



30 July 2014

PRESS SUMMARY

Healthcare at Home Limited (Appellant) v The Common Services Agency (Respondent)
(Scotland) [2014] UKSC 49
On appeal from [2013] CSIH 22

JUSTICES: Lord Mance, Lord Kerr, Lord Sumption, Lord Reed, Lord Hughes

BACKGROUND TO THE APPEALS

The present case concerns a tendering process carried out by the respondent in 2010 in respect of the provision of medical services to health authorities in Scotland. The appellant was the existing supplier of the services in question, but was unsuccessful in a tender competition for a replacement contract. The appellant challenged that decision on the ground that the respondent had breached certain of its duties under the Public Contracts (Scotland) Regulations 2006 (SSI 2006/1), which implemented certain EU Directives. In particular, the appellant complained that: (i) the criteria in the invitation to tender were insufficiently clear; and (ii) that the reasons given for the rejection of the tender bid were unclear and lacking in detail. [18]

One of the EU Directives implemented by the Regulations is Directive 2004/18/EC of 31 March 2004, which concerns the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The Directive seeks to ensure that the award of contracts by public authorities in the member states is subject to the principles of freedom of movement of goods, freedom of establishment and freedom to provide services, and to other principles derived from those, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In particular, article 2 requires that “contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way”. Article 41 entitles unsuccessful candidates to be informed of the reasons for the rejection of their applications. The Court of Justice of the European Union (the “CJEU”) has explained that the principle of transparency requires that the award criteria for public contracts “must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers [“RWIND” tenders]) to interpret them in the same way”. [5–7]

The appellant’s case was rejected by the Outer House of the Court of Session. There, the Lord Ordinary, Lord Hodge, concluded that the award criteria met the required standard of clarity and that the reasons given by the respondent for rejecting the appellant’s tender were adequate. The appellant’s appeal to the Inner House of the Court of Session was refused. [19–23]

The issues before the Supreme Court on the appeal from the Inner House are: (i) in relation to the clarity of award criteria, whether the lower courts erred in treating the RWIND tenderer as a hypothetical construct, based on the court’s objective assessment of the appropriate standard of clarity, rather than on the basis of the evidence of witnesses as to what an actual tenderer did or thought; and (ii) whether the lower courts had erred in concluding that the reasons given to the appellants for the rejection of their tender were adequate.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Reed gives the only judgment, with which the other Justices agree. The courts below applied the correct legal test to assess the clarity of the award criteria. In these circumstances it was not appropriate for the Supreme Court to interfere with the conclusion which they reached in the light of their evaluation of the evidence. Similarly, in assessing the adequacy of reasons given to the appellant, the lower courts applied the approach laid down by the CJEU, and it is not appropriate for the Supreme Court to interfere with their factual findings.

REASONS FOR THE JUDGMENT

Standard of clarity in award criteria

When courts refer to the approach of a reasonable person or, in this case, an RWIND tenderer, they are describing an objective legal standard by reference to a hypothetical person. It follows that it would be misconceived for a party to seek to lead evidence from actual persons on how they would have acted in a given situation or what they would have perceived. [2–3]

The decisions of the CJEU and the opinions of Advocates General in a series of cases also make clear that the RWIND tenderer standard is an objective one. The relevant question is not whether it had been proved that all actual or potential tenderers had in fact interpreted the criteria in the same way, but whether the court considered that the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers. An approach which depends on evidence of the actual or subjective understanding of tenderers would undermine the principle of legal certainty and the need that any review of a tender process be carried out as quickly as possible. [7–16]

Reasons given to unsuccessful tenderers

The scope of the duty to give reasons for an unsuccessful tender is described by the Court of First Instance in *Strabag Benelux NV v Council of the European Union* (Case T-183/00). The court stated that the obligation was fulfilled if tenderers were informed of the relative characteristics and advantages of the successful tenderer and the name of the successful tenderer. The lower courts followed this approach and each concluded that the reasons which had been given to the appellant were adequate since the appellant could have been left in no real doubt as to why it had been unsuccessful, and as to the relative characteristics and advantages of the successful tenderer. [19; 23; 30]

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.shtml>