



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

BETWEEN:

CENTRAL SURREY HEALTH LIMITED

Claimant

and

NHS SURREY DOWNS CLINICAL COMMISSIONING GROUP

Defendant

PARTICULARS OF CLAIM

I. The Parties

1. The Claimant is a private limited company engaged in the provision of, *inter alia*, a wide range of adult community health services in the areas of mid and north west Surrey, and children's National Health Service ("NHS") community services across the whole of Surrey.
2. The Defendant is an NHS Clinical Commissioning Group ("CCG") established under Chapter A2 of the National Health Service Act 2006, with responsibility for a population is over 305,000 and an annual commissioning budget of over £360 million. It is a contracting authority as defined in regulation 2 of the Public Contracts Regulations 2015 ("PCR15").

II. Factual background

3. By Contract Notice Ref 2017/S 196-403007 published in the Official Journal of the European Union ("OJEU") on 9 October 2017, the Defendant sought expressions of interest in a contract to provide Adult Community Services in the Defendant's area of responsibility for an initial

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term of three years, with the possibility of extension for a further two years (the “**Contract**”). The Contract Notice (Section II.1.5) estimated the lifetime value of the Contract at GBP 102 500 000.000 excluding VAT. The Contract Notice (Section IV.1.1) stated that an open procedure would be deployed.

4. The Claimant has been the main provider of Adult Community Services in the Defendant’s area of responsibility since 2006 pursuant to a contract dated 30 September 2006 (as subsequently varied to extend the contract term from 1 April 2009 and then from 1 April 2012 and 1 October 2012), and a further contract commencing 1 February 2013 (as subsequently varied to extend the term from 1 April 2018 to 30 September 2018). The majority of the services currently provided by the Claimant to the Defendant are similar to those required under the Contract, although the Contract anticipates a degree of service transformation over its lifetime.
5. The Defendant hosted a market engagement event prior to publication of the Contract Notice on 24 July 2017, which was attended by a selection of at least 13 public and private sector healthcare organisations, including the Claimant.
6. The Claimant initially expressed an interest in bidding for the Contract by an informal, verbal communication to the Defendant in or around early October 2017. To the Claimant’s knowledge, none of the other organisations which attended the market engagement event on 24 July 2017 similarly expressed an interest or went on to submit a bid to the Defendant in respect of the Contract.
7. Pursuant to a Non-Disclosure and Exclusivity Agreement dated 2 November 2017 and Heads of Terms for proposed Joint Working in relation to the provision of Adult Community Services in the Surrey Downs area dated 22 November 2017, the Claimant agreed to submit a bid for the Contract in consortium with a number of other health care



providers, namely, (i) Epsom and St Helier ~~University Hospitals~~ NHS Trust (“**ESth**”), (ii) GP Health Partners Limited, (iii) Dorking Healthcare Limited and (iv) Surrey Medical Network Limited. The consortium, including the Claimant, referred to itself as the “**IDEEA Partnership**”.

8. On 27 November 2017, the IDEEA Partnership, including the Claimant, submitted a timely, compliant tender for the Contract (the “**Consortium Bid**”).

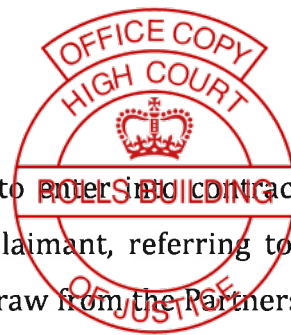
9. The service solution proposed in the Consortium Bid relied heavily on the capabilities of the Claimant and its involvement in the IDEEA Partnership and the Consortium Bid was prepared on the basis that the Claimant would provide the majority of the service delivery capability at least at the outset of the Contract. In particular, without limitation, the Consortium Bid relied upon the Claimant to provide:
 - (i) in the region of 550 staff required to deliver the Adult Community Services, with the IDEEA Partnership itself employing just less than 10 staff in management roles, to operate the partnership day-to-day (excluding the IDEEA governance board comprising the CEOs and Executive Directors of the IDEEA partners);
 - (ii) know-how and experience in the effective management of that staff and patients, built over the last 12 years, in the provision of Adult Community Services;
 - (iii) know-how of clinical leadership and provision of Care Quality Commission-registered managers to deliver a risk-free service to patients within the unique community services environment;
 - (iv) a proven and a consistent track record of clinical delivery having achieved a ‘good’ overall rating from the Care Quality Commission and a specific ‘outstanding’ rating for the community hospitals as part of the overall rating;
 - (v) a tried and tested system-wide patient record and information management system that would be operational on day one of the

