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

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 14 December 2023

Before:

HIS HONOUR JUDGE PEARCE

B E T W E E N :

OCS GROUP UK LIMITED

Claimant

- and -

COMMUNITY HEALTH PARTNERSHIPS LIMITED

Defendant

MR J BARRETT (instructed by Birkett's LLP) appeared on behalf of the Claimant.

MR A SUTERWALLA (instructed by Capsticks LLP) appeared on behalf of the Defendant.

J U D G M E N T

(Via MS Teams Hearing)

JUDGE PEARCE:

1 This is my judgment on the claimant's application for specific disclosure. I heard the application on 8 December of 2023 and reserved until today, 14 December.

2 This is a public procurement case in which, by its application notice dated 31 October 2023, the claimant seeks an order for specific disclosure of documents as set out in a draft order, those being:

> "The outstanding contemporaneous evaluation records in relation to questions 4-13 of the Quality and Social Value Evaluation and the current draft and any previous drafts of the Reg. 84 Report."

3 That application, which I shall consider in more detail in a moment, is supported by two statements for the claimant, both from Ms Sara Sayer – one dated 31 October and one dated 5 December 2023 – and for the defendant, a statement from Mr Dylan Young dated 30 November 2023.

4 At the beginning of the hearing last week, the defendant sought an adjournment in order to permit this application to be aligned with the defendant's application for strike out of part of the claim and an anticipated amendment application by the claimant, which the defendant said was intended as an attempt to defeat the strike out application. The application to adjourn had been refused on paper by Constable J on 5 December. I refused it when it was orally renewed at the hearing on the 8 December for the reasons I gave at the time.

5 The background to this application is a challenge under the Public Contracts Regulations 2015 to the award of a public services contract for the provision of cleaning services on the National Health Service estate. The claimant is the incumbent provider of such services to the defendant. The new contract, in respect of which this claim is brought, is a contract with

a value of about £236 million and a term of about nine years, therefore a very significant contract.

6 The defendant, as is normal and indeed required by the regulations in such cases, sent an award letter to the claimant. That award letter recorded that the claimant had scored an aggregate of 85.33 per cent. The preferred bidder to whom the contract was to be awarded was Mitie, who were awarded an aggregate score of 85.35 per cent. Thus, one will immediately see that the difference between the scores of the two bids was miniscule, just 0.02 per cent.

7 The process of the invitation to tender in respect of the procurement involved bidders responding to a number of quality questions and completing a pricing submission. There was also a question relating to social value and the nine quality-related questions and the one social value-related question were scored in a way which is not unusual for tender processes of this kind.

8 By way of example, on a quality question, the marking scheme would give the option for those evaluating the response to award either 0, 25, 50, 75 or 100 to the bidder, and by way of example of description within the marking scheme on quality questions, 100-excellent would apply where:

> "A comprehensive response demanding a thorough understanding of the requirements and the broader context of the requirements. The response provides comprehensive and unambiguous details of how the requirement will be met in full and is specific and direct on how it meets the requirements. All the points highlighted in the Guidance Notes have been covered extremely well in a cohesive manner. A response has detailed supporting evidence and has no weaknesses, resulting in a high level of confidence."

9 In contrast, again by way of example, 25-poor would be described as follows:

> "A poor response which provides limited evidence of understanding of the requirements or the broader context of the requirements. The response has addressed some elements of the points highlighted in the Guidance Notes, but this is either weakly or not in a manner which clearly articulates how the key individual points interrelate, and there are points which have not been addressed. The response includes poor supporting evidence which lacks convincing detail and poses risks that the response will not be successful in meeting all the requirements. The bidders would therefore respond to such questions and as with the questions relating to quality, so with questions relating to social value there are relevant criteria."

10 I have indicated that the claimant's bid was awarded an aggregate score only slightly below that of the winning bidder, Mitie. Almost immediately, the claimant engaged in correspondence with the defendant, and in particular by a letter dated 3 October, the claimant set out concerns regarding the defendant's conduct of the procurement. The claimant sought a disclosure of material that was not given and therefore just over three weeks later, the claim was issued on 25 October and another six days later this application was made on 31 October 2023.

11 The award letter is before me at page B52 in the bundle. Just so that the reader of this judgment has some kind of sense of how the award letter is set out, I will read one of the scoring within the award letter, namely that for question 5, "Supply chain management." As I have indicated already, a total of 100 marks were available. The claimant scored 75, and the award letter annexe includes the following:

> "Rationales for award of score. Your response was evaluated in accordance with the evaluation marking scheme. The evaluation consensus panel agreed that you provided a good response, demonstrating a good understanding of the requirements. Some positive aspects of your response. The particular aspect of your response addressing the assessment of subcontractors appears to be fully compliant and thoroughly benchmarked for quality and pricing. CHP would have access online via the portal in consolidating monthly reports, and this was seen as a positive. Your response was particularly strong on SME, engagement and the provision of ongoing support. To score higher, the panel would have liked more detail on the following. Your response refers to an escalation process in the event of supply chain failure. However, to fully meet the requirement,

> the response would have benefited from detailing how the failure would then be resolved after escalation. Your stated 'strong focus' on environmental targets would have benefited from some practical examples of what the initiatives could look like or how they could be delivered to demonstrate the how rather than just the what. Overall, it was agreed that your response is good. The majority of the points highlighted in the Guidance Notes have been covered well and in a manner which demonstrates how the key individual points interrelate. The response has good supporting evidence."

