IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

TECHNOLOGY & CONSTRUCTION COURT (QBD) HT-2019-000039

[2019] EWHC 2727 (TCC)

Rolls Building
7 Rolls Buildings
Fetter Lane London,
EC4A 1NL

Tuesday, 9 July 2019

Before:

MR JUSTICE STUART-SMITH

B E T W E E N :

MARINE SPECIALISED TECHNOLOGY LTD Claimant

- and -

SECRETARY OF STATE FOR DEFENCE Defendant

Ms McCredie QC appeared on behalf of the Claimant, instructed by DTM Legal.

Mr Suterwalla appeared on behalf of the Defendant, instructed by the Government Legal Department.

J U D G M E N T

MR JUSTICE STUART-SMITH:

1 This is an application for specific disclosure in a challenge by the Claimant to a procurement by the Defendant Secretary of State for a framework agreement for the delivery of platform support to maintain the capability of Ministry of Defence boats. This application for disclosure has been listed for hearing in the context of an application by the Defendant to lift the automatic suspension that is to be heard on 30 July 2019. That suspension arose upon the Claimant issuing its claims on 7 February 2019 and 24 April 2019 (amended on 22 May 2019).

2 This is an unusual application in two respects, and an unusual case. The first is the admitted breach by the Defendant, of which the Defendant has known since January 2019, in publishing the Claimant's important confidential pricing information for a previous procurement and subsequent contract with the Claimant for similar services. The second respect is that the admitted breach is now to be considered in the context of an ongoing procurement. Each of those factors affect the Claimant and the Defendant in different ways. However, there is a common interest between the Claimant and the Defendant to know, as soon as possible, whether or not the publishing of this information has actually had any real consequences. Because if no one of significance has accessed the information, then a lot of heat goes out of this case, certainly in the context of the procurement challenge.

3 I have reviewed the chronology carefully, both before coming into court, and again while I have been listening to submissions. And it is my view, without going into any greater detail, that there is a surprising lack of explanation about the time taken for the Defendant to get to a position where it was able to make any useful contribution to this process at all. And as I indicated to Mr Suterwalla, it seems to me to be very surprising that a Department of State, which admits that it has blundered in the way that it clearly did, was still in March and April apparently liaising with other departments to find out what had happened, and indeed to find out whether anything significant had come of the admitted breaches.

4 The only criticism that is made of the Claimant is that that it has not sufficiently identified what it wants since either the end of May or into June. I have read all the correspondence before coming into court, and in my judgment, it is quite clear that the Claimant was someone on the outside wanting to know what had happened and having to rely upon the Defendant effectively to allay those fears. And so, although I accept that there were letters written, particularly on the 12th June 2019, saying, "What exactly do you want?", I also accept, having read all of the correspondence, that there is force in Ms McCredie's submission that the Claimant was, as I put it, on the outside and not fully able to understand what had happened.

5 So, I come to this application for early disclosure. It is an application for early disclosure in the context of a procurement dispute. The principles in relation to early disclosure in the context of a procurement are of course different from normal early disclosure applications; and for the present purposes I need only refer to *Roche Diagnostics Limited v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC (TCC) 933, and to acknowledge the other authorities which have considered the same problems and come to the same conclusion as that expressed by Mr Justice Coulson (as he then was) at paragraph 20 of *Roche*.

6 The Claimant seeks the opportunity for its experts, Mr Sykes, Mr Raske and Mr Coyne, to inspect the data, which it claims is available from Google Analytics and other data sources, in respect of all the websites upon which the Claimant's confidential information has been

published by the Defendant. That material is sought by the Claimant because they say that it will, or may, reveal whether or not third parties accessed the Claimant's confidential information and, if so, their identity and the timing of any such access. There is sensitivity on the part of the Defendant about allowing access to government websites and their analytical data, which it explained in witness evidence filed in advance of this hearing.

7 I think Mr Suterwalla is right to treat disclosure as a two-stage exercise, where you can call the first stage disclosure, and the second stage inspection. I am bound to say that if this were a paper disclosure exercise, which is the analogy that one normally resorts to, there would be no question but that the Claimant should be entitled to inspect documents, not least because of the hearing that is coming up on the 30th July. So, I come to this position or conclusion: that there are compelling reasons to bring this spat, for that is what it is, to an immediate head. By calling it a "spat", I am not belittling the importance to the Claimant, nor am I belittling the irritation of the additional burdens that may be imposed upon a government department which, as its evidence shows, is subject to resourcing constraints and wishes to bring its procurement to a conclusion for reasons which are relatively standard. And, once again, I do not by mean "relatively standard" in any derogatory sense, but the standard reasons are the wish to get a better contract into place, make financial savings, and provide a better service to the military services who protect us and the country.

8 That said, as I have said, I think there are compelling reasons to bring this to an immediate head. I think it is unsatisfactory that MST, who do not as a company have particular IT resources, should be left on the outside in the context of what is going on at the moment. For that reason, it seems to me that the approach to be adopted is to take the categories of data referred to by the Claimant and that the Defendant has indicated exist and to order that there should be inspection / interrogation in the ways proposed by the Defendant in the manner proposed, and with the protections allowed for, by Mr Storrar and Mr Moore, coincidentally I think at paragraphs 54 and following of each of their statements. In addition, the Claimant's experts are to agree to the usual confidentiality undertakings before commencing their inspection.

9 The Defendant sought its costs of this application against the Claimant on the indemnity basis. I take the view that what information the Claimant has been searching for was clear from the outset. There was a compelling need from the outset for the Defendant to find out whether the Claimant's information had been accessed and if so, by whom. That nettle had not been effectively grasped by the Defendant. I accept that the issues relating to this application were iterative and that inspection was not referred to in the initial letter from the Claimant to the Defendant. It is arguable that the Claimant could have been quicker in responding to correspondence from the Defendant. But I do think there is substance in the submission that this is a highly unusual case, because the Defendant knew it had breached confidentiality and that as a procurement case it should have been dealt with more quickly. I do not see a recognition of that or any urgency from the Defendant in the papers. The end result is the Claimant was successful and therefore the Defendant should pay its costs on the standard basis. The Defendant relied on *Serco Ltd v Secretary of State for Defence* [2019] EWHC 515 (TCC) in seeking that the Claimant pay indemnity costs. Whilst this case is close to the line, it is not a *Serco* case. The Defendant's submissions put across the degree of difficulty perceived by the Defendant. There was no deliberate obstruction or obfuscation. This is therefore not a case where indemnity costs should be paid.

10 The Claimant claimed costs of and occasioned by the application issued on 3 May 2019 in the sum of £91,593.50. Those costs are summarily assessed in the sum of £75,000 and are to be paid by the Defendant on or before 4:00 p.m. on 23 July 2019.

CERTIFICATE

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This transcript has been approved by the Judge.