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Contract, including the fully integrated ~~IT solution tailored~~ for an Adult Community Services provision;

- (vi) a tried and tested know-how of systems, tools, policies and processes to facilitate compliance with statutory and regulatory, quality, governance and patient risk management matters as well as community-based reporting requirements;
 - (vii) a well-established infrastructure, including a number of premises to be used for the delivery of services under the Contract, clinical and non-clinical equipment, an established materials supply chain, back office support functions such as HR, and existing third party service contracts for non-clinical services, such as IT and telephony.
 - (viii) know-how and practical experience of successfully transitioning patient information and clinical services following the successful award of the North West Surrey Adult Community Services and the Surrey-wide Children's and Families Services contracts awarded to CSH on 1st April 2017 by the North West Surrey and Guildford and Waverley CCGs respectively; and
 - (ix) stable and trusting relationships with other regional partners such as local authorities, district and borough councils and the third sector.
10. By letter dated 6 February 2018, the Defendant informed EStH that the Consortium Bid had been successful and that the Defendant proposed to enter into the Contract with the IDEEA Partnership subject to the Condition Precedent, *inter alia*, that the Defendant be satisfied with the contractual joint venture arrangements in place between the members of the IDEEA Partnership.
11. From late February until early July 2018, the Claimant sought to engage constructively with the other members of the IDEEA Partnership to agree a mutually acceptable contractual joint venture arrangement. By letter dated 12 July 2018, the other members of the IDEEA Partnership



informed the Claimant of their intention to enter into an actual joint venture arrangements that exclude the Claimant, referring to a desire allegedly evinced by the Claimant to withdraw from the Partnership. The Claimant has since repeatedly clarified – including in letters to the other members of the IDEEA Partnership dated 13 and 18 July 2018 – that it has not at any relevant time intended to withdraw from the IDEEA Partnership, nor has it by any act or omission to be taken to have evinced any such intention.

12. In the course of a meeting on 19 July 2018, Colin Thompson of the Defendant informed Bill Caplan and Steve Flanagan of the Claimant that the Defendant was conducting due diligence and that, whilst he was aware that any alternative option would be a variation to the accepted Consortium Bid, the Defendant was considering various options for taking forward the award of the Contract, including proceeding to award to Contract with the other four members of the IDEEA Partnership, excluding the Claimant (the “**Reduced IDEEA Partnership**”). It was suggested by Colin Thompson that he was not prepared to mediate a deal between the Claimant and the Reduced IDEEA Partnership and that any challenge to the Defendant's proposed course of action may impact negatively on any future bids submitted to the Claimant by the Claimant. Further, it was stated by Colin Thompson (in a meeting also attended by Richard Nicholson) that, as the Defendant was part of the wider Surrey Heartlands region (in which the Claimant also held its other two contracts, namely North West Adults Community Services and the Surrey-wide Children's and Families contract), the Defendant would not expect the Claimant to pursue legal proceedings.
13. By letter to the Defendant dated 26 July 2018, the Claimant explained the operational, legal and financial risks of awarding the Contract to the Reduced IDEEA Partnership.

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14. By letter of 30 July 2018, the Defendant informed the Claimant of its intention to enter into the Contract with Reduced IDEEA Partnership, subject to the completion of a satisfactory due diligence process by on or around 17 August 2018. The details of the specific considerations and criteria being applied by the Defendant in the course of that due diligence process were not at any stage shared with CSH.
15. These proceedings were issued on 10 August 2018. The Defendant had not entered into any Contract with the Reduced IDEEA Partnership at that time.

III. Legal framework

16. The Claimant is an economic operator within the meaning of regulation 2(1) PCR15.
17. Pursuant to regulation 89(1) PCR15, the Defendant owes the Claimant a duty to conduct the Procurement and award the Contract in accordance with regulations 74-76, including the principles of transparency and equal treatment enshrined in regulation 76(2) PCR15.
18. Pursuant to regulation 91(1) PCR15, any breach of the aforementioned duty is actionable by the Claimant in these circumstances – i.e. where the Defendant's breach of duty risks causing the Claimant loss and damage.