12 Dealing with the score of the successful bidder on the same question, the text says as follows:

> "Question 5, characteristics and advantages of the successful tender, a score of 75. There were no relative advantages of the successful tender as you received the same score. Some of the characteristics of the winning tender were that the tender set out a very clear path of actions for the resolution of any service failure and set out what happens and not just a process which provides a clear understanding of actions if necessary, commits to looking to align the procurement strategy against the CHP's and this further demonstrates the commitment to work in partnership with CHP and a clear understanding of the requirements for this contract."

13 One might, in passing, note two particular points there. First of all, as is normal in procurement contracts of this kind, the scoring involved a consensus evaluation by a panel of people who will have individually scored the bid before a consensus score is reached.

14 Second, in this, as in other questions, both the claimant and the successful bidder achieved the same score. The structure of the annexe to the award letter is to point out negative features of the claimant's bid insofar as it did not achieve the maximum score, but in respect of the successful bidder's score, which also was not the maximum score, one will see that all the document sets out is some of the characteristics of the winning tender.

15 The law in respect of public procurement of this kind is substantially contained in the Public Contracts Regulations 2015. In this regard, it is important to note regulation 84, which implements the Public Contracts Directive, and regulation 86, which deals with the

notification of decisions to award a contract or to conclude a framework agreement. It is, I think, not in dispute that the defendant here was exempt from the requirements of regulation 86(1) by virtue of the nature of the contract, this being an exemption under regulation 86(5).

16 Nevertheless, the defendant did, in giving notice of the award, give characteristics and relative advantages of the successful tender, as we have already heard in the passage that I read out, and also has disclosed the score obtained both by the successful tender and by the claimant as an unsuccessful tenderer. Thus, though it need not have done so, it has in fact, it says:

> "complied with regulation 86(2)(b) as to the content of a notice."

17 The giving of reasons in respect of the award of procurement contracts has, however, also been considered in other cases, and in this respect, it is important that I note the judgment of Stuart Smith J, as he then was, in the case of *Lancashire Care NHS Foundation Trust & Anor v Lancashire County Council* [2018] EWHC 1589 (TCC). In considering the sufficiency of reasons by a public authority dealing with a tender process of this kind, Stuart Smith J set out at paragraph 49 and following a summary of the principles to be applied.

> "49. There is no substantial issue about the principles to be applied. It is conveniently summarised in two Dynamiki decisions. In Case 272/06, Evropaiki Dynamiki [2008] ECR-II 00169 at [27] the Court said:
>
> 'In accordance with settled case-law, the statement of the reasons on which a decision adversely affecting a person is based must allow the community court to exercise its power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded.'
>
> 50. To similar effect, in Case 447/10 Evropaiki Dynamiki at [92] the Court said:
>
> 'The corollary of the discretion enjoyed by the Court of Justice in the area of public procurement is a statement of reasons that sets out the matters of fact and law upon which the Court of Justice based its

assessment. It is only in the light of those matters that an applicant is genuinely in a position to understand the reasons why those scores were rewarded. Only such a statement of reasons therefore enables him to assert his rights and the general court to exercise its powers of review.'"

"51. In **Healthcare at Home Limited v The Common Services Agency** [2014] UKSC 49, Lord Reed (with whom the other justices agreed) said at [17]:

'As I have explained, article 41 of Directive 2004/18 imposes on contracting authorities a duty to inform any unsuccessful candidate, on request, of the reasons for the rejection of his application. Guidance as to the effect of that duty can be found in the judgment of the Court of First Instance in **Strabag Benelux NV v Council** of the European Union (Case T-183/00) **[2003] ECR II-138**, paragraph s 54-58, where the court stated (para 54) that the obligation imposed by an analogous provision was fulfilled if tenderers were informed of the relative characteristics and advantages of the successful tenderer and the name of the successful tenderer. The court continued (para 55):

The reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the court to exercise its supervisory Jurisdiction.'"

"52. It is no accident that each of these statements of principle refers to the need to provide reasons and reasoning. With one possible exception, that is not the same as providing a list of factors that were taken into account. The exception would be if each identified factor was awarded equal weight, in which case one could at least identify the numbers of factors whether positive or negative. In that case, the greater number would outweigh the lesser (or equality would be achieved). The exception is inapplicable in this case … Quite apart from this general point, the possible exception is inapplicable if some points are highlighted without any indication of the relative weight applied to normal and highlighted points….

54...I look for the reasons why the Council awarded the scores that it did; and I accept the submission that 'a procurement in which the contracting authority cannot explain why it awarded the scores which it did fails the most basic standard of transparency.'"

18 As we will see a little later in this judgment, there is some debate about the relevance of the principles with which Mr Justice Stuart Smith was dealing when one is dealing with an application at this stage for specific disclosure. I shall return to that point.

19 The power of the court to order specific disclosure in this case arises under CPR Part 31.12. In *Harrods Ltd v Times Newspaper Ltd* [2006] EWCA Civ 294, the Court of Appeal said of a specific disclosure application the following at paragraph .12 of the judgment of Lord Justice Chadwick, with whom the other judges agreed:

> "In my view the judge was plainly correct to approach the application for further disclosure on the basis that it was essential, first, to identify the factual issues that would arise for decision at the trial. Disclosure must be limited to documents relevant to those issues. And, in seeking to identify the factual issues which would arise for decision at the trial, the judge was plainly correct to analyse the pleadings. The purpose of the pleadings is to identify those factual issues which are in dispute and in relation to which evidence can properly be adduced. It is necessary, therefore, to have in mind the issues as they emerge from the pleadings and as are relevant in the present context."

