



Challenging the tender process - what is the effect of recent case law?

by Jeremy Glover

- 1 The purpose behind this paper is, in one sense, a simple one - namely to review the EU Procurement Rules. The reason we thought it was necessary, was because of the increasing number of cases – both reported and otherwise – where unsuccessful tenderers are not only bringing cases alleging breaches of the procurement rules but they are winning those cases.
- 2 Accordingly the paper is divided into two sections:
 - (i) A summary of the EU Procurement Rules, including a look at some of the proposed future changes to the EU Procurement Rules¹; and
 - (ii) A review of some of the recent cases from Europe, Northern Ireland, and England and Wales.

PART 1: THE EU PROCUREMENT RULES – FRAMEWORK AGREEMENTS

- 3 Framework agreements are, of course, used typically where an employer has a long-term programme of work in mind and is looking to set up a process to govern the individual construction or supply packages that may be necessary during that framework term. Framework agreements allow an employer to instruct another party to carry out works or provide services, by reference to pre-agreed terms, over a (usually) pre-agreed period of time.
- 4 Arrangements for framework agreements and call-off contracts are governed by the detailed rules of the Public Contracts Regulations 2006 (SI 2006/05) which are designed to implement the Consolidated EU Directive 2004/18/EC. By Regulation 19 a framework agreement is defined as an agreement with suppliers, the purpose of which is to establish the terms (in particular terms as to price and, where appropriate, quality) governing contracts to be awarded during a given period. This definition covers agreements which are in themselves contracts, i.e. an agreement in writing, which places a *binding obligation* on the public authority to purchase works, goods or services for consideration. This type of framework agreement was covered by the pre-2006 Regulations as it could be treated in the same way as any other contract. However, the term “framework agreement” can also refer to an agreement that sets out the terms and conditions between the parties for the purchase of works, goods or services but where there is no *binding obligation* on the parties and in particular the contracting authority to purchase anything. The contract is only formed when (and if) the purchase is actually made at a later date. It is this type of framework agreement that previously caused difficulties as it could be classified as a contract under the pre-2006 Regulations, and it is this type of agreement that the 2006 Regulations explicitly address.
- 5 If a contracting authority chooses to adopt a framework approach it will be necessary to advertise the proposed framework agreement, by means of an OJEU notice provided the estimated value of the works, goods or services procured

¹ From the viewpoint of framework agreements, as this seems to be the area of most (legal) activity at the moment.



over the life of the framework exceeds the relevant EU threshold. The OJEU notice must:

- (i) Make it clear that a framework agreement is being awarded;
- (ii) Identify the contracting authorities who are entitled to make purchases or call-off under the framework agreement;
- (iii) State the length of the framework agreement (the maximum length of a framework agreement is four years unless there are justifiable exceptional circumstances); and
- (iv) Set out the estimated maximum quantity or value of works, goods or services to be procured under the framework agreement, in other words set out the value and frequency of the call-offs.

6 Framework agreements can be made with either one tenderer or more, but if there is more than one tenderer to be appointed then the minimum number should be three to ensure that when purchases are made there is still an element of competition.

7 Once the framework agreement has been awarded it is not necessary for the contracting authority to go through the procurement procedures again when making purchases under the framework, but the contracting authority is required to invite all tenderers capable of performing the contract to submit a tender within a specified time. The contracting authority must award the contract to the best tenderer on the basis of the award criteria specified.²

8 Where a framework agreement is concluded with one supplier then subsequent contracts under the agreement must be awarded within the terms laid down in the framework agreement. There can be no substantive change to the specification or the terms and conditions that have been agreed at the time the framework was awarded.

9 The JCT framework agreement has been designed to comply with the EU Public Procurement Rules. The EU Consolidated Directive (2004/18/EC) defines a framework agreement as an agreement with the suppliers, the purpose of which is to establish the terms governing contracts to be awarded during a given period, particularly with regard to price and quantity. If a framework agreement, as defined under the Consolidated Directive, is duly advertised and let in accordance with its provisions, every separate call-off contract awarded under the framework will not have to be advertised separately. For a framework to be brought within the directive, its estimated maximum value must exceed the threshold set out in the directive.

10 Accordingly, the JCT framework agreement acknowledges that where an employer is subject to the 2006 Public Contracts Regulations:

- (i) By clause 3.2 the parties acknowledge they have entered into the framework agreement pursuant to a compliant tender process including the issuing of the OJEU notice;
- (ii) By paragraph 11 of the JCT Guide, the framework is capable of establishing a

² As we will see, these criteria must be transparent. See *Emm G. Lianakis AE v Alexandroupolis* – CILL May 2008.



pricing mechanism which will be applied to particular pricing requirements during the period of the framework;³

- (iii) Note 7 to the Framework Particulars establishes the terms that will apply, for example setting out the form of underlying contract which will apply to the separate call-offs; and
- (iv) Note 9 to the Framework Particulars and paragraph 12 of the JCT Guide confirm that an agreement should not be concluded for a period that exceeds four years.

11 In addition, the tender for a framework agreement must, like any other public tender, comply with the relevant EU regulations, and here is where certain authorities have been coming unstuck. For example, Directive 2004/18/EC on the Co-ordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts notes that:

Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result it is appropriate to allow the application of two award criteria only: the lowest price and the most economically advantageous tender. To ensure compliance with the principle of equal treatment in an award of contracts, it is appropriate to lay down an obligation – establish by caselaw – to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, but the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases they must indicate the descending order of importance of their criteria.

Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tenderer to be assessed in the light of the object of the contract, as defined in the technical specifications and the value for money of each tender to be measured.

In order to guarantee equal treatment the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs – defined in the specifications of the contract –

³ This does not necessarily mean that the price should be fixed.



of particularly disadvantageous groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.

12 It is this question of openness and transparency where much of the focus of the recent litigation lies. To take one European example of this, the case of *ATI v ACTV Venezia et al.*⁴ Here the parties were given four award criteria with a maximum of 60% marks for the first criterion and a smaller figure for the other criteria. Subsequently, after the submission of tenders but before the envelopes were opened, the panel (or jury) divided or weighted the 25 percentage points available under criterion 3 into five subheadings. A disappointed contractor challenged that step. The ECJ ruled:

18. As a preliminary point, it must be observed, as the referring court pointed out, that, by the decision at issue in the main proceedings, the jury simply decided how the 25 points allocated for the third award criterion had to be distributed among the five subheadings in the contract documents.

19. Accordingly, the questions referred should be understood to relate essentially to the question whether Article 36 of Directive 92/50 and Article 34 of Directive 93/38 must be interpreted as meaning that Community law precludes a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those subheadings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared ...

21. Next, it must be observed that the award criteria defined by a contracting authority must be linked to the subject matter of the contract, may not confer an unrestricted freedom of choice on the authority, must be expressly mentioned in the contract documents or the tender notice, and must comply with the fundamental principles of equal treatment, non-discrimination and transparency (see *Concordia Bus*, cited above, paragraph 64).

22. In the present case, it must be observed, in particular, that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives and that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed.

23. It must also be observed that, in accordance with Article 36 of Directive 92/50 and Article 34 of Directive 93/38, all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope.

24. Similarly, in order to ensure respect for the principles of equal treatment and transparency, it is important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, their relative importance, when they prepare their tenders.

25. Finally, it is for the national court to assess, in the light of these rules and principles, whether, in the case of the main proceedings, the jury infringed Community law by applying a weighting to the various subheadings of the third criterion for the award of the contract.

⁴ [2005] ECR I-10109



26. In that regard, it must be determined first whether, in the light of all the relevant facts of the case of the main proceedings, the decision applying such weighting altered the criteria for the award of the contract set out in the contract documents or on the contract notice.

27. If it did the decision would be contrary to Community law.

28. Second, it must be determined whether the decision contains elements which, if they had been known at the time the tenders were prepared, could have affected that preparation.

29. If it did the decision would be contrary to Community law.

30. Third, it must be determined whether the jury adopted the decision to apply weighting on the basis of matters likely to give rise to discrimination against one of the tenderers.

