for Health and Social Care

Defendant

Azeem Suterwalla (instructed by **Clarks Legal**) for the Claimant
Michael Bowsher QC and Ewan West
(instructed by **The Government Legal Department**)
for the Defendant

Hearing date: 28 May 2021 and further
written submissions 25 June 2021 and 1 July 2021

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Mr Justice Fraser:

1. This ruling is in relation to an application by the Claimant for permission to rely upon expert evidence in these procurement proceedings against the Defendant, to whom I shall refer as the Secretary of State. The subject matter of the procurement in respect of which the Claimant brings this challenge is the supply of PPE to the Department of Health and Social Care, and the situation that arose earlier in 2020 in respect of the Government response to the Covid-19 pandemic. The PPE in question in this case is face masks. The Claimant is in the business of supplying what are called Type IIR face masks.

2. Type IIR is a particular type of face mask. Common types are Type 1, Type II and Type IIR. Type IIR is a surgical mask which is specifically used for close proximity environments such as care homes and hospitals, and these are intended to protect against transfer of the virus from person to person. The World Health Organisation only certify Type IIR masks (and a different type, called FFP2) for use in a close clinical environment. The wider world knows far more about Covid-19 and the use of PPE now than it did 18 months ago, and also there is much greater knowledge about the procurement processes adopted by the Secretary of State during the relevant period in 2020. The basis of the claim in these proceedings is an alleged breach or breaches by the Secretary of State of Regulation 26 of the Public Contracts Regulations 2015 ("PCR 2015"), including failures to advertise, failures to allow competition, and the use of the so-called "VIP Lane" for preferred suppliers. The Secretary of State denies all the allegations of breach and maintains that the procurement was permitted in the way that was adopted due to the extreme urgency and lack of foreseeability of the pandemic on the existing stocks of PPE. He relies upon Regulation 32.2(c) of the PCR 2015 and other defences.

3. The Secretary of State claims that, in any event, the Claimant's offer to supply Type IIR masks was not a valid one. It is said that the offer failed to supply certain information, was therefore defective, and did not pass a "technical evaluation stage", in accordance with the Department's Specification. The Claimant maintains that its offer was a valid one, which did meet the Specification, and that the Secretary of State fundamentally misunderstood the requirements of the Department's own Specification and/or made errors in its assessment of the Claimant's offer. This included the Department referring to, and relying upon, supposed technical requirements and information which it is said were not provided, and which were not in fact requirements of the Specification, nor had these been requested by the relevant Department at the point of taking offers under the Scheme. It is also said that these were not requested by the Department after it had received and considered the Claimant's offer. All of these different matters will be resolved at trial.

4. When asked to define the issues to which expert evidence would go, the Claimant identified (both at the hearing and in its subsequent written submissions) the following four areas:

   1. Whether suppliers of CE-marked products falling within the same category of products as those offered by the Claimant (i.e. Class I medical devices within the meaning of Council Directive 93/42/EEC) should provide purchasers with a Quality Management System Certificate ("QMSC"), or whether the provision of a Declaration of Conformity self-certifying the existence of a QMS is sufficient.

2. Whether a Declaration of Conformity should state on its face the precise product to which it applies.

3. Whether suppliers of CE-marked products falling within the same category of products as those offered by the Claimant (i.e. Class I medical devices within the meaning of Council Directive 93/42/EEC) are required to provide purchasers with testing reports or conformity assessments provided by third party testing houses.

4. What the contents of a testing report evidencing compliance with BS EN 14683 should include.

5. The Secretary of State denies that any of these four issues or categories of evidence are appropriate or suitable issues for expert evidence.

6. This ruling is made at the Case Management Stage of the proceedings, and the trial is to take place in April 2022. At the Case Management Conference itself, the Claimant sought permission to rely upon expert evidence. This was then, and is still, opposed by the Secretary of State, and in any event the permission of the court is required for expert evidence under CPR Part 35.4(1) which states:

> "No party may call an expert or put in evidence an expert's report without the court's permission."