20 That statement, it appears to me, is clearly of application to the general run of specific disclosure applications, but in the case of Roche *Diagnostics Limited v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC), Mr Justice Coulson as he then was, set out at paragraph .20 of his judgment the relevant principles to applications for early specific disclosure in procurement cases:

> "(a) An unsuccessful tenderer who wishes to challenge the evaluation process is in a uniquely difficult position. He knows that he has lost, but the reasons for his failure are within the peculiar knowledge of the public authority. In general terms, therefore, and always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed of view can be taken of its fairness and legality.
>
> (b) That this should be the general approach is confirmed by the short time limits imposed by the regulations on those who wish to challenge the award of public contracts. The start of the relevant period is triggered by the knowledge which the claimant has (or should have) of the potential infringement. As Ramsey J said in Mears Ltd v Leeds City Council [2011] EWHC 40 (QB), 'the requirement of knowledge is based on the principle that a tenderer should be in a position to make an informed view as to whether there has been an infringement for which it is appropriate to bring proceedings.'

> (c) However, notwithstanding that general approach, the court must always consider applications for specific disclosure in procurement cases on their individual merits. In particular, a clear distinction may often be made between those cases where a prima facie case been made out by the claimant (but further information or documentation is required), and those cases where the unsuccessful tenderer is aggrieved at the result but it appears to have little or no grounds for disputing it.
>
> (d) In addition, any request for specific disclosure must be tightly drawn and properly focused. The information/documentation likely to be the subject of a successful application for early specific disclosure in procurement cases is that which demonstrates how the evaluation was actually performed, and therefore why the claiming party lost. Other material, even if caught by the test of standard disclosure, is unlikely to be so fundamental that it should form the subject of a separate and early disclosure exercise.
>
> (e) Ultimately, applications such as this must be decided by balancing, on the one hand, the claiming party's lack of knowledge of what actually happened (and thus the importance of the prompt provision of all relevant information and documentation relating to that process) with, on the other, the need to guard against such an application being used simply as a fishing exercise, designed to shore up a weak claim, which will put the defendant to needless and unnecessary cost."

21 This need for parties to consider early disclosure in public procurement cases is reflected by Appendix H to the Technology and Construction Court Guide, which at paragraph 25 of the current version, says this:

> "Contracting authorities are encouraged to provide their key decision-making materials at a very early stage of proceedings or during any pre-action correspondence. This may include the documentation referred to in Regulation 84 of the Public Contracts Regulations 2015 ("the 2015 Regulations")."

22 During the course of submissions my attention was also drawn in particular to passages from the judgment of Mr Justice Coulson, as he then was, in *Geodesign Barriers Ltd v The Environment Agency* [2015] EWHC 1121 (TCC). That was a case in which one can note from paragraph 14 of his judgment, the judge considered that although the claimant had demonstrated a prima facie case:

> "It struck me on reading the papers prior to the hearing that this was not a claim which could be described as particularly strong."

23 He goes on to explain that evidence, but also made the order sought, considering the evidence from the defendant that there was no contemporaneous tender evaluation report to be "extraordinary." At paragraph 24, he said this of that, the absence of that evidence:

> "In my experience, a contracting authority produces some kind of Tender Evaluation Report as a matter of routine, in order to aid and support the decision-making process. That Report will deal with all the evaluation criteria relevant to the procurement exercise, and will identify, with respect to each bid, the scores awarded, together with a brief explanation for each score. Where a question is more general, such as the so-called 'binary' question as to whether or not the tenderer's design met the mandatory performance specification, there will usually be something recorded in writing recording the answer to that question in respect of each tender. Sometimes that will be done by reference to various key elements of the specification itself. Such a Tender Evaluation Report also forms the basis of the subsequent debriefing feedback exercise when the tenderers are informed of the result."

24 He went on, at paragraph .25:

> "As I observed in my brief oral judgment at the end of the hearing, the absence of a contemporaneous Tender Evaluation Report of any kind in this case raises a significant question mark as to the transparency and clarity of the procurement exercise. It gives rise to a whole host of questions. For example; how can any of the tenderers be certain that there has been a fair and transparent process if the document relating to that process is a miscellaneous collection of manuscript notes, some written on the back of an old notebook, and some subsequent documents produced for the debriefing/feedback exercise? Furthermore, how could that latter category of documents have even been prepared, if there were no contemporaneous documents recording the results of the evaluation…"

25 In this case too there is no specific tender evaluation report, although the defendant explains that by stating that the other materials of the kind that the claimant seeks amount to such a report in the circumstances of this case. For the avoidance of doubt, I do not consider the absence of a specific tender evaluation report to be a relevant factor to the determination of the application given the defendant's explanation.