31. If it did the decision would be contrary to Community law.

- 13** A slightly shorter formulation was adopted in the English case of *Lion Apparel Systems Ltd v Fireby Ltd*. Morgan J noted that:

If the authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the authority to have a 'margin of appreciation' as to the extent to which it will, or will not, comply with its obligations.

The Consequences of Failing to Comply with the European/Public Procurement Rules

- 14** The courts can order interim or non-financial remedies by suspending either the award procedure or the implementation of a decision to award. Alternatively, a party who is able to show that there has been a breach of the procurement rules may be able to bring a claim for damages.

- 15** When considering whether to grant an injunction, the court will take the usual factors into account. These include whether there is a strong case to be tried and whether damages are an adequate remedy, for example the failure to advertise a contract or the unlawful exclusion of a tenderer are instances where damages would probably not be adequate. However, the 2006 Regulations state quite clearly that interim relief may not be awarded by the court once the contract is actually concluded.⁵ The courts must weigh up the damage resulting from the delay to the procurement against the other interests that may be prejudiced if no interim relief is given and the claim turns out to be well founded. This can vary considerably according to the nature of the project. The courts will need to take into account the interests of other firms involved in the award procedure who may also be prejudiced by the delay and, in particular, the interests of any firm that may have been awarded the contract.⁶ Equally, the court has to consider whether there would be inconvenience to the contracting authority if there is a delay to the contract.

- 16** If a claim is to be brought, there are a number of preconditions. Before an aggrieved party can commence legal proceedings for damages, it must:

- (i) notify the contracting authority in writing of the breach or anticipated breach of duty complained of; and

⁵ Regulation 47(9)

⁶ *Boroughs Machines v Oxford Area Health Authority*



- (ii) notify the authority of its intention to bring proceedings and seek damages under the 2006 Regulations pursuant to Regulation 47(7)(a).

17 There is also a strict time limit of three months in which to bring a claim from the date of the breach of the 2006 Regulations. The time limit of three months is not a guaranteed time period within which to bring proceedings, but a long stop period. Regulation 47(7)(b) states that:

Proceedings under this Regulation must not be brought unless those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of those proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

18 If a claim for damages is being brought, then there are primarily three legal bases upon which that claim can be made:

- (i) Breach of statutory duty;
- (ii) Breach of an implied contract; or
- (iii) Misfeasance in public office.

19 Regulation 47(1) places an obligation on the Contracting Authority to comply with the relevant provisions of the Regulations and with any directly effective Community obligation under the Procurement Directives. Thus any Contracting Authority entering into a contract under the 2006 Regulations owes a statutory duty to any actual or potential tenderer who could or would have been awarded the contract. The court is given the following powers by Regulation 47(6):

A breach of the duty owed in accordance with paragraph (i) or (ii) is actionable by any economic operator which, in consequence, suffers or risks suffering loss or damage and those proceedings shall be brought in the High Court.

20 In the case of *Harmon CFEM Facades v Corporate Officer of the House of Commons*,⁷ Judge LLOYD QC noted that:

As a matter of general approach, I consider that where compensation is sought by a tenderer for being deprived of an opportunity to be awarded the contract, the approach should be to award damages on a "contractual" basis rather than on a "tortious" basis, although the remedy is a statutory remedy and usually the assessment damages for breach of a statutory duty akin to those for a comparable tort.

21 The Judge also acknowledged that:

I consider that it is now clear in English Law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenders fairly.

22 The terms of the implied contract included the principles of fairness and equality. The judgment in *Harmon* therefore establishes the existence of an independent cause of action in contract covering similar matters as those claimed under the Regulation. At the time, this aspect of the decision in *Harmon* was criticised by a number of commentators but this common law approach of implying an

⁷ [1999] EWHC TCC 195



agreement to act fairly during the tender process has developed vigorously in various Commonwealth countries as well as in more recent times in the UK.⁸

- 23 The remedy of misfeasance had been open to litigants before the Regulations came into existence and it remains available to aggrieved tenderers. Misfeasance in public office involves an element of “bad faith” and arises when a public officer exercising his power specifically intended to injure the claimant, or where he acted in the knowledge of, or with reckless indifference to, the illegality of his act and in the knowledge, or with reckless indifference to, the probability of causing injury to the claimant or a class of claimant. If successful in proving a breach of the duty of care that the public officer owed, then only those losses which were foreseeable by the public officer concerned, as a probable consequence of his act are recoverable. In *Harmon*, this claim failed because the Judge felt that there were other remedies available to the claimant.
- 24 Of course, establishing a breach does not automatically translate into an award of damages. A claimant must also prove that it has suffered a loss as a result of that breach. Claims for damages following a breach of the Regulations or, for that matter, an implied contract, will inevitably contain a claim for the tender costs incurred. If such a claim is to be successful, the claimant has to show either that:
- (i) it would not have tendered at all had it known the Regulations would be breached; or
 - (ii) that the contracting authority would breach its obligations to treat it fairly under the implied contract.

Thus in determining whether the claimant has suffered a loss, the key question to ask is would the tenderer have tendered for the contract in any event irrespective of the contracting authority’s actions?

- 25 The other element of a potential claim for damages is the loss of profit or overheads that the tenderer would have obtained had it been awarded the contract. These damages will be assessed on a loss of chance basis. The ability to claim for loss of chance or loss of receiving a future benefit is well established. The leading case is *Allied Maples v Simmons & Simmons*.⁹ The claimant must establish on the balance of probability that there is some link between the defendant’s negligence and the claimant’s loss. Where the quantification of the claimant’s loss depends on future uncertain events, the loss has to be determined on the court’s assessment of that risk materialising. Where the breach consists of an omission, then the link depends on answering the hypothetical question as to what the claimant would have done if the defendant had not been guilty of the omission. Provided that there was more than a speculative chance, the court will assess the loss of chance on a percentage basis and award a corresponding percentage of the overall damages claimed.
- 26 In *Harmon*, the court considered that it was “virtually certain” that Harmon would have been awarded the contract if the defendant had not breached its obligations and as a consequence Harmon succeeded in recovering its tender costs. However, in relation to Harmon’s claim for loss of profits, the Judge distinguished between the evaluation of “success” and the probability that the whole net profit would be recovered. The recovery of profit would clearly have been subject to the number of uncertainties, and on the facts the Judge assessed the overall percentage of

⁸ See, for example, *Aquatron Marine v Strathclyde Fire Brigade* [2007] CSOH 185

⁹ [1995] 1WLR 1602



probability of profit being earned as 35%, which means that Harmon would be entitled to 35% of whatever profit it could establish it would have made had it been awarded the contract.

- 27 It is likely that claims for breach of the Procurement Rules will increase. There is an increasing awareness within the construction industry and legal firms of the ability to commence claims under procurement regulations. Other factors which may provide some encouragement to tenderers are the Freedom of Information Act and also the internet. Local authorities, in particular, post on the internet the minutes of various committee meetings. It is therefore possible to obtain information as to what has been discussed and the reasons taken as to why contracts have been awarded. The following changes to the procurement legislation, and the publicity given to them, may also serve to encourage claims.

The Remedies Directive: forthcoming changes to the EU Procurement Rules;

- 28 The Remedies Directive 2007/66/EC requires that the new rules be implemented by 20 December 2009. So what do they entail? The legislation is intended to:
- (i) harmonise the standstill arrangements following contract award; and
 - (ii) introduce ineffectiveness as a remedy for illegal direct awards.
- 29 The first proposed change relates to the standstill procedure. This is the 10-day period between contract award and contract conclusion during which an unsuccessful bidder may apply for a review of a public authority's decision and seek information as to why it has not been awarded the contract. The Remedies Directive imposes a new minimum standstill period of 10 to 15 days (and being a minimum period the government could choose a longer period), depending on the means of communication used to inform bidders that they have been unsuccessful (electronic or otherwise). Whilst a breach of the standstill period currently does not carry any immediate sanctions in the UK, under the new Remedies Directive, such a breach in the future will lead to the automatic suspension of the contract conclusion pending resolution of the challenge. The concluded contract may also be set aside. Currently, if a contract is awarded in breach of the standstill period, a tenderer only has recourse to damages.
- 30 Accordingly, under the new Remedies Directive contracting authorities will be required to provide each bidder with a precise statement of when the standstill period starts and ends. Again this is new.