7. At the Case Management Conference on 28 May 2021 the parties sketched out their positions on the application, but only in outline terms. I gave permission for them to add to these oral submissions with written submissions to follow, and they requested that a decision be provided after consideration on paper and without a further oral hearing. This is therefore what has occurred.

8. Permission for expert evidence is rarely given in procurement cases. Without reciting the different Regulations, most procurement challenges are based on breaches of transparency, equal treatment and/or manifest error, although in recent years, complaints by losing tenderers that the winning tender has submitted what is called an "abnormally low tender" have increased. In very few of these cases does the need for expert evidence arise. Very occasionally, there may be areas where the subject matter of the procurement is such that some expert evidence is required to assist the court in understanding the technical subject matter, but these are rare. For example, even in the field of decommissioning nuclear reactors, which could readily be described as a highly technical area, widespread procurement challenges can be conducted without either party even suggesting expert evidence is necessary; ***Energy Solutions EU Ltd v Nuclear Decommissioning Authority*** [2016] EWHC 1988 (TCC).

9. Regardless of that, there are some important decisions dealing with the issue of expert evidence in the procurement field in particular. Procurement cases proceed both under the relevant regulations (in this case the PCR 2015) and also by way of judicial review. Some proceed under both at the same time.

10. In ***BY Development Ltd and others v Covent Garden Market Authority*** [2012] EWHC 2546 (TCC) Coulson J (as he then was) considered a number of authorities. These included, in the field of judicial review, ***R (on the application of Lynch) v General Dental Council*** [2003] EWHC 2987 (Admin); and more specific procurement cases such as ***Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*** [1999] 67 Con LR 1 and ***Henry Brothers (Magherafelt) Ltd***

v Dept of Education for Northern Ireland [2011] NICA 59. In ***BY Development*** the judge said the following:

> "[20] In summary, I consider that the authorities demonstrate that, where the issues are concerned with manifest error or unfairness, expert evidence will not generally be admissible or relevant in judicial review or procurement cases. That is in part because the court is carrying out a limited review of the decision reached by the relevant public body and is not substituting its own view for that previously reached; in part because the public body is likely either to be made up of experts or will have taken expert advice itself in reaching the decision; and in part because such evidence may usurp the court's function.
> [21] All of that said, however, I believe that it goes too far to say that expert evidence can never be admissible in public procurement cases concerned with manifest error. In some cases, it may be required by way of technical explanatory evidence (***Lynch***). In addition, there may be other cases where, unusually, such evidence is both relevant and necessary to allow the court to reach a conclusion on manifest error. That may be particularly so where the particular issue is specific and discrete, such as a debate about one of the criteria used in the evaluation (***Henry Bros***) or complex issues of causation (***Harmon***). Thus, I do not accept the submission, trailed at one point in Mr Giffin's skeleton argument, that, if expert evidence is required to support an allegation of manifest error, that would of itself indicate that the error could not be manifest. In my view, that would always depend on the facts of the particular case.
> [22] Having concluded that expert evidence is not generally admissible in a case of this type, but that there may be unusual circumstances which justify the use of experts, I turn to the particular facts of this case. Is this a claim where the technical background is so complex that explanatory expert evidence is required, and/or is this an unusual case where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the court to reach a proper view on the issues of manifest error or unfairness?"

11. I respectfully agree with that analysis. It has been adopted in a number of other procurement cases, for example ***Circle Nottingham Limited v NHS Rushcliffe Clinical Commissioning Group*** [2019] EWHC 3635 (TCC), a decision of HHJ Stephen Davies sitting as a High Court Judge. It is, in any event, clearly right.

12. Essentially therefore, in a procurement case, these are the two routes by which expert evidence would be admissible, and when permission for such evidence would be considered. That is not to say permission will always be given, because matters of proportionality may arise, but one of the two tests posed by Coulson J must usually be satisfied.