26 My attention was also drawn to another judgment of Mr Justice Coulson, as he then was, in the case of *Bombardier Transportation v Merseytravel* [2017] EWHC 726 (TCC). In that case, Mr Justice Coulson was considering concern about whether, as the defendant there suggested, the claimant's case was in the nature of a fishing expedition. He spoke a little of the need to avoid a creep within the process of challenging tenders, but went on, at paragraph 23:

> "This concern can be taken too far. The reported cases show that a procurement challenge may often be successful because of the failures on the part of the contracting authority to ensure equal treatment […] Experience shows that this is something which not infrequently happens and a claimant in the position of Bombardier is entitled to investigate fully the comparative treatment of the tenders, either to confirm criticisms it has already made or to found freestanding allegations." (my emphasis)
>
> 24. Accordingly, whilst the court is alive to the risk that the Bombardier claim, when extended to a consideration of the Stadler tender, has the potential to become an unjustified fishing expedition, that conclusion cannot be reached at this stage…"

27 I have been shown other cases, including *Healthcare at Home*, the decision of the Supreme Court to which reference was made earlier in the judgment of Mr Justice Stuart Smith in *Lancashire Care* and the case of *Serco Ltd v Secretary of State For Defence* [2019] EWHC 515 (TCC). They, it seems to me, do not provide any detailed guidance on the particular issues in this case, although they are good examples, in one case at Supreme Court level, of the proper approach to be taken.

28 The disclosure that the claimant has requested is set out in the letter of 3 October, to which I have referred already. In the letter of 3 October 2023, to which I have referred already, the claimant has requested:

> "One, the contemporaneous evaluation reports of the quality and social value evaluation, including both the individual and consensus records; two, any guidance, advice, age, or similar documents

provided to the evaluators in connection with the evaluation; three, the contract award report; and four the regulation 84 report."

Some, but by no means all, of that documentation has been provided.

29 I turn to the claimant's pleading in this case. The claimant has at paragraph 15 pleaded a particular criticism of the defendant's evaluation of the responses to question 13. The defendant has disclosed the individual and consensus reports relating to the claimant's response to question 13, but it has disclosed no records in relation to the Mitie response. The claimant now seeks the Mitie evaluation report.

30 At paragraph .16, the claimant deals with question 6 within the tender bid that it made. Again, the claimant is critical of the evaluation of its answer to that question. The defendant has disclosed the consensus evaluation records relating both to the claimant and to Mitie but has not disclosed any individual or other records. The claimant seeks the outstanding records for both bids relating to that question. The claimant then seeks evaluation records in respect of the other quality questions.

31 In respect of the other quality questions, the claimant's pleaded case is as follows, at paragraph 17:

> "In breach of the duties of *inter alia* transparency and equal treatment and under the regulations, the defendant has failed to provide the claimant with any or any sufficient, clear and transparent statement of reasons for the decisions communicated in the award letter. Without prejudice to the generality of the foregoing averment:
>
> 1. No reasons have been provided in support of the scores awarded to Mitie's question 13 response.
>
> 2. The reasons provided for the scores awarded to the other Mitie responses were inadequate and incapable of supporting the lawfulness of the evaluation and contract award decisions conducted.

3. The initial reasons were inadequate and failed to comply with the duty of transparency.

4. The reasons provided in relation to question 13 failed to comply with the duty of transparency."

32 Thus, in respect of all questions other than question 6 and the social value question, question 13, the claimant has no detail to its case at all other than the assertion that there is a lack of transparency coupled with the identified failings in respect of question 6 and question 13.

33 I turn then to the claimant's case on this application. The claimant contends that the regime of specific disclosure in public procurement cases differs from that in other litigation; see the decision in *Roche Diagnostics Limited v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC), and the test there applied by the court. Whilst the claimant accepts that the case must be looked at on its merits (see particularly paragraph 20(c) in *Roche*) the merits threshold is low.

34 The claimant says that it is able to show from the limited documents already disclosed that there were features of this public procurement process that are clearly unsatisfactory and are probably unlawful.

35 I have referred to questions 13 and 6 but I turn now to the detail of the complaint there made. Dealing with first with question 13, the defendant said in its initial reasons and in respect of its scoring of the claimant:

> "Some social value targets have been reduced as the bidder overclaimed the targets and one measure has been discounted as the described initiative did not meet the requirements. To improve, the bidder should look to claim targets in accordance with the national TOM and commit to the relative initiatives."

36 The claimant queried this response in a request for further information, to which the defendant responded as follows:

> "The defendant only reduced one of the claimant's social value quantitative proposals or targets, which was NT82. It did not reduce any of the claimants other social value quantitative proposals. The claimant's NT82 quantitative proposal was reduced to zero for the reasons set out in the second sentence of para.15(a) of the particulars of claim and in para.13(a) of the defence. The reasons provided in the award letter were therefore in error in referring to social value targets in the plural."

37 Insofar as these reasons have been read by the claimant to mean that the defendant was seeking to expressly and explicitly distinguish between NT82 and a number of other different targets, then that understanding is incorrect. The reference to the claimant looking "to claim targets in accordance with the national TOM and commit to the relevant initiatives" was a generalised statement regarding how it could have improved its bid:

> "It was not intended to mean that the claimant had failed to claim more than just the NT82 target in accordance with national TOM."

38 It follows from what is said in the request for further information that the claimant contends that there is an admitted error in respect of the reasoning for the score on question 13 in the award letter. That is an error which is as yet unexplained.

39 In line with the scheme of the appendix to the award letter that I referred to earlier, in respect of Mitie, the award letter provides scores against it without providing reasons beyond relative advantages. That is the case in respect of question 13 but also in respect of all the other questions evaluated by the defendant.