What is "ineffectiveness"?

- 31 This is a new concept introduced by the new Remedies Directive. It is the single most important change. It is being introduced to act as a remedy and therefore a deterrent to the "illegal direct award". It allows for the possibility that a contract that has been concluded, could be rescinded under this new "ineffectiveness" principle. Currently, contracts that have been concluded, cannot be rescinded. The only remedy for the aggrieved tenderer in such circumstances is damages.
- 32 A contract under the new directive will be considered to be ineffective if:
- (i) a contract notice is not published in the OJEU when required;



- (ii) legislation is not followed correctly, i.e.:
 - the contract is concluded before the end of the standstill period;
 - the contract is awarded during an ongoing review sought by a disgruntled bidder from the authority.
- (iii) a contract is concluded before the court has taken at least interim measures.

33 However, in order for the rule to apply in these circumstances, the following conditions must be met:

- (i) because of the breach, the tenderer cannot pursue other remedies apart from the contract annulment;
- (ii) the breach is combined with an infringement of the relevant Procurement Directive and has diminished the chance of the disgruntled bidder from winning the contract.

How will a contract be rescinded under the new “ineffectiveness” principle?

34 The new Remedies Directive leaves Member States to decide on how to apply ineffectiveness in the context of procurement legislation. They may, for example, choose that contracts are annulled retrospectively, such that the contract is annulled from the date when it came into operation; or prospectively, from the time a court decides to apply the annulment.

35 The Office of Government Commerce (or “OGC”) stresses that a retrospective cancellation of a contract declared ineffective would “seek to ‘undo’ what has already been done”, which in many cases would be “difficult, unwise or even impossible”. Additionally, it is unclear what such an approach to ineffectiveness would entail in practice, particularly where it is impossible to “undo” a service performed or to return a consumed product.

36 Member States may opt for prospective annulment of contracts only. This would free the “parties from any obligations under the contract”, but the OGC has indicated that prospective annulment would need to be combined with additional penalties.

37 In some cases, prospective cancellation could lead to one party having benefited more from the contract than the other. In such a case the OGC has suggested that the courts should decide which method of annulment should apply. Member States may also allow courts the discretion not to apply ineffectiveness in exceptional circumstances.

38 Are there any proposed exemptions from ineffectiveness? Yes, under certain conditions, contracts can be exempted from ineffectiveness:

- (i) if an OJEU publication is not required, but a voluntary notice is published before the selection process and the contract is awarded at least 10 days after this publication;



- (ii) in the case of Dynamic Purchasing Systems (or "DPS") and framework agreements, ineffectiveness will not apply if the standstill period is waived, provided the contracting authority respects the specific DPS and framework regulations.

So what penalties does the new Remedies Directive propose?

- 39 The new directive states that penalties, whether as an alternative to ineffectiveness or as an addition to prospective ineffectiveness, must be in the form of fines or a shortening of the contract duration. Additionally, according to the new directive, penalties must be "effective, proportionate and dissuasive". This commitment will apply to both the imposition of fines and the shortening of the contract duration.

What are the time limits?

- 40 The Remedies Directive suggests minimum time limits for seeking a review of a procurement process in court. This can be extended by the Member States. The minimum limit will be 30 days if a contract award notice is published (for contracts requiring no prior publication), or if the authority informs the candidates of the conclusion of the contract and explains the decision, as required, under existing procurement rules.
- 41 The minimum limit will be six months from the day after which the contract was awarded in cases where the above requirements have not been met.

When does the legislation come into force?

- 42 The Remedies Directive requires that the new rules are implemented by 20 December 2009. Currently there is no suggestion that the legislation can have retrospective effect, and indeed that would seem rather unfair and illogical.

PART 2: CHALLENGES FOR BREACHES OF THE EU PUBLIC PROCUREMENT RULES – RECENT CASELAW

- 43 As I have said, one of the more important trends which we have noticed over the past year or so is the increasing number of cases coming before the courts involving successful challenges to tender procedures, in particular in relation to alleged breaches of the European Public Procurement Rules. One reason for this is undoubtedly that tenderers are becoming more aware of the possibility, and indeed availability, of their right to challenge the procurement process if they are unsuccessful. Accordingly, the second half of this paper will look at a number of important decisions from the last 18 months or so:
- (i) *EMM G Lianakis AE and Others v Municipality of Alexandroupolis*
 - (ii) *Letting International Ltd v London Borough of Newham*
 - (iii) *McLaughlin and Harvey Ltd v Department of Finance and Personnel – Parts 1, 2 and 3*
 - (iv) *Lightways (Contractors) Ltd v North Ayrshire Council*
 - (v) *Federal Security Services Ltd v The Northern Ireland Court Service*



- (vi) *Brent London Borough Council v Risk Management Partners Ltd*
- (vii) *Amaryllis v HM Treasury*
- (viii) *JB Leadbitter & Co v Devon County Council*
- (ix) *Coco Paving (1990) Inc v Ontario (Transportation)*
- (x) *R (on the application of Mark Austin) v Portsmouth City Council*

44 In doing so, we consider:

- (i) the basic principles of fairness, transparency and equality;
- (ii) the time within which proceedings for a breach of those principles must be brought;
- (iii) the perils of electronic tendering; and
- (iv) the question of whether amendments to the provisions of a public contract can constitute a new award.

A PRINCIPLE OF TRANSPARENCY AND EQUALITY OF TREATMENT

45 As we have seen, back in 1999 HHJ Lloyd QC, in the case of *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons*, observed that the principle of equal treatment of tenderers requires that all tenders comply with the tender conditions so as to ensure an objective comparison of those tenders which are submitted.

EMM G Lianakis AE and Others v Municipality of Alexandroupolis

46 So what must you tell bidders about your award criteria and your evaluation methodology? This basic principle of equal treatment came before the European courts in the case of *EMM G Lianakis AE and Others v Municipality of Alexandroupolis*.¹⁰ This was a case about Article 36(2) of Council Directive (EEC) 92/50 which provides that:

Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.

47 Here, the town council had invited tenders for a town planning project. It had set out the award criteria in the contract notice and had listed these criteria in a specific order of priority. The list was (i) proven experience on projects carried out over the last three years (ii) manpower and equipment, and finally (iii) the ability to complete the project by the anticipated deadline. Thirteen consultancies responded. However, during the evaluation procedure, the committee in charge of the appointment set weightings of 60%, 20% and 20% for each of the three award criteria. It also set up certain sub-criteria, for example stipulating that experience should be evaluated by reference to the value of completed projects.

48 As the stipulation of the weighting factors and sub-criteria was only made at a date after the submission of the tenders, certain tenderers brought proceedings against

¹⁰ Case C-532/06



the town council. The Greek Court referred the case to the European Court asking whether Article 36(2) precluded a contracting authority from acting in this way, i.e. stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or notice.

