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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 3334 (Admin)

No. CO/64/2019

Royal Courts of Justice

Thursday, 17 October 2019

Before:

MR JUSTICE JOHNSON

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
DYLAN CONRAD KREOLLE SOLICITORS — Claimant

- and -

LORD CHANCELLOR — Defendant

MR ARFAN KHAN (instructed by DCK Solicitors) appeared on behalf of Claimant.

MR S. TAYLOR (instructed by Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

(Transcribed without the access to documents)

MR JUSTICE JOHNSON

1 The claimant is a firm of solicitors that seeks to challenge a decision of the Legal Aid Agency whereby its tender for a contract for the provision of legal services was rejected. The claimant has for a number of years held a legal aid franchise for housing, debt and welfare work. It has sought from the Legal Aid Agency a further franchise in these and other fields of work.

2 The procurement was governed by a document entitled "Procurement of Civil Legal Aid Services to England and Wales from 1 September 2018. Face-to-face Invitation to Tender Information for Applicants" (or "IFA" for short). The document set out a list of procurement areas for housing, debt and welfare benefits work. It said, "Below there is a list of procurement areas for the purposes of the housing, debt and welfare benefits ITT." Then there was an entry in respect of the London region which set out different procurement areas which included, so far as is relevant for present purposes, Brent and Barnet.

3 The IFA provided detailed rules for the procurement process and at 8.1 stated:

> "This procurement process is governed by this IFA which represents a complete statement of the rules of the procurement process."

It then provided for the requirements that must be satisfied by all applicants who were tendering for a face-to-face contract under the IFA. Those included the following:

> "2.35 Applicants are not required to have operational offices or family mediation outreach locations at the point of submitting a tender. Applicants are required to confirm that they will meet the relevant office requirements as part of their tender. As part of an ITT response, applicants should provide the address(es) of where they intend to deliver contract work where known at the time of tender, together with the relevant LAA account number where the applicant is a current LAA contract holder. An applicant's office must be in the procurement area for which it tenders. The LAA will validate office address details provided …
>
> 2.37 … where an applicant is unable to evidence at the point of verification that they have an office which is in the procurement area … tendered for as part of the individual bid, the LAA will reject the relevant individual bid."

4 The IFA included a section entitled "Verification of face-to-face contract tenders", which states at 7.3:

> "It is the applicant's sole responsibility to ensure they provide us with all the necessary information to evidence they meet the relevant verification requirements no later than 11.59 p.m. on 20 July 2018."

5 The tender documents were submitted by the claimant on 9 November 2017. On 21 March 2018, the claimant was informed that it had been awarded the contract subject to verification. On 19 July 2018, the claimant submitted verification evidence. That evidence

suggested, as it happens correctly, that the claimant's office address was in Hendon as opposed to Brent - Hendon, of course, being in the London Borough of Barnet. Accordingly, the Legal Aid Agency responded by a message sent on 1 August 2018 in which they said:

> "… We did not receive from you prior to the verification deadline of 23.59 of 20/7/18: … (b) confirmation of your office address: your letterhead suggests an office in NW4 3LH, but your tender indicated an address in NW9 8UA. Please clarify."

The claimant responded by a message sent on 13 August in which it said:

> "… our office is 421 Hendon Way, Hendon, Central London, NW4 3LH. The other postcode is for our previous office which we moved from to our current address in December 2017."

6 The Legal Aid Agency responded by letter dated 11 October 2018 in which it said:

> "… you have been awarded a contract to deliver work in the Brent procurement area. Your office address however is in the London Borough of Barnet. In our letter of 25 September, we asked you to provide us with details of an office from which you will deliver contract work in these categories of law in the London Borough of Brent. Our records show that this letter has not been opened and, in any event, we do not have evidence to show that you have an office in the correct procurement area to deliver the categories of housing, debt and welfare benefits. Given the time that has already elapsed since our letter of 25 September, we are prepared to allow you a final period to provide us with evidence that you have an office in the Brent procurement area. Please provide us with that evidence within ten working days of this letter (i.e. by 23.59 on Thursday, 25 October)."

7 There was no response by that deadline and the Legal Aid Agency then sent a letter dated 26 October 2018 in which they said:

> " … We note from our records that our messages of 25 September and 11 October have not been read. We are now writing to inform you that, as you had not provided the required information, the offer of a contract in the categories of housing and debt and welfare benefits has been withdrawn."

8 On 3 December 2018, so more than a month after that decision letter, the claimant sent a pre-action letter of claim to which the defendant responded on 20 December 2018. The claimant then issued proceedings claiming judicial review of the outcome of the procurement exercise. By its initial grounds of claim, it contended, firstly, that the decision was unfair or unreasonable, because the claimant had been successful in the same procurement exercise in respect of other categories of provision. Secondly, it was said that the process failed to comply with principles of natural justice, because the Legal Aid Agency had not notified the claimant that it was not within the procurement area and had instead simply rejected the bid outright. Thirdly, it was said that the decision was a breach of a legitimate expectation, because the claimant had been successful in respect of other bids in the same process. Finally, it was said that the decision was irrational on *Wednesbury* grounds.