40 The second specific criticism of question 6 relates to a Workforce app. The claimant's concern that question 6 has been misinterpreted or indeed misscored by the defendant can be seen by what the defendant has to say in the question 6 response. A part of that response said as follows:

> "Site-based staff will be trained to understand KPI/SLA response times. Times and task instructions will be on new smartphones/tablets to aid compliance. Process is:
>
> 1. Help desk prioritises requests based on KPI/SLA and allocates to area manager via Workforce Connect app. AM assigns to site operative via app and phone call.
>
> 2. Operative completes task, signs off on tablet/phone using app, automatically notifying originator and closing job on CAFM."

41 When this response was queried by the claimant in the request for further information, the defendant responded:

> "Read as a whole (i.e. the entirety of the text set out in the quote above) [the defendant] reached the view that it was not clear whether the claimant's site-based staff would have access to the Workforce Connect app. This is further explained in the evaluation records, which the claimant has been supplied with, where it is noted under the heading "Consensus notes":
>
> "Good process in place for rapid response, although confirmation required if site-based staff will be given access to the Workforce Connect app. How does this work, and will all staff have access to it? Will it be via mobile phone? What happens if not all staff have access at the time that rapid response is required?"

42 The defendant goes on within its reasons to say that its evaluators were entitled to form the view that there was ambiguity about whether all staff would have access to the Workforce Connect app. The claimant says that the defendant may have misunderstood its reply to question 6. It appears to me, on the face of it, that there is some force in this assertion. The defendant, at the very least, accepts that there is an arguable case in this regard and an arguable case in respect of question 13. It was for that reason that the defendant provided limited disclosure in respect of those two matters.

43 However, for reasons I have indicated already, the claimant contends that that disclosure is incomplete, even on questions 6 and 13, and that there is no meaningful disclosure of Mitie's scoring as against the questions in respect of all of the questions within the bid.

44 The claimant contends, then, that this is a case which easily crosses the threshold for disclosure as set out in *Roche* and as considered in a variety of cases to which I have been referred. The claimant says it is entitled to disclosure both to investigate the complaints it has already made and to identify whether it might make other freestanding claims. The claimant reminds me that the scores are so close that even a single error might put a change to the overall scores and might put the claimant ahead of Mitie.

45 On issues of proportionality and confidentiality, which clearly are in play as considerations in any application of this kind, the claimant accepts that the order must be drawn sufficiently tightly to be proportionate. It says that this is a tightly drawn order and that there will be no excessive or disproportionate disclosure if the order is made. As to confidentiality, the claimant says any confidentiality issue could be dealt with by a confidentiality ring, although, in fact, no confidentiality issue has been raised.

46 The defendant submits that this application is based on a fundamental misunderstanding of the law of specific disclosure and/or that the pleadings come nowhere near supporting the application that is advanced. The defendant says that it has provided sufficient reasons for both the claimant score and the Mitie score within the material already disclosed and that such additional disclosure beyond that in the original decision letter should not be permitted beyond that which the defendant has already voluntarily given in respect of the specific pleadings relating to questions 6 and 13.

47 In making these submissions, the defendant starts with the regulations and in particular the terms of reg.86(2b). The notice needs to disclose the reasons for the decision but not the reasons for the score. The award letter is not obliged to include the reasons for the score, but, as is usual in public procurement cases, the defendant contends that in fact it has done so here.

48 Thus, the defendant contends that its letter dealing with the award sufficiently deals with its obligation for disclosure and that any further obligation would only arise were there to be an adequately pleaded case.

49 As I say, there is, the defendant concedes, a sufficiently adequately pleaded *prima facie* case on the issues as to questions 6 and 13 to justify further disclosure, but it has given that disclosure.

50 The defendant took me carefully through the various authorities, particularly *Roche*, *Geodesign Barriers Ltd v The Environment Agency* [2015] EWHC 1121 (TCC) and *Serco*, showing how in each case the judge focused on the pleading and, in each case, the claimant was able to show that there was a properly pleaded case that justified the disclosure being sought.

51 In contrast, says the defendant, all one sees here is, as I have indicated, specific complaints about two questions on which disclosure has been given and then a generic complaint which seems not significantly to add to that. This, says the defendant, is a "classic fishing expedition."

(i) Furthermore, and as I prefigured earlier in this judgment, the defendant expresses concern that the claimant misstates the effect of the judgment of Smith J in *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC). That was a case which was dealing with the defendant's duty to give reasons and to justify its case at trial, not the prior question as to whether an award letter is adequate.

52 This argument clearly gave rise to some disagreement between the parties and led to the parties filing supplemental skeleton arguments on the issue as to whether there is in some

way some kind of differing duty to give reasons at different stages of a case or a possible case.

53 In particular, the defendant took me to the judgment of Fraser J in *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988. That is a very lengthy and full judgment. At para.299 of his judgment, Fraser J was dealing with the need for reasons to comply with the relevant regulations and he said this:

> "The reasons provided should amount to sufficient information to satisfy the Regulations. One of the purposes of the reasons is to enable unsuccessful tenderers to decide whether to defend their rights by issuing proceedings. Such reasons ought to be readily available to the contracting authority because they are (or should be) the reasons why an authority has already acted as it has, by the time the tender award notification has been issued. They also ought to be broadly accurate. Of course they are not going to be of the same nature and detail as a fully (or even partly) pleaded case, and in my judgment Energy Solutions is not claiming that they should be.
>
> But where (as here) the RSS Tender Response was scored on a particular requirement under an Evaluation Node as meriting a mark of 1 (or sometimes a 3), the reason for that ought to be readily capable of being provided. My findings on admissibility of reasons going to the consideration of unlawfulness at Stage 1 should not be seen as requiring anything out of the ordinary for a sensibly organised procurement exercise that is conducted transparently. There is certainly no intention within this judgment to impose any extra burden upon authorities in providing such reasons, or to insist upon a counsel of perfection."