IV. The Defendant's breach of duty

19. By purporting to award and/or enter into the Contract to the Reduced IDEEA Partnership without conducting a fresh procurement procedure (initiated by the publication of a fresh Contract Notice) in circumstances where the offering of the Reduced IDEEA Partnership *necessarily* involves substantial modification/material change to the originally accepted



Consortium Bid, the Defendant has breached its loss and/or duties, in particular:

- a. the principles of transparency and equal treatment; and/or
 - b. regulation 75(1) PCR15 requiring new contracting opportunities to provide social and other sector specific services as described in Schedule 3 PCR15 having a value of £615,278 or more to be advertised by means of an appropriate Notice in the OJEU.
20. The Claimant is not aware of the details of the solution proposed to be delivered by the Reduced IDEEA Partnership. Pending further disclosure, information and evidence, the best particulars that the Claimant can presently provide of the substantial modifications/material changes to the original Consortium Bid that would be necessitated in a Contract between the Defendant and the Reduced IDEEA Partnership are as follows:
- a. loss of the Claimant's experience, know-how and expertise (both in terms of clinical leadership and front-line) in the delivery of Adult Community Services, including an effective Out of Hours community service, in the Surrey Downs area;
 - b. loss of the service delivery capacity capable of provision by front-line staff employed by the Claimant;
 - c. loss of ability to rely on the Claimant's operational system-wide patient record management system and the associated IT integrated infrastructure for the Surrey Downs area, and the resultant need to devise, propose and procure an alternative system by the Service Commencement Date of 1 October 2018;

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- d. loss of the systems, policies and processes critical to a safe service delivery and patient care which would otherwise have been available from day one of the Contract;
- e. Loss of statutory and regulatory reporting capability required to evidence that the contract is performing in accordance with national and local operational standards, quality indicators and service level indicators;
- f. loss of infrastructure and equipment including premises, clinical and non-clinical equipment, the benefit of an established and trusted supply chain, back office functions such as HR and third party services contracts, and the resultant need to seek additional monies and conduct a fully compliant procurement process for the required goods and services in line with PCR15;
- g. Loss of practical experience of successfully mobilising and transitioning similar Adult Community Services (*cf.* North West Surrey Adults Community Services contract)
- h. changes to the employment arrangements of the Claimant staff that currently provide Adult Community Services in the Surrey Downs area and which (it was proposed) were to continue under the terms of the Consortium Bid. It is anticipated that, in the event of a Contract with the Reduced IDEAA Partnership, these Claimant staff would transfer to EStH, with attendant disruption to working and management arrangements; and
- i. changes to the pricing/cost in the Consortium Bid driven by increases to the wages of staff transferring from the Claimant to EStH in accordance with the London Higher Cost of Living Allowance – Agenda for Change pay scale. The Claimant estimates that these additional costs are likely to be in the region of £2.5 to

£3 million per annum (subject to inflationary increases throughout the lifetime of the Contract).



V. Relief including loss and damage

21. By letter of 16 August 2018, the Defendant has confirmed that it has not yet entered into a Contract with the Reduced IDEEA Partnership. The Defendant's ability to enter into such a Contract has been provisionally suspended by the issue of this claim pursuant to regulation 95(1) PCR15. On this basis the Claimant intends to pursue a non-monetary remedy in the first instance, but reserves the right to amend these Particulars of Claim to include further particulars of monetary loss in the event that the regulation 95 suspension is lifted.
22. Absent the Defendant's aforementioned breaches of duty, the Claimant would have been awarded the Contract (as part of the original IDEEA Partnership); alternatively, would have benefited from a further opportunity to compete for the Contract in a fresh procurement procedure, either on its own or as part of a consortium other than the IDEEA Partnership.
23. By reason of the aforementioned breaches of PCR15, the Claimant will suffer loss and damage in the event that the Contract is awarded to the Reduced IDEEA Partnership. Such loss and damage will take the form of, *inter alia*, loss of the profit that it would have made on the Contract and/or loss of a chance to make profit on that contract and/or wasted bid costs.
24. The Claimant claims the relief set out in the prayer below.

AND the Claimant claims:



- (1) An order prohibiting the Defendant from awarding the Contract to the members of the Reduced IDEEA Partnership or any of them;
- (2) An order mandating the Defendant to award the Contract to the IDEEA Partnership (including the Claimant) or, in the alternative, mandating the Reduced IDEEA Partnership to appoint the Claimant as its Mandatory Material Sub-contractor in the delivery of the Services pursuant to the Contract;
- (3) In the alternative to (3), an order mandating the Defendant to carry out a fresh Procurement for the Contract in compliance with the requirements of PCR15;
- (4) In the alternative to (3) and (4), damages in an amount to be assessed;
- (5) Interest on (5) pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period as the court deems fit;
- (6) Costs;
- (7) Such further or other relief as the court deems fit.

Statement of truth

The Claimant believes that the facts set out in these Particulars of Claim are true. I am duly authorized to sign this statement of truth on behalf of the Claimant.

Signed: 

Print Name: Steve Flanagan, Chief Executive Officer

Date: *16 August 2018.*