- 49 The European Court noted that the purpose of the legislation is to ensure that there is no discrimination between different service providers. Where a contract is to be awarded to the economically most advantageous tender, a contracting authority must state in the tender documents the award criteria which it intends to apply. Potential tenderers must be in a position to ascertain the scope of the criteria elements when preparing their tenders. Therefore, a contracting authority cannot apply weighting rules or sub-criteria which it has not previously brought to the tenderers' attention.
- 50 Tenderers must be placed on an equal footing throughout the procedure, which means that the criteria and conditions governing each contract must be adequately publicised by the contracting authorities. Here, the projects award committee referred only to the award criteria and it was only later after submission of the tenders that it introduced the stipulation of the weighting factors. Accordingly, this did not comply with the article requirements. In other words, the European Court was making clear that compliance with the legislation requires the equal treatment of tenderers. The evaluation process must be transparent and objective. That had not happened here.
- 51 As to the consequences of any such breach, where a public authority does not adhere to applicable public procurement law (or the "OJEU Procedure") when tendering for work, then it is susceptible to a claim by an aggrieved tenderer. The whole thrust of the public procurement law is to ensure that those tendering are able to compete on an equal basis and that public contracts are awarded fairly. There is also common law authority to the effect that public authorities engaged in tendering processes may in fact create collateral contracts with the tendering parties. The nature of those contracts is likely to be that if the public authority in question has stated that it will evaluate tenders in accordance with a given procedure, then that public authority is obliged to the tendering parties to do just that.

*Letting International Ltd v London Borough of Newham: the requirement of transparency*¹¹

- 52 Here, Mr Justice Silber applied the *Lianakis* decision and held that a contracting authority cannot further define its award criteria following submission of tenders, as to do so would be contrary to the relevant directive and the principles of equal treatment and transparency. Letting International Ltd (LIL) had tendered for a position under a framework agreement. The tender evaluation criteria stated that the contract would be awarded on the basis of the most economically advantageous tender. The evaluation of the tenders was to be based on the detailed written response, pricing and site visits. The evaluation criteria were weighted as follows: specification (50%), price (40%) and suitability of premises, staffing and working conditions (10%).
- 53 After LIL's tender failed, it sought details from Newham as to how the tenders had been marked. It emerged that the proportions attributed to the subject matter of

¹¹ [2008] EWHC 158



the method statements establishing compliance with specification were not equal but varied between 5% and 17%. These weightings were established after the tender had been published but before any tenders had been received. LIL also learnt that the overall criteria of compliance with the specification had been broken down into 28 sub-criteria. The weightings had not been previously disclosed. Finally, when evaluating the sub-criteria, full compliance with the specification received three marks out of five, whilst the next highest mark was reserved for tenders which not merely met but actually exceeded the specification. Consequently, LIL obtained an interim injunction, upheld by the Court of Appeal, restraining Newham from entering into any contract or framework agreement pursuant to the above tender arrangements.

- 54 Following the Lianakis case, and in accordance with the Public Contracts Regulations 2006, the Judge noted that if parties wish to use sub-criteria, they must state them in the tender notice. The requirement of transparency means that all criteria used to enable a contracting party to determine which tender will be accepted must be disclosed. The weighting here should, in the view of the Judge, have been disclosed. The critical factor was not whether the disclosure of the weightings would have affected the preparation of the tenders, but whether they could have affected the tenders.
- 55 If a tender meets and focuses on the sub-criteria considered most important by the contracting authority, it is much more likely to obtain higher marks than one which deals not only with those issues, but also matters which fall outside the selected key sub-criteria. A claim for breach of the EC regulations is not dependent on a party showing that if there had been full disclosure of the relevant criteria and approach, the party's tender would have been different. All a party has to show is that as a result of the breach, it risked suffering loss and damage. Thus, the claim that Newham failed to mark its tenders fairly and objectively became academic as it would not alter the relief to which LIL was entitled. (As it happened, LIL failed in this part of their case.)
- 56 Accordingly, if LIL had been informed, as it should have been, of the weight attached to each item in the method statements and that to obtain full marks it had to exceed the specification, then it would have had a "significant chance" of being both a successful tenderer and then successfully obtaining some work under the framework agreement. That was enough to justify bringing its claim for breach of the transparency provisions.
- 57 During the case, the parties had agreed that if the Judge reached the conclusion that he did, he should then invite the parties to agree on the remedy that should be adopted. This he did, although noting that:

rather than having a new tender procedure, Newham might consider it prudent merely to add the name of the Claimant as one of the successful tendering parties. This is merely a suggestion and I will happily hear submissions if this were not to be mutually acceptable.



Seeking an injunction - McLaughlin and Harvey Ltd v Department of Finance and Personnel – Part 1

- 58 It is not yet known whether this suggestion will assist in the resolution of the dispute. However, it is certainly often the preferred outcome for aggrieved tenderers. In the Northern Irish case of *McLaughlin and Harvey Limited v Department of Finance and Personnel*,¹² M & H had sought an interlocutory injunction preventing the award of the framework agreement to the successful tenderers.
- 59 In October 2007 M & H had tendered for a place on the defendant's proposed four-year framework agreement for various construction projects with an estimated value of £500m-£800m. On 17 December 2007 they were told that their tender had been unsuccessful and therefore requested a debrief meeting. At this meeting, M & H claimed that they realised that the Department had marked their tender using a methodology which had not been disclosed to them in advance. M & H claimed this was in breach of the European requirement for transparency and was therefore unfair. They had come sixth in the competition (there being five places on the framework) but their score was only 1% behind and so even a modest improvement in their score would have affected the outcome materially. However, M & H were unable to persuade the court that the Department should not be allowed to proceed with the award of the framework agreement. The key test in such cases is a sequential one taken from the decision in *American Cyanamid Co v Ethicom Ltd*¹³:
- (i) Has the plaintiff shown there is at least a serious issue to be tried?
 - (ii) If it has, has it shown that damages would not be an adequate remedy for the plaintiff and would be an adequate remedy for the defendant if an injunction were granted and it ultimately succeeded?
 - (iii) If there is doubt about the issue of damages the court will then address the balance of convenience between the parties;
 - (iv) Where other factors are evenly balanced it is prudent to preserve the status quo;
 - (v) If the relative strength of one party's case is significantly greater than the other, that may be legitimately taken into account; and
 - (vi) There may be special factors in individual cases.
- 60 The Judge added a seventh requirement, namely that the court has an overall discretion to do what is just and convenient in the circumstances.
- 61 One of the factors the court took into account was the effect on the Department of granting the injunction but then the Department and not M & H succeeding at the trial. Usually this could be dealt with by M & H as claimant giving an undertaking or cross-undertaking in damages. However, the undertaking offered here was a qualified one confined to the additional costs sustained by the Department in putting individual projects out to tender generally pending the trial. The Department noted that construction inflation was running at 4%-6% and that inevitable delays caused by the injunction could add as much as £1.6m to construction costs on projects of this size. Furthermore, the Judge noted that the whole purpose of this

¹² [2008] NIQB 25

¹³ [1975] A.C.296



framework agreement is to obtain greater value for money for the public purse and the loss of that for projects for half a year would cost them £7.5m. Therefore M & H's undertaking in damages would not fully compensate the Department in the event of an interlocutory injunction being granted but the Department ultimately succeeding at the full hearing.

- 62 The final question the court considered was whether or not it could order the Department to add M & H to the list of contractors who benefit from the framework agreement. At first blush, that argument was contrary to Regulation 47(9) of the Public Contracts Regulations 2006.

In proceedings under this Regulation the court does not have power to order any remedy other than an award of damages in respect of a breach of duty owed if the contract in relation to which the breach occurred has been entered into.

- 63 That seemed to preclude any award other than damages if the injunction was not granted and the Department proceeded to conclude the framework agreement. But did it? The court disagreed that a framework agreement was a "contract" within the meaning of Article 47(9). This definition distinguished between an agreement or arrangement and a contract which would only be entered into thereafter. There was a clear distinction in the language of that Regulation between the framework agreement as such and any contract or specific contract made under it. The purpose of Regulation 47(9) is not to compel a contracting authority to break a contract with another economic operator which it has entered into. Either the disappointed economic operator obtains interim relief preventing the contract from being entered into or it must be content with damages. However, a framework agreement is different. It is the selection of a number of operators, the number not being defined in the Regulations, who will be eligible to bid for these contracts over the duration of the framework agreement. Therefore it was not impossible that the court, if satisfied that there was a breach of transparency or a manifest error or unfairness which could have had a causative effect on the outcome, would order the Department to add the plaintiff as a sixth contractor to the list.