54 That reference to "Stage 1" is a reference to an earlier part of the judgment in which Fraser J was speaking of the reasons to be given in the notification to bidders following an award decision.

55 He also said within para.299 of his judgment that "the nature and extent of the reasons will be fact-specific."

56 The defendant contends that, apart from on questions 6 and 13, the claimant has said nothing about the inadequacy of reasons justifying the claimant's own score and that the complaint about inadequacy of reasons relating to Mitie's score is simply wrong. The defendant has met the standard of the specific duty under reg.86 which, if it had been owed, would have required the defendant to explain features of the winning bid. The defendant rejects the suggestion that the scoring of the winning bid cannot be understood from the reasons.

57 This, then, says the defendant, is a "fishing expedition" justified by nothing more than that there are some narrow complaints which might be capable of being made out in respect of questions 6 and 13.

58 In coming to my conclusion in this matter, I bear in mind that it is clear from the authorities that applications for specific disclosure in public procurement cases are likely to give rise to slightly different considerations than those in many contractual claims for the reasons set out in the decision in *Roche*. It is not seriously in dispute that there is a special regime for such cases simply because of the relative imbalance of knowledge between the parties.

59 I accept, however, that that does not mean that the court should depart without a look back from the more general principles of disclosure as set out, for example, in the *Harrods Ltd v Times Newspaper Ltd* [2006] EWCA Civ 294 case. It is central to an application for specific disclosure that the court look at the case as pleaded and look at the issues that have emerged.

60 However, in a public procurement case where the knowledge is very much stacked in favour of one side, with the other side in relative ignorance about the process that has taken place, it is inevitable that the pleaded case for the party who is in relative ignorance is likely to be less detailed and specific than one would otherwise look for.

61 Indeed, the claimant's lack of knowledge of how the process is conducted is the very reason for the special principles in *Roche* and, of course, the less clear the reasons are that are given, the harder it will be for the claimant to particularise its case. One must guard against complaining about a lack of particularity in circumstances by a party complaining about the process where the underlying reason for the lack of particularity is in fact a lack of adequate disclosed reasoning.

62 Of course, any disclosure order must balance the claimant's lack of knowledge with the need to avoid a fishing exercise designed simply to shore up a weak case, and, of course, any disclosure order must be proportionate and drawn as tightly, as is consistent with any obligation to give reasons or to give disclosure in support of reasons that the defendant might be under.

6 3 I accept that it is not the defendant's case that there are two different duties to give reasons, depending on whether one is providing the reasons for the decision or one is seeking to defend the procurement process at trial. The criticisms in *Lancashire Care* were, however, made in the context of a judgment after an expedited trial, where inevitably the court had a much better picture of the tender process and therefore, inevitably, had a much better view of the adequacy of the reasons that had been given.

6 4 To that extent, one perhaps must be a little careful about applying the *Lancashire Care* provisions to the slightly factually different situation of the award letter, as in this case, but that does not undermine an important point that was made by Stuart Smith J, as he then was, at para.54 in his judgment, where he accepted the proposition that he should look at why the procuring authority had awarded the scores that it did and whether this was a procurement in

which the contracting authority could not explain why it had ordered the scores, because if it were such a case it would, as he put it, fail the most basic standard of transparency.

6 5 The obligation of transparency applies as much at this stage at the stage of giving reasons as it does at a trial. The question for me is whether the *Roche* test for disclosure is made out on the facts of this case with particular reference to two matters, namely, whether the claimant shows a sufficient *prima facie* case to justify the making of an order, and second, whether absent the disclosure that is now being sought, the claimant, as an unsuccessful tenderer, is able, using the words of Fraser J in *Energy Solutions*:

> "…to decide whether to defend their rights by issuing proceedings."

6 6 On the facts of this case, it is clear that the claimant's particularised allegations in respect of the tendering process are relatively narrow, and that the broadest criticism is a lack of transparency in the process rather than as a result of any identified failing in the process itself. However, in my judgment, that is a consequence of the fact that the claimant does not have the information to assess the adequacy of the process in greater detail.

6 7 In my judgment, the claimant has been able to identify specific criticisms of question 6 and question 13 which are at least arguable. As I have identified already, in respect of question 13, it appears to be acknowledged that there was a mistake within the decision letter and in respect of question 6 it seems to me clearly to be arguable that the defendant's evaluators may have made an error of evaluation.

6 8 Whilst such alleged errors, if proved, do not lead to the assumption that the claimant will be able to prove errors in respect of other aspects of this process, it certainly means that it is more likely that the claimant will be able to make out other criticisms than it would be the case if the claimant had no particularised criticisms on the available material. It follows that in my judgment the claimant's arguable case in respect of question 6 and question 13 is capable of supporting the argument that the claimant has a *prima facie* case to seek disclosure more broadly on other issues.

