PPP AND PFI

Supreme Court rules on discovery in public procurement cases

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In September the Supreme Court considered discovery applications in the context of procurement litigation in the case of Word Perfect Translation Services Limited v Minister for Public Expenditure and Reform.

Discovery in judicial review proceedings is not typical. It is, however, a feature of procurement cases (which are a form of judicial review). In procurement cases, applicants are in a position of information deficit; they often have little information to go on prior to issuing proceedings. Accessing discovery materials relating to the contracting authority's decision-making process and rival tenderers' bids therefore can provide detailed and necessary insights into the procurement processes undertaken by awarding authorities and, on occasion, unearth additional grounds of challenge to the applicant.

The issue is to ensure that the right to discovery is balanced with the rival tenderers' interests in protecting their commercially sensitive information. Some practical takeaways from the judgment are:

- **General principles:** it is necessary for the requesting party to show, *by reference to the pleadings*, that documents sought are **relevant** and **necessary**. Main principles are set out at para. 29 of BAM PPP PGGM Infrastructure Cooperatie UA v NTMA and Minister for Education and Skills, with the most recent general statement of law set out in Tobin v Minister for Defence.
- **Defending an application:** however, it is open to the requested party to argue that there is some **countervailing factor** that should lead the Court to conclude that disclosure of particular material is not necessary. For example, the material might contain **confidential information** (in particular, information that is confidential to a third party).
- **Confidentiality:** the fact that documentation may contain confidential information does not, of itself, provide a reason for preventing its disclosure but it is **a factor that the Court can take into account** in determining either to decline disclosure or to put in place measures to protect the confidential information (unless its disclosure should become absolutely essential).
- **Proportionality:** there is a balance to be struck between the extent to which ordering discovery of a particular category of documents may give rise to the disclosure of **confidential** information and the extent to which the information may be important to **a just and fair resolution of the proceedings**. It is open to a requested party to argue that the discovery of particular documents may be **disproportionate** to their likely utility to the fair resolution of the proceedings.

Possible mechanisms for balancing the rights of the parties

- **Confidentiality rings:** where a confidentiality ring is in place, the confidential documents and information in question are ordinarily made available in confidence only to the parties' legal advisors (and, for example, technical experts, where relevant). Irish courts have used confidentiality rings but the Court understood that they had not yet been implemented in Ireland in the context of public procurement (though they had in England and Wales).
- **An iterated approach:** documents containing the confidential information in question are made securely available at the trial but not disclosed unless the trial judge comes to the conclusion that disclosure is truly required in the interests of justice. The underlying logic is that, as the case develops at trial, it may be much easier for the trial judge to reach a detailed and considered view as to whether some or all of the documents in question are truly important to the just and fair resolution of the proceedings. The Court referred to this as an "iterated approach".

What about discovery in procurement proceedings?

There is no special rule for discovery in procurement proceedings. However, **application of the general rules may be somewhat different in procurement proceedings** compared to other proceedings that do not involve the same level of confidential information. Issues about the disclosure of confidential information are likely to loom more largely, but that is only because of the

nature of the case rather than the need to have *different rules*.

Interestingly, the Court noted that the extent to which adequate reasons for the result of the procurement process have been given may be relevant. The judgment states that "*it may breach the requirement that there be an effective remedy if a party obtains very limited information about why the result went the way it did and is then told that it cannot have discovery because it has not put forward a credible basis for suggesting that there was anything wrong with the procurement process*". In this case, the Court directed discovery in respect of those areas where no reason for the awarding authority's decision was given (albeit without revealing sensitive commercial data submitted by competing parties).

The need of a challenger to obtain information for the purposes of substantiating its claim will not necessarily trump the need to protect competitors' confidential information; likewise, the need to protect such information will not always trump an assertion on the part of the challenger of the relevance and necessity of the disclosure sought.

Practical solutions

In its conclusions, the Court considered a practical way forward:

- The Court suggested that the approach in appropriate procurement proceedings should be to direct immediate discovery of documents that are relevant and which either do not involve confidentiality or, where it is clear that the disclosure of confidential information will be required, it is left to the trial judge to determine whether further disclosure may be necessary.
- Where an "iterated process" is required to achieve a balance between the competing interests of effectiveness and confidentiality, a speedy resolution would not be achieved by a series of separate interlocutory applications for discovery. Any second round of additional discovery should therefore be left to the judge conducting the full hearing.
- All documents in respect of which it is appropriate to adopt an iterated approach should be the subject of an affidavit sworn contemporaneously with the main affidavit of discovery. That additional affidavit should not be handed over at that time; instead, it should be available in court (together with the documents referred to in it) so that there can be immediate disclosure of any materials which the trial judge directs. (This should include unredacted copies of any documents in respect of which a redacted copy is made available at this stage.)

Providing as it does both a detailed consideration of how general discovery principles apply to procurement proceedings, along with practical solutions on how to expeditiously manage the challenges involved, this judgment provides useful guidance to practitioners. It also is a reminder of the importance of striking the correct balance in providing reasons to tenderers who have been unsuccessful in a procurement process.

KEY CONTACTS

Aaron Boyle
Partner
+353 1 920 1213
aaron.boyle@arthurcox.com

Joanelle O'Cleirigh
Partner
+353 1 920 1650
joanelle.ocleirigh@arthurcox.com

Andy Lenny
Partner
+353 1 920 1140
andy.lenny@arthurcox.com

Ciara Dooley
Associate
+353 1 920 1855
ciara.dooley@arthurcox.com

Peter Woods
Associate
+353 1 920 1659
Peter.Woods@arthurcox.com

Sinéad Flanagan
Associate
+353 1 920 1372
sinead.flanagan@arthurcox.com