- 64 Public bodies are increasingly using framework agreements and the failure by a contractor to secure a place on those frameworks can have a significant impact on its business. This case demonstrates some of the hurdles faced by a contractor in trying to prevent the award of that framework agreement where it alleges there has been unfairness in the tender process. In this case, no evidence was put forward by the plaintiff that the existence of its business rested on being awarded a place on the framework agreement and therefore damages would constitute an adequate remedy. The court also was clearly persuaded by the submissions that any delay to the contract award would significantly delay and increase the costs of major infrastructure projects which ran contrary to the intention of awarding the framework in the first place.

*McLaughlin and Harvey Ltd v Department of Finance and Personnel – Part 2*¹⁴

- 65 So the court having refused to grant an injunction, the next step was a full hearing on liability. Judgment was released in September 2008. The Judge found in favour of M & H. The Judge, Deeny J, went through the events again. He noted that it was when they sought a debrief meeting that M & H learnt that all the tenders had been marked using a particular methodology that had not been disclosed

¹⁴ [2008] NIQB 91



in advance. M & H came sixth, only 1% behind the contractors placed fifth and fourth. M & H said that these undisclosed criteria were new. The Department said the criteria were a perfectly legitimate working out of detail of the material which had been included in the tender documents.

- 66 The selection of the economic operators for the framework agreement was to be carried out by a panel of the central procurement directorate of the Department. Various tender documents were prepared. All tenderers were directed to read the tender documents and it was stated that the responses would be evaluated against the criteria provided in Section 8.3 of these documents. However, there was to be additional material not in the documents given to the tenderers, which M & H said consisted of criteria or sub-criteria to be used for evaluation. The Judge found that the tenderers were judged by a number of different criteria but that the criteria were given weightings which varied from topic to topic. It did not seem that the weightings for each topic were predicted or even predictable by a reasonable bidder. They were subjective judgments formed by the tender panel collectively. What the Department should have done was to provide the weightings to the bidders in advance. This material could have affected the preparation of the tender documents. It was likely to have done so. A bidder would be bound to take it carefully into account in allocating their bid.
- 67 That said, there was no intention on the part of the Department to discriminate against M & H. Indeed, no other bidders were given the information. What had happened was that those preparing the evaluation guide prepared it before they looked at the tenders. The Judge thought that it would be preferable that any sub-criteria development for the tenders should be formulated and spelt out before the tenders are received so as to avoid the suspicion of some special treatment. The Judge did note that it was somewhat surprising that the Panel managed to do all their valuation work without making any notes at all. This was particularly the case when the scheme in relation to weightings and sub-weightings was very detailed and complex.
- 68 Therefore, the Judge found that there was a breach by the Department of a duty owed under Regulation 47 of the Public Contracts Regulation 2006.

*McLaughlin and Harvey Ltd v Department of Finance and Personnel – Part 3*¹⁵

- 69 Following that judgment, the parties were unable to agree on a remedy for M & H. Therefore the case found its way before Judge Deeny again at the end of October. He made it clear that the matters complained of were neither minimal nor tangential but entitled M & H to some substantive remedy. In particular the Judge recalled that even a modest improvement in the marking of M & H's tender could have materially affected the outcome. Further, some 30% of the marking overall was given under the criterion of price. M & H had the fourth lowest price of the economic operators and therefore was well placed to benefit from any slight improvement in the quality assessment of its tender. Finally, the tender was for a place on a Framework containing some £800m worth of contracts over a period of four years.
- 70 A key issue was the extent of the court's powers to grant remedies. M & H's first preference was for the court, by way of declaration, mandatory injunction or otherwise, to order the Department to add it to the list of preferred economic

¹⁵ [2008] NIQB 122



operators under the Framework. Alternatively, M & H asked that the court set aside the contract award, leaving the Department either to rerun the competition or dispense with the Framework altogether. European Regulation 47(8) notes:

Subject to paragraph (9), but otherwise without prejudice to any other powers of the court, in proceedings brought under this Regulation the Court may

(b) If satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with paragraph (1) or (2) –

(i) order the setting aside of that decision or action or order the contracting authority to amend any document;

(ii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach; or

(iii) do both of those things.

71 However, paragraph (9) of the Regulations goes on to say that:

In proceedings under this Regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into.

72 The Department said that this paragraph prevented the court from granting any remedy other than an award of damages in respect of the breach of duty. However, the Judge rejected this argument. The reason for this was that in his view, the wording of the Regulations specifically referred to a breach in relation to “the contract” which has been entered into. By that was meant a public services, supply or works contract as defined in the Regulations. It would also extend to a specific contract under a framework agreement, but not the framework agreement itself. If a court is dealing with a public contract or a specific contract under the framework agreement (which is just another type of public contract) and the party bringing the proceedings has either not sought or been refused interim relief, then the court is not at liberty to set aside that specific public contract. Damages are the only remedy.

73 In the view of the Judge, the purpose of the Regulations was clear. By definition, the contract will have been given to a third party which, by the time the matter is before the court, may well be engaged in the very works of supply or construction under the contract. It would be entirely unfair on that third party and, indeed, on the public, to interfere in that contract which has been made. The economic operator under such a contract will have performed work for the Department and will have received or will have been promised remuneration as consideration in return. For the court to set aside a contract which may be partly or wholly performed would be contrary to principle and inappropriate. Therefore damages would be an appropriate remedy.

74 However, the position was completely different with regard to a framework agreement. The Framework consists of the pre selection of certain economic operators who will be allowed to bid, without competition from parties outside the Framework, for specific contracts during the lifetime of the Framework. Therefore



the Department had not made any promises to the economic operators under the Framework, and it had not yet, in fact, awarded any specific contracts. The court considered but dismissed the suggestion that the Department would be at risk of significant litigation from the five successful economic operators if the tender had to be re run. Whilst they may not succeed the second time, the fact was that the first procedure was conducted unlawfully. Therefore they had not lost anything to which they were lawfully entitled. If, in fact, they were the best economic operators under the framework agreement, it is likely that they would succeed on a re run of the framework agreement tendering procedure. If they did not, it was because the second procedure was fairer and more transparent than the first.

- 75 The position was less clear-cut with regard to M & H's preferred remedy - adding it as a sixth economic operator to the framework agreement. In that event the work available to the other five economic operators would be diluted to the extent of having an additional competitor. An additional competitor was, as it happened, consistent with the strong aim of encouraging competition in community law. But the successful parties had entered into a procedure by which they were selected as one of only five economic contractors eligible for this substantial quantum of work over the next four years. Thus the likelihood of the successful tenderers being able to take action against the Department was not "beyond the bounds of possibility".
- 76 Judge Deeny said that the aim of the court was to achieve fairness and transparency according to law. The setting aside of the decision would, in all likelihood, lead to a rerun of the framework agreement competition. It would be rerun in the more transparent way indicated by the court. That would be in the public interest to secure the tenderers who would be most economically advantageous to the public. If M & H was right it may well improve its performance, but if it does not, as above, the fairer new procedure should lead to the five best tenderers succeeding, whether or not they are in the present top five or six.
- 77 There was no legal precedent for the proposal that the Judge here should simply add M & H to the list of contractors. As we have seen, Silber J proposed it in the Newham case. However, ultimately the court here felt that to insert M & H into the Framework, whilst it could be done, could only be done by a "somewhat strained" interpretation of the legislation. On the other hand, the Judge was entirely satisfied that the court had the power to set aside the decision to enter into a framework agreement with five parties but excluding M & H.
- 78 The Department submitted that the proper remedy here was one of damages. The issue before the Judge was which is the most appropriate remedy to grant? The assessment of the loss of profits might well have to wait for some time, perhaps years, to allow the court to make a reasonable estimate of the profits which the successful economic operators enjoyed from the framework agreement. This was, in the view of the Judge, clearly not ideal. The profits of the economic operators who were given contracts under the framework agreement (or who were not) would not necessarily be publicly available, particularly as they applied to each contract. Indeed, as some of these contracts were likely to be of a very substantial nature it may take years for them to work out before one would know what profit, if any, the economic operator made out of a particular contract.