6 9 But the central question, in my judgment, is whether the material before the court amounts to the adequate giving of reasons in respect of the Mitie score. In my judgment, it does not do so. I read out the answer to question five earlier in this judgment. Going back to the assessment of Mitie under question 5, it is of course true that the text in the annex to the award letter goes some way to comply with the Regulation 86 duty to show the characteristics and relative advantages of the winning score, but in fact, in a case where both the claimant and Mitie received 75 out of an available 100 marks, it goes no way to showing why it was that Mitie's score was less than perfect. The reader can, of course, discern weaknesses in the claimant's tender, since reasons are given there, but the reader is simply not informed why the score for Mitie was 75 rather than 100. There must have been some weakness in the Mitie bid for it not to have received a full score, but the readers will not know what that weakness is.

7 0 It follows, in my judgment, that there is an essential step in the reasoning for the score on the Mitie bid that is missing, namely, at least some indication as to what it could have done to receive a higher score or putting the same point the other way around, why it did not

receive full marks on that. Without knowing the answer to that question, the reader simply cannot know whether there has been some inadequacy in the process and importantly, to the defendant's criticism of the claimant's pleading, cannot plead a case on the lawfulness of the evaluations and the contract award decision. All that the claimant can do in respect of the Mitie bid is to say there is a failure adequately to provide reasons. Thus, the claimant may accept that the scoring of its own response on that particular question and other questions within the award letter was correctly scored, but that of course without law does not answer the question as to whether the contract is rightly awarded to Mitie since one cannot know that without knowing more of how Mitie's bid was scored.

7 1 If one asks the question which Fraser J asked in paragraph 299 of his judgment in *Energy Solutions* as to whether the material being sought by the claimant is "out of the ordinary for a sensibly organised procurement exercise that is conducted transparently" it seems to me that the answer is inevitably yes. The claimant cannot assess its position. This is not a transparent process unless it knows more of the reasoning behind the scoring of the Mitie bid. The mere fact that the claimant cannot assess its case without knowing more of the Mitie bid would not though be sufficient to justify a specific disclosure application under the *Roche* principles unless the claimant shows a *prima facie* case. It does do so for reasons I have given already in respect of questions 6 and 13.

7 2 In my judgment, taken together then, the criticisms of questions 6 and 13 and the broader criticisms as to the particularity of reason giving in respect of the Mitie bid, puts this case into the position of one where the claimant *prima facie* has a claim sufficient to justify a specific disclosure order and where the disclosure order that is sought may be liable to

enable it to particularise the case more fully, and to know whether it should make a larger criticism than is made already.

7 3 The defendant complains that the result of the claimant's application if successful will be that there is an automatic right to specific disclosure for a disgruntled tenderer in a regulated procurement case. I do not accept this. First of all, the claim is filtered by the claimant's need to show a *prima facie* case. The claimant does so here; it will not be the case that every claimant is able to do so. It will not be sufficient, it seems to me, simply to show a lack of transparency unless one shows – arising from that lack of transparency – some kind of *prima facie* argument that the reasoning or scoring is inadequate.

7 4 Second, of course, the claimant has to show that the reasons given are inadequate. If adequate reasons have been given within the award letter, then the claimant would simply fail in an application for specific disclosure on the basis that an early application for specific disclosure is for reasons I have given already, to be limited, only very narrowly, to the documents necessary to judge the adequacy of the reasons given.

7 5 The defendant argues that the approach taken by the claimant is likely to lead to a duty of disclosure which may be unduly burdensome and disproportionate. I disagree, at least on the application before me, the order is sufficiently tightly drawn to avoid any disproportionate disclosure.

7 6 Finally the defendant argues that since the claimant has not criticised the scoring of its own bid, apart from on questions six and 13, this does not justify an order in respect of documents relating to the evaluation of its own bid. But the difficulty with this is it seems to me both as a matter of logic – and the point has been made in the authorities to which I have referred – that the evaluation process is always a comparative process. The question is not whether each of the claimant and Mitie have been correctly evaluated, it is whether both of them have been correctly evaluated and unless one knows that one cannot, it seems to me, meaningfully make a challenge of the kind that the claimant seeks to do.

7 7 I conclude therefore for the reasons given that the claimant makes out the grounds for an order sought. I will hear any submissions on the precise terms of an order, but I hope it is apparent from the judgment that I have given that I am willing to make an order broadly in the terms that the claimant has sought on this application. That concludes my judgment.

LATER

78 This is my judgment on the first issue relating to costs, which is whether I should deal with the claimant's costs on two statements which have not been formally filed at court through CE filing. I am told they have been emailed to the court. Mr Suterwalla accepts that they have been emailed to him, so I equally accept they have been emailed to the court at, I think, 15.03, was I told, this afternoon, that is to say during the course of me giving judgment on this application. Those two additional cost statements relate to the fact that this hearing has run over to a second day, namely today, and for the costs on the adjournment application that Mr Suterwalla's client unsuccessfully made on the last occasion.

79 The summary assessment of costs by the court, pursuant to Part 44 of the Civil Procedure Rules and the guide to the summary assessment supposes that cost statements will be filed 24 hours in advance. That is to enable the other party to take instructions on the cost statement and indeed to enable the cost statement to get before the judge. On this occasion, that has not been achieved in either respect. Indeed, it remains the case that I do not have the cost statements here.

80 Mr Suterwalla argues that in those circumstances the breach of the rule should, here, be met with the claimant simply being disallowed those costs. Mr Barrett says that that is disproportionate since, in principle, his client would be entitled to those costs and the recovery of a reasonable and proportionate amount should be permitted. It would be disproportionate for the claimant to recover nothing.