9 The defendant has filed an acknowledgement of service in which it took issue with each of those four grounds. But the defendant's overarching point is that there was a clear requirement in the procurement exercise that the successful bidders must have an office within the relevant procurement area and that the claimant did not have an office within the relevant procurement area. That, in itself, was an end of the matter.

10 On 12 August 2019, Sir Wyn Williams refused permission to claim judicial review. He said this:

> "At para.4 of the acknowledgement of service, the defendant sets out three bases upon which it is said this claim is bound to fail. Thereafter each of the points made by the defendant is developed. Despite the length and complexity of the grounds of claim, I am firmly of the view that the points made by the defendant are very likely to defeat this claim. Accordingly, I have no option but to refuse permission."

11 The claimant renews his application to seek permission to bring a claim for judicial review and also seeks substantially to amend the grounds for claiming judicial review. The amended grounds are as follows:

> "Ground one. The decision to withdraw the offer was unlawful in that (a) the decision is *ultra vires* (s.12 of the Legal Aid Sentencing and Punishment of Offenders Act 2012); (b) the LAA fell into error in reading clause 2.37 of the Information for Applicants without regard to clauses 2.38 to 2.40 of the 2018 contract specification as required by clause 1.23 of the IFA; and (c) the LAA failed to comply with its duty to make reasonable enquiries which may have led to a successful tender.
>
> Ground two: The decision to withdraw the offer was procedurally irregular in that the LAA sent relevant email correspondence to the wrong email address which prejudiced the claimant in the tender process.
>
> Ground three: The decision to withdraw the offer was *Wednesbury* unreasonable in that (a) the LAA withdrew the offer on the basis that the claimant had moved from the address that had been provided within the procurement area and, therefore, did not have a permanent presence within the procurement area; and (b) in the current IFA for a bid in November 2019 for housing and debt services and HPCDS services in England and Wales under the same contractual specification used in the claimant's case, the LAA permits applicants to bid by providing an outreach service even where they do not satisfy the requirements of the permanent presence in the procurement area."

The claimant relies on a detailed skeleton argument in support of those grounds.

12 The defendant objects to the application to amend the grounds of challenge and provides in its skeleton argument a summary response as follows:

> "Ground one is time barred. It is an entirely new claim based on different legislation and contractual documents that the claimant seeks to bring almost 12 months after the impugned decision. Ground one is also misconceived. The cited provisions of LASPO relate to an individual's

right of access to legal aid. The rejection of the claimant's tender has no bearing whatsoever on the access to legal aid of individuals in the London Borough of Brent. The claimant simply lost out to other providers who met the bid criteria and will provide the services in Brent.

As to clause 2.38 to 2.40 of the contract specification, the contract only applies once a tender has been successful and sets out the contractual rules on maintaining a permanent presence in the procurement area. By contrast, the IFA sets out the requirements that must be met to be awarded a contract. The IFA was clear that tenderers for the Brent procurement area without an office in Brent at point of verification would be rejected. In any event, the claimant's suggestion that clause 2.40 - which states, 'Outreach services under para.238 to 239 may not be taken into account in satisfying the requirements for permanent presence' - actually means the opposite (that the possibility of outreach may be taken into account) is untenable.

Ground two repeats an objection to the use of ITT 445, the defendant's e-messaging route used for generic contracts related to communications. Other tender communications, including the award decision letter of 21 March 2018 and the withdrawal letter of 26 October 2018, were sent by the same route and it was the tenderer's responsibility under s.3.5 of the IFA to check for messages regularly.

Ground three is based on the unarguable contention that, because the defendant's IFA in a different 2019 tender for housing and debt services permitted tenderers to qualify with an outreach service without having a permanent presence in the procurement area, it should qualify in this tender. In fact, each tender is different. In the 2017 tender, for the category of housing, debt and welfare benefits, which is the subject of this claim, an in-area office was required. If the claimant's objection is to the office requirement for this category, it has known about that since the IFA was published in 2017 and any challenge now is time barred.

Finally, it appears that the claimant seeks to change its argument as the application … argue the relevant limitation period is three months under CPR 54.5. If the claimant is right, the case should still have been brought promptly after 26 October 2018 and it was not."

13 In my judgment, the claim for judicial review, whether by reference to the grounds as originally pleaded or by reference to the proposed amended grounds, has no arguable prospect of success, essentially, for the reasons given by the defendant and adopted, so far as the original grounds were concerned, by Sir Wyn Williams in his refusal of the application for permission to claim judicial review on the papers. The overarching point remains that the IFA was clear that an office within the procurement area was required and the claimant did not provide evidence of having an office in the procurement area and, in fact, did not have an office in the procurement area. That simple fact in and of itself was fatal to the application.