79 The Judge was faced with a difficult decision. He accepted that the appropriate way to proceed on any assessment of those damages would be based on the loss of chance principles. However, reliably fixing the value of that percentage loss of chance would take time, face difficulties and be costly. This led the Judge to conclude that whilst the Department was entitled to maintain that damages could be an adequate remedy, in his view they were an inferior remedy here to that of setting aside the framework agreement. Judge Deeny concluded that:

I say that not only for the reasons set out above but for public policy reasons. At the present time there is a question mark over whether the best five economic operators were selected under this framework agreement. Given that some £800m of works are said by the Department to be at stake here it must be in the public interest to try and ensure that the best five, whether or not that includes the plaintiff, are in fact selected. Secondly it cannot be in the public interest for the public to pay for these new buildings and to pay the plaintiff again a percentage of the profits of the contractor who actually builds the new buildings. That is in the most literal sense of the word a waste of money. It may be that in some circumstances there is no alternative to such an award being made, but where, as here, there is a much better alternative I consider it preferable to opt for it.

*Lightways (Contractors) Ltd v North Ayrshire Council*¹⁶

80 Similar issues were raised in this Scottish case concerning a motion for an interim order. To secure an interim order, a claimant must (amongst other things) advance a prima facie case to be answered by the defendant. Lightways sought a suspension of the implementation of the Council's decision to accept a tender submitted by Centre Great – a competitor of Lightways – for a lighting maintenance contract. The maintenance contract was a public contract subject to the Public Contracts (Scotland) (Regulations) 2006 (the "Scottish Regulations"), which implemented Directive 2004/18/EC.

81 There were three tenders for the contract. Lightways were subsequently given notice of the award of the maintenance contract to Centre Great, pursuant to which they made a request for reasons as to why their tender was unsuccessful. Two debriefing meetings were held as a result. Lightways claimed that in awarding the maintenance contract to Centre Great, the Council had breached the Scottish Regulations in four respects:

- (i) the Council failed to treat the tenderers equally during the tendering process;
- (ii) the Council had not complied with the requirements as to the criteria used to award the contract;
- (iii) during the scoring exercise, the Council failed to carry out an equal and transparent assessment of the tenders; and
- (iv) the Council failed to comply with provisions of the Scottish Regulations requiring provision of information at the debriefing meetings.

Equal treatment

82 There were two aspects to this complaint. The first related to information as to qualifications, training and experience of Centre Great's employees who would be

¹⁶ [2008] CSOH 91



likely to transfer to a new contractor under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”). Centre Great already had details of the qualifications and experience of employees on the existing contract. Lightways wished to know whether they would have all the necessary qualifications to work on the maintenance contract and made several attempts to obtain that information. Lightways argued that if they had been aware that the employees were already suitably qualified, they would have taken the employees’ lower rates of pay into account when pricing their tender.

- 83 The second aspect concerned information about planned maintenance. Lightways argued that the only information given was the names of the town in which maintenance was proposed in 2008/2009. Their request for more detailed information had been refused.
- 84 Lord Barcadale found that in relation to the issue of qualification of employees, the Council had indicated that it was passing on the request for more detailed information to Centre Great. As regards information about planned maintenance, Lord Barcadale was of the view that all tenderers were in the same position. On this basis he expressed doubts as to whether Lightways had raised a prima facie case of inequality of treatment based on failure to provide requested information.

The award criteria

- 85 Lightways argued that the Council had failed to properly differentiate between selection and award factors. In doing so, Lightways relied on the European Court of Justice (“ECJ”) decision in the Lianakis case, saying that a contracting authority must state in the tender documents the award criteria which it intends to apply. Potential tenderers must be in a position to ascertain the scope of the criteria elements when preparing their tenders. A contracting authority could not apply weighting rules or sub-criteria which it has not previously brought to the tenderers’ attention. In response, the Council sought to rely on a Court of First Instance (“CFI”) decision in *Renco SpA v Council of the European Union*¹⁷. The CFI held that the qualitative criteria used in that case were not vague and could all be evaluated objectively and specifically. The criteria were transparent and relevant in relation to the nature of the contract and sought to identify the most economically advantageous bidder.
- 86 Lord Barcadale noted that the decisions of the ECJ in *Lianakis* and the CFI in *Renco* were contradictory. In his view, however, it was not necessary to analyse the hierarchy of the European courts in terms of their persuasiveness. Instead, it was sufficient to recognise that some of the criteria used by the Council could not be properly considered as award criteria in light of the *Lianakis* decision. Thus, in this respect Lord Barcadale concluded that Lightways had a prima facie case.

Equal and transparent assessment of tenders

- 87 Lightways alleged that the scoring system employed by the Council offered complete discretion to the panel members to manipulate the scores on an entirely subjective basis without any objective constraints. There were no individual score cards for the tender evaluation exercise, rather a consensus view of the entire panel. In addition, Lightways claimed that at the debriefing meeting it was informed that the Council assessed the tender on the basis of a “feeling”. In addition, the assessment of tenders was weighted so that 60% would be allocated

¹⁷ 2003 ECR II 171



to consideration of price and 40% would be allocated to considerations of quality. Lightways alluded to the fact that members of the selection panel had sight of both the price and quality submissions of the tenderers, and argued that good practice would require different people to address these separately. Lightways argued that these considerations demonstrated a lack of objectivity and reflected a failure to deal with the tenders in a transparent way.

88 Lord Barcadale was of the opinion that:

it is self-evident that the scoring system leading to the award of a public contract under the [Scottish Regulations] is an area which is particularly vulnerable to the risk of unequal treatment of tenders and a lack of transparency. A robust approach observing objective standards is essential. Unrestricted freedom of choice must be avoided.

89 Lord Barcadale was of the view that Lightways may have been able to prove that the approach adopted by the defender demonstrated a lack of objectivity and reflected a failure to deal with the tenders in a transparent way. The averments that members of the selection panel had sight of both the price and quality submissions of the tenderers; that the panel arrived at a consensus view rather than reaching a conclusion through individual scoring; and that they did so on the basis of a “feeling” are matters which, if proved, could undermine the integrity of the award process. Accordingly, Lord Barcadale was satisfied that Lightways had demonstrated a prima facie case on this issue.

Failure to provide proper debriefing

90 Lightways argued that the Council had failed to adequately “inform [Lightways] of the characteristics and relative advantages of the successful tender”, as required by the Scottish Regulations. This requirement is prescribed by Directive 2004/18/EC, and has been implemented in the rest of the UK. The issue centred on whether this requirement could be interpreted narrowly, such that only details of where the winning tenderer scored higher marks should be disclosed, or whether the Council should have informed Lightways of how good its submission was in all areas. Lord Barcadale felt it was clear that:

satisfaction of the obligation under [the Scottish Regulations] depends on whether it puts an unsuccessful tenderer in a position in which it can clearly identify the reasons for rejection in order that it can defend its rights.

91 He was of the opinion that significant information was made available to Lightways at the debriefing meetings. Nevertheless there remained room for an argument as to a broader interpretation of the Scottish Regulations than the Council was prepared to concede in the debriefing process. Accordingly, Lord Barcadale was of the opinion that Lightways had set out a prima facie case, albeit a weak one.

Balance of convenience

92 Lightways submitted that the balance of convenience favoured the grant of an interim suspension. If an order for interim suspension was not made, the maintenance contract would be entered into, and Lightways would be left without any rights under the Scottish Regulations except the right to damages. That was not a satisfactory alternative remedy, as damages would be difficult to quantify. On the other hand, an interim suspension would not materially prejudice the Council



or Centre Great as the maintenance contract which was presently in operation would continue until the procurement exercise had been completed.