81 On this occasion, although this is not always my judgment on this particular issue, I favour the position taken by Mr Suterwalla for the defendant. To have to adjourn the costs issue in order to provide for written submissions by the parties and further judicial time to be taken up on the costs issue is simply disproportionate. The figures are of course not small amounts, £4,500 in respect to the adjournment application, £5,800 in respect to the costs of today, but in reality, the preparing of written submissions and dealing with them, together with the additional use of judicial time, will rapidly make the course of action proposed by the claimant a disproportionate one. In those circumstances, in my judgment, the failure of the claimant to comply with the rule on service of the cost statements should be met with me making no order in respect of those costs and I will limit myself to the cost statement that has been served.

LATER

82 This is my judgment on the summary assessment of the claimant's costs. The costs are to be assessed on the standard basis, therefore the claimant recovers that which is reasonable and proportionate having regard to the various factors set out within civil procedure rules, any doubt as to which being exercised in favour of the paying party, the defendant. The cost statement totals £41,968 exclusive of VAT, a figure of just over £50,000 inclusive of VAT. Of course, there is nothing that the claimant can do about the VAT element, and in accordance with my usual practice, for the purpose of assessing that which is reasonable and proportionate, I disregard the VAT and then add it back in at the end.

83 The defence position is that this is both a disproportionate statement looked at in the round, as well as including unreasonable elements looked at in detail. The defence's own cost statement is significantly less than this, though as Mr Barrett points out for the claimant, that is at least in part because of the much lower hourly rates being charged by those acting for the defendant, reflecting, no doubt, the fact that the defendant can achieve those rates for its service providers in the open market. That is true, although it does not in and of itself explain the differences. There are also significantly less hours on some of the phases involved.

84 This was an important application for specific disclosure in the context of a public procurement case involving a figure of around a quarter of a billion pounds. It follows, it seems to me, that the reasonable and proportionate costs are likely to be much more significant than many other specific disclosure applications, albeit that I accept Mr Suterwalla's point that this case is not really to be compared to the largest of such cases, the *Serco Ltd v Secretary of State For Defence* [2019] EWHC 515 (TCC) case, which has been cited to me being an example of that.

85 I have looked at individual parts of the statement. I consider that it is arguable that there has been excessive use of higher rate fee earners. I also consider that there are a lot of attendances, a lot of time with attendance both on the claimant and on the opponents, rather more than I would have expected. Furthermore, some of the work on documents appears to me on the high side, and therefore, on a reasonable test, would merit a reduction.

86 I consider also that, given the nature of the application, the figure claimed is disproportionate. Putting aside for a moment the question of court fees, which is a separate issue, I consider a proportionate figure for this application for the claimant to be £35,000 exclusive of VAT. If one then adds into the figure of £35,000 the relevant VAT, one gets to £42,000, and adding the court fees, one gets to £42,275.

87 I have separately sought, in a summary way, to consider whether, if I conducted a line-by-line analysis of that which was reasonable, it would reduce the figure any further below that. Doing the best I can in the limited time available, it seems to me unlikely that it would do so, and in those circumstances, I assess the costs at £42,275.

LATER

88 This is my judgment on the defendant's application for permission to appeal. Mr Suterwalla seeks permission on the basis that an important point of law arises from my judgment, that my judgment covers essentially previously unexplored areas relating to public procurement cases and most particularly what amounts to a significant *prima facie* case to justify a specific disclosure application under the *Roche Diagnostics Limited v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC) principles, if I can call them those.

89 Mr Suterwalla contends that my decision is potentially of importance to practitioners in the field of public procurement and those involved in public procurement and that the issue

would merit further investigation at a higher level. Against this, Mr Barrett, who I did call upon given an argument about this being a case management decision, contends that this is a fact specific decision in a case where although it is true that the claimant only mounted relatively limited criticisms of specific parts of the evaluation by the defendant, there was a more general transparency and argument that was raised.

90 I certainly accept that the case is fact specific in the sense that it is unlikely that the next case will be identical to it, but I see the possibility, at the very least, from my reading of the authorities, that this is an area that has not previously been examined in any detail and where practitioners and those who work in this area would welcome some kind of clarification.

91 That said, an order for specific disclosure, in my judgment, clearly is a case management decision and I bear in mind the provisions of para.4.6 of practice direction 52A. The first and third of those considerations, whether the issue is of sufficient significance to justify the cost of an appeal and whether it would be more convenient to determine the issues at or after trial can clearly, it seems to me, be answered in the defendant's favour. The issue is significant. The cost of an appeal would not be disproportionate.

92 Furthermore, this is not an issue that would be determined at trial in any event, but I am more concerned about the procedural consequences. True, it is that no timetable would be derailed by me granting permission to appeal, but the preparations for that timetable would be considerably affected since any question of amendment, statements of case and really any questions of meaningful case management would have to await the decision of the Court of Appeal.

93 In those circumstances, I am more cautious about granting permission even if it is right, as Mr Suterwalla says, that my decision does raise an important point of principle upon which clarification would be welcome. Given its effect on the potential timing of this case and given the well-recognised desire through the authorities for these cases to be dealt with quickly, it seems to me that the appropriate decision is that I should refuse permission at this stage. I will do so, recording the fact that the defendant contends that there is a point of importance on which clarification might be sought, but I will leave it to the Court of Appeal to judge whether in fact it is appropriate to grant permission or not.