14 The claimant relies on the 2018 Standard Civil Contract Specification. In my judgment, that document was not in any way incorporated in the IFA, but, even if it was, it does not change the basic position that I have outlined. The contract specification is, as one would expect, consistent with the provisions of the IFA and, in particular, para.2.34 provides as follows,

> "To provide a permanent presence, you must have a permanent (i.e. continuously occupied by you) office in the procurement area."

The claimant did not have an office in the procurement area and it was not, therefore, able to comply with that requirement.

15 The claimant draws attention to para.s.2.38 to 2.40 under the heading "Outreach Services", which state:

> "in providing controlled work that is not gateway work, you must attend your client in the office or other permitted location named in the schedule unless the controlled work is (a) provided by any outreach services specifically authorised by a schedule or other contract issued by us …
>
> 2.40 Outreach services under paras.238 to 239 may not be taken into account in satisfying the requirements for permanent presence."

16 In my judgment, even if this contract were incorporated into the IFA, it would not advance the claimant's case. That is because the possibility of providing work by an outreach office only arises where that has been specifically authorised and does not, in any event, replace the requirement to have a physical presence in the procurement area.

17 So far as the proposed amended grounds of challenge are concerned, I do not agree that it is arguable that the defendant's decision was *ultra vires* s.12 of the Legal Aid, Sentencing and Punishment of Offenders Act. That provision concerns determinations as to whether an individual qualifies for civil legal services. Section 9(1) states:

> "Civil legal services are to be available to an individual under this Part if—
>
> > (a)they are civil legal services described in Part 1 of Schedule 1, and
> >
> > (b)the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination)."

18 The decision that is here under challenge has nothing whatsoever to do with the determination of whether any particular individual qualifies for the provision of civil legal services, nor does it have the effect that an individual might find it impossible to access civil legal services. I am told that there are five other solicitors' offices who have been awarded contracts in the relevant area of work within the London Borough of Brent and, of course, there are many more within the London region more generally.

19 The claimant relies on the decision of the Supreme Court in *R (Public Law Project) v Lord Chancellor and the Secretary of State for Justice* [2016] UKSC 39. In that case, Lord Neuberger PSC said at [37]:

> "The exclusion of individuals from the scope of most areas of civil legal aid on the ground that they do not satisfy the residence requirements of

> the proposed order involves a wholly different sort of criterion from those embodied in LASPO and articulated in the 2011 paper."

20 The claimant argues that this case is *a fortiori* in that the purpose of the IFA is to remove legal aid on the basis of residence of the service provider through a widening of the scope of the LASPO contrary to its objective, which is to facilitate access to justice. I do not consider there is any merit in that argument. The purpose of the IFA has nothing to do with the removal of legal aid. It was to provide a procurement exercise to ensure that service providers across a range of fields of law and in different regions were awarded contracts and, as I have said, five were awarded contracts in the Brent area. There is no question of removing any individual's right to access civil legal services.

21 Ground two was concerned with the method by which the defendant communicated with the claimant. Even if there were any merit in the substantive ground, it would, in my judgment, be incapable of affecting the overall outcome in this case, because the claimant simply could not comply with the procurements. But, in any event, as I have said, the IFA put the responsibility for checking communications on the claimant and, in any event, the relevant requirement as to having an office in the relevant procurement area was explicit in the IFA itself. I accept that the claimant did not read the letters that drew attention to the deficiencies in the application, but the the claimant was anyway never going to be able to satisfy that requirement.

22 So far as the third proposed ground of challenge, *Wednesbury* unreasonableness, is concerned, in my judgment, there is nothing unreasonable at all in the defendant's decision. Indeed, it was obliged to reach the decision it did under the terms of the IFA. The fact that the claimant has been successful in respect of other bids with different requirements is nothing to the point.

23 For those reasons, I consider that the claim for judicial review, whether in the original grounds or the proposed amended grounds, is not arguable.

24 There is a further point relating to the claim which is that the original decision was, as I have said, made on 26 October 2018, and the judicial review claim form was issued in the court office on 3 January 2019. There is a potential issue as to whether the time limit is the 30-day time limit imposed by Regulation 92(2) of the Public Contract Regulations 2015 and applied by Civil Procedure Rule 54.5(6) or whether it is the ordinary three-month limit for judicial review augmented by the requirement for promptness.

25 I am satisfied that the relevant start date was that of 26 October and, although the claim was alighted on the pre-action correspondence, that did not amount to any different or separate decision. Even if the appropriate time limit is three months, the claimant has not brought these proceedings promptly given the particular context, that is a challenge to a procurement decision. On any view, they ought to have been brought well before January 2019.

26 Accordingly, I separately refuse permission on the ground that the claim has been brought out of time.

LATER

27 The defendant seeks its costs of the acknowledgement of service. Sir Wyn Williams awarded the defendant its costs of preparing the acknowledgement of service in the sum of £2,238. I am satisfied that the defendant should have its costs of the acknowledgement of service. I am told by Mr Taylor that, in fact, those costs were slightly less and that they are sought in the sum of £2,046 and I adjust the order for costs accordingly.

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