- 93 The Council argued that in the event of an order for interim suspension, the existing contract would have to continue. The existing contract was more expensive than the new contract, as a result of which the Council would expend an additional £23,360 per month in order to sustain the existing contract. The Council also argued that it would not be particularly difficult to quantify a claim for damages. It would be a claim for loss of profit and lost work. Such an exercise was commonly encountered in building contracts and it would not be particularly complex to work out.
- 94 Lord Barcadale recognised that Lightways would be put at a disadvantage if damages were awarded. However, he was not persuaded that the difficulties associated with quantifying damages would be undue. Lord Barcadale was of the view that, if the order was made, the Council (which is a local authority) would have been required to expend significant sums of additional money each month until the matter was resolved. He viewed this as a powerful consideration that shifted the balance of convenience in favour of the Council. He did not consider that the prima facie case was sufficiently strong to tip the balance back in Lightways' favour. Accordingly, Lord Barcadale was satisfied that on the balance of probabilities there should be no order to suspend implementation of the Council's decision to award the contract to Centre Great.

Conclusion

- 95 The Lightways case demonstrates that bidders may face significant hurdles in persuading courts to suspend contract awards pending a challenge. In this instance, the court held that the balance of convenience was not with Lightways and declined to make an interim order suspending the contract award decision, even though the court was satisfied that there was an arguable case on three out of four grounds of challenge.

*Federal Security Services Ltd v The Northern Ireland Court Service*¹⁸

- 96 The proceedings related to the contractual provision of security and ancillary services in 23 courts throughout Northern Ireland. The proceedings involved the following parties:
- (i) the disappointed bidder – Federal Security;
 - (ii) the existing contract holder and highest-scoring bidder in the new contract award competition – Resource NI Ltd (“Resource”); and
 - (iii) the contract awarding authority – The Northern Ireland Court Service (the “Court Service”).
- 97 Federal Security instigated the proceedings in relation to a decision by the Court Service to abort the competition at a late stage. In 2006 the Court Service initiated a competition designed to lead to the award of a new contract for the provision of security and ancillary services. Federal Security was one of several bidders which tendered for the contract.

¹⁸ [2009] NIQB 15



- 98 The Court Service subsequently aborted the competition on the basis that the instructions and statement of requirements issued to tenderers were insufficiently precise regarding the requirement to hold a licence to provide security services. In addition, when the tender was opened, the bidders were informed that criteria, including mandatory requirements, would be scored and weighted. After reconsidering this requirement, the Court Service concluded that it should have designated the statutory requirement to hold a licence to provide security services at the time of tendering as a prerequisite without which tenders would not be considered further. It should not have been included as one of a number of criteria which would be scored and weighted. For these reasons the Court Service concluded that the proper course was to abandon the tendering procedure and initiate a new one.
- 99 Federal Security sought the determination by the court of the following questions:
- (i) whether the impugned decision was unlawful and in breach of EU law;
 - (ii) if the answer to the first question was in the affirmative, then whether the Court Service was thereby in breach of Regulation 47; and
 - (iii) if the answer to the first question was in the affirmative, and the existing competition had to continue, whether Resource was disqualified from further participation by reason of its failure to have a valid security licence when it submitted its tender.
- 100 In posing the above questions, Federal Security sought an order annulling the decision and an order requiring the Court Service to complete the aborted competition and award the contract on the basis that Resource was ineligible. Federal Security also sought damages as an alternative remedy.
- 101 The non-possession by Resource of a valid, current security licence at the time of submitting its tender for the contract was undisputed, and constituted one of the key facts in the proceedings.
- 102 Prior to 2001, security and ancillary services in the courts of Northern Ireland were provided by an in-house team, supported by police personnel. The responsibility for providing these services was assumed fully by the Court Service in 2001. This gave rise to the award of the first contract for the provision of such services. Resource secured this contract around November 2001. The contract was scheduled to expire in November 2006. The contract was subsequently extended to the end of March 2009.
- 103 The competition for award of the new contract, was divided into two basic stages. At the first stage, all interested parties had to submit a completed pre-tender questionnaire. To assist with completion of the questionnaire, the Court Service provided the tenderers with documentation setting out instructions and information regarding the tender. The documentation contained a brief description of the requirements associated with four specific services – general security, safety, court order and keyholding. An outline of the “ancillary services” to be delivered under the contract was also provided.



104 In the questionnaire, the bidders had to provide detailed information about their business. The questionnaire also posed the specific question of whether the firm was registered to a number of specific standards.

105 The second stage involved the submission and evaluation of tenders. Federal Security (along with Resource and 11 other companies) submitted completed questionnaires. Both Federal Security and Resource passed through this phase of the competition successfully, and were invited to submit tenders for the award of the contract. The “documentation pack” furnished to each of the seven companies invited to submit tenders included “Instructions to Tenderers”. The instructions included the following mandatory requirement:

The services are to be delivered to meet the following security standards and specifications (or those that supersede them) ... Secretary of State Certificate/Licence to provide security services. A copy should be submitted with your tender submission or an explanation as to why it has not been included.

106 Federal Security, Resource and the other bidders subsequently submitted their completed tenders. In submitting its tender, Resource attached an expired security services licence.

107 The submitted tenders were then evaluated by the Court Service. Before this exercise began, the Court Service discovered that Resource did not have a valid current security licence.

The contract award

108 During the evaluation exercise, Resource was assessed as having complied with all of the 92 mandatory requirements, with the exception of the security licence requirement. Applying the scoring and weighting methodology, which contemplated a possible maximum score of 1000, the evaluation panel gave Resource a score of 920. Federal Security achieved an overall score of 812. With regard to mandatory requirements for ancillary services, Resource was assessed as having achieved 100% compliance.

109 Following the evaluation of all tenders, Federal Services and Resource emerged as the leading contenders for the award of the contract. They were the only tenderers invited to “clarification” meetings. The clarification meetings did not result in any alteration of the parties’ scores, which remained at 920 (Resource) and 812 (Federal Services) respectively.

The decision to abort the competition

110 There subsequently followed extensive internal deliberations, involving senior civil servants and Ministers, concerning the proposed award of the contract to Resource. At the same time, Federal Security raised a series of questions relating to Resource’s non-possession of a valid, current licence at the time of submitting its tender.

111 Following internal deliberations at the Court Service (and receipt of legal advice), a decision was taken to abort the tender process and initiate a new contract award process.



- 112** Having considered the above facts, McCloskey J proceeded to consider in detail the applicable law. McCloskey J began by considering the domestic and European legislative frameworks applicable to public procurement (i.e. Directive 2004/18/EC and the Regulations). In both instances he concluded that the legislative provisions specifically empowered contracting authorities to abort tenders.
- 113** Having considered the applicable European and domestic statutory frameworks, McCloskey J went on to consider relevant jurisprudence. He was of the opinion that the judicial decisions, both European and domestic, which fell to be considered essentially belonged to two streams.
- 114** The first of these streams provided guidance on how the principles of transparency and equal treatment impact on the information furnished to tenderers about the criteria and weightings applied to contract awards. The second stream of jurisprudence was concerned with the principles and constraints which govern a decision by a contracting authority to discontinue a contract award competition and/or to recommence afresh.
- 115** Having considered authorities falling into the first stream¹⁹, McCloskey J summarised the test of whether principles of transparency and equal treatment were satisfied as follows:

If the tenderers had known in advance of the relevant information, bearing on the award criteria or the proposed contract, might this have influenced the terms in which they formulated their tenders?²⁰

- 116** From the second stream of authority²¹ (which was relied on heavily by Federal Security) McCloskey J distilled the general principle that the option of the contracting authority to decide to discontinue a tender is not limited to exceptional cases. Likewise, such a decision does not have to be based on serious grounds. As such, a contracting authority does not have the obligation to carry the award procedure to its conclusion. Further, preceding jurisprudence indicated that a contracting authority may discontinue a tender after discovering that errors committed during the preliminary assessment made it impossible to accept the most economically advantageous bid (subject to compliance with the principle of equal treatment).