13. In considering that two-part question posed in [22] from ***BY Development v Covent Garden*** in the instant case and on this application, I conclude that the subject matter of this claim is not such that the technical background is so complex that explanatory expert evidence is required.

14. Face masks of any type are not technically complex items. They are essentially barriers, admittedly of different types and standards, but technically they cannot sensibly be described as complex. Therefore the first limb of the question posed by Coulson J is answered in favour of the Secretary of State and in favour of refusing permission for expert evidence.

15. Additionally, issues 1 to 3 identified by the Claimant in this application which I have set out at [4] are matters of interpretation and construction, such that the question of expert evidence in respect of them does not arise. These issues concern construction and consideration of the relevant directive, namely Council Directive 93/42/EEC. As such, expert evidence would not be admissible in any event.

16. However, issue 4 at [4] is another matter. This requires the court to consider whether the testing reports were compliant. The Secretary of State has pleaded in paragraph 28(c) of the Defence that the Claimant's offer was defective because it did not provide testing reports which particularised the testing values. For that reason it was rejected. The Claimant argues that the relevant British Standard, BS EN 14683 does not prescribe the contents of a testing report. If the Claimant is right – and at this stage the court cannot and should not come to a conclusion on that point, other than to say that it is reasonably arguable, and the British Standard does not appear to provide the answer to what should be included – then the issue becomes what technical information should be included in a testing report, and how. The contents of an industry compliant testing report, and whether one was provided in this case, is not a matter upon which the court will have any knowledge of its own. Expert evidence on the industry standard and expected contents of testing reports under the British Standard (which does not prescriptively identify the contents) will assist the court in determining whether the Secretary of State was entitled to conclude that the Claimant's offer was defective in this regard.

17. In my judgment, this is one of those unusual cases where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the court to reach a proper view on the issues of manifest error and/or unfairness. I therefore find for the Claimant on this application.

18. However, there are two important caveats. Firstly, expert evidence is permitted but only (without further order) limited to the issue identified in [4](4) above. Secondly, the Claimant seeks permission for expert evidence from a "CE Engineer/Consultant". The Secretary of State challenges this particular description as not being a specific field of expertise to which an expert could belong.

19. In my judgment, there must be a field of expertise in the industry regarding standards and methods of testing PPE of this nature, regardless of whether "CE Engineer/Consultant" is the correct descriptive term. I consider that expression generally would be sufficient for present purposes and to satisfy CPR Part 35.4(2)(a). The just and proportionate way forwards is to grant the limited permission for expert evidence in the way described, and permit either party at trial to challenge the specific expertise of the individual chosen (if so advised). It may be that "testing engineer" is a better term than the one advanced by the Claimant. There may be no difference between these expressions, but any expert must be sufficiently qualified in order to give expert evidence to the court.

20. If, at trial, such a challenge is made to the necessary expertise on the part of a witness, and the court finds that challenge to be made out, then the party who has instructed that expert will simply find themselves without expert evidence as a result, with any consequences that entails. It is incumbent on the parties to select a witness with the necessary expertise. Given the narrowness with which the issue itself is described at [4](4), the precise term used to describe the expert field becomes less important. The order will give permission for an expert in the field of "CE Engineering and/or Testing".

21. Finally, at the hearing on 28 May 2021, I raised with the parties the issue of appointing a Single Joint Expert under CPR Part 35.7. The parties were reluctant to follow this route. Indeed, Mr Bowsher for the Secretary of State was somewhat more than reluctant. He urged me (if minded to permit any expert evidence) to allow the Secretary of State to have his own separate expert, and not to order the use of a Single Joint Expert. I do not, therefore, order a Single Joint Expert, and each party has permission to instruct and rely upon the evidence of an expert of their own, limited in the way that I have explained. The parties are invited to agree the timetable for such evidence to be exchanged and for meetings between experts to take place. There will be liberty to apply in the order granting permission for expert evidence (which the parties should draw up), to deal with the unlikely event that such agreement cannot be reached.