The parties' claims

- 117** Federal Security acknowledged that a contracting authority is entitled, in appropriate circumstances, to discontinue and/or recommence a contract award competition.
- 118** The cornerstone of Federal Security's submissions was the twofold contention that:
- (i) the instructions to tenderers imported a requirement to submit a valid, current statutory security licence with their tender, in unambiguous terms; and
 - (ii) this requirement was mandatory, in the sense that, as framed, it admitted no possible relaxation or exception, and operated as a precondition to further evaluation of tenders submitted.

¹⁹ *Universale-Bau and Others* [2002] ECR I-11617; *ATIAC* [2005] ECR I-10109; *SIAC Construction v Mayo County Council* [Case C-19/00] [2002] All ER (EC) 272; *Letting International v Newham London Borough Council* [2007] EWCA Civ 1522; *Regina (Law Society) v Legal Services Commission* [2008] 2 WLR; *Commission v French Republic* [2004] ECR I-9845

²⁰ see *Federal Security Services Limited v The Northern Ireland Court Service* [2009] NIQB 15, paragraph 38

²¹ *Hospital Ingenieure v Stadt Wien* [2004] 3 CMLR 16; *Metalmecanica v Ant Der Salzburger* [1999] All ER(D) 1015; *Kaupattalo Hansel v Imatran Kaupunki* [2004] 3 CMLR 17



- 119** In addition, Federal Security contended that the impugned decision was disproportionate. The Court Service had erred in concluding that the instructions to tenderers could have been the cause of uncertainty or possible confusion on the part of any bidder. Lack of proportionality was further evidenced by the considerations that the competition had reached an advanced stage and Federal Security was a suitable and high-scoring candidate. Thus, the defendant's decision was arbitrary and discriminatory – it gave an unfair advantage to Resource which, through its own fault, had failed to observe an unambiguous mandatory requirement. Federal Security further submitted that, the requirement being statutory in nature, Resource should have been aware of it and could not invoke ignorance of the law as an excuse.
- 120** In turn, the Court Service argued that it did not have to establish any exceptional or serious grounds to justify its decision. Rather, the standard against which its decision is to be measured is a less exacting one. Essentially, the Court Service argued that, for various reasons, a purchaser may wish to terminate an award procedure. It may also decide to begin a new procedure – for example, if it thinks this might produce better results, or where it has made a mistake in the first procedure, such as omitting appropriate award criteria. The sum of the argument was that contracting authorities “enjoy a broad discretion”.
- 121** With regard to the principle of transparency, the Court Service argued that it requires that tenderers must know, and clearly understand, when compiling their tenders, the criteria to be applied in awarding the contract and the relative weightings to be allocated to each of the criteria. The relevant passages in the instructions to tenderers were capable of misleading and confusing those concerned. As regards proportionality, it was submitted that the impugned decision was the product of careful and considered reflection on the part of the Court Service. It was further argued that the decision to discontinue and recommence the tender would not simply benefit Resource. Rather, it would afford an opportunity to all interested bidders to submit a tender for the contract, participating on equal terms.

The Decision

- 122** McCloskey J was of the view that the court must examine whether the relevant parts of the instructions to tenderers were formulated in the contract documents in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. This was an objective assessment, to be applied from the viewpoint of a hypothetical reasonably well-informed and usually diligent tenderer. In addition, the court should also consider whether the matter in question might or could have affected the terms in which tenders were compiled.
- 123** In McCloskey J's opinion, the contract award criteria concerning the security licence were not formulated and expressed in such a manner as to allow all reasonably well-informed and normally diligent tenderers to interpret them uniformly. The instructions to tenderers, while stating that certain requirements were “mandatory”, on the one hand, explicitly provided that all mandatory requirements would be subjected to a variable scoring exercise and a weighting exercise. This could convey to some tenderers the notion of differing values and variable scores. Likewise it could fail to convey to all tenderers that “mandatory” requirements were of an



absolute, inflexible character. The language used was capable of leading some tenderers to believe that full compliance with all “mandatory” requirements was not a prerequisite to further evaluation of their tenders, but would be evaluated on the basis of variable scores and relative weights. Equally, the terms in which the instructions to tenderers were framed, could have conveyed to other tenderers that compliance with all “mandatory” requirements was a precondition of an absolute nature to which no exceptions would be made.

- 124** McCloskey J felt that the hypothetical reasonably well-informed and normally diligent tenderer could have construed and understood the instructions to tenderers in the various ways outlined above. There was sufficient uncertainty and ambiguity in the key passages in the instructions to give rise to this. There was scope for differing interpretations and viewpoints, none of which could be condemned as unreasonable, unarguable or illegitimate. On this basis, McCloskey J rejected Federal Security’s first contention that the instructions to tenderers imported a requirement to submit a valid, current statutory security licence with their tender, in unambiguous terms.
- 125** McCloskey J then concluded that the impugned decision was harmonious with the principle of proportionality. Properly analysed, the view formed by the Court Service was that the instructions to tenderers and associated documents did not comply with the principle of transparency and the associated principle of equal treatment, as explained in the European jurisprudence. To have proceeded further, awarding the contract, would have been in breach of European law. Furthermore, the principles of transparency and equal treatment are key elements of Directive 2004/18/EC and the Regulations. A fresh competition, curing the shortcomings of its predecessor, would ensure that EU principles of transparency and equal treatment would be fully observed. In addition, the decision’s proportionality was reinforced by evidence of the care which the Court Service had taken, and the consideration that the Federal Security’s final score was significantly lower than that of Resource.
- 126** Accordingly, McCloskey J held that the Court Service’s decision was lawful and did not breach EU law. It followed that there was no breach of Regulation 47, and that Resource would not be disqualified from the tender by reason of its failure to hold a valid security licence at the time of its bid.

Conclusion

- 127** The case demonstrates that the abandonment of a tender to rectify an error can itself result in a challenge from a disappointed bidder. The question of whether a tender can be aborted rests on a two-stage test:
- (i) whether award criteria are formulated in such a way as to allow all reasonably well-informed and normally intelligent tenderers to interpret them in the same way; and
 - (ii) whether, if the bidders had known in advance the correct criteria, this could have influenced the terms in which they formulated their tenders.



128 Thus, a contracting authority would be right to discontinue a tender (subject to requirements of proportionality) where award criteria are ambiguous and carry the potential to affect the formulation of tenders. In the present case it was not surprising that the court dismissed Federal Security's case. There was a real possibility that the bidders could have interpreted the award criteria differently. In turn, this raised issues of discrimination and lack of transparency, as the interpretation of the competition's requirements could have affected the manner in which bidders formulated their offers. Accordingly, it was proportionate for the defendant authority to discontinue the tender and initiate a fresh procedure. Failure to do so would have constituted a breach of legal requirements.

B THE THREE-MONTH RULE

129 It is well known that claims brought for a breach of the 2006 Public Contracts Regulations must be made within a tight three-month time limit. There have been two recent cases, *Brent London Borough Council v Risk Management Partners Ltd*,²² and *Amaryllis v HM Treasury*,²³ which have considered this principle.

130 Regulation 47(7) makes it clear that there is a two-step process:

(7) Proceedings under this regulation must not be brought unless –

- (a) the economic operator bringing the proceedings has informed the contracting authority ... of the breach or apprehended breach of the duty owed to it ... and of its intention to bring proceedings under this regulation in respect of it; and
- (b) those proceedings are brought promptly and in any event within 3 months from the date when the grounds for the bringing of the proceedings first arose unless the court considers that there is good reason for extending the period within which the proceedings may be brought.

Brent London Borough Council v Risk Management Partners Ltd

131 The Brent case came before the Court of Appeal. Here RMP claimed that certain contracts of insurance had been awarded by Brent to the London Authorities Mutual Ltd ("LAML") outside of a tender process in which they participated. It is important to note that RMP were only making a claim for damages. Amongst other issues, Brent said that the claims were started more than three months after the date on which the grounds for bringing the proceedings first arose. In particular, Brent submitted that grounds for bringing proceedings existed (and that time therefore started to run) in November 2006 when RMP were told that Brent was obtaining insurance elsewhere. Proceedings were not commenced until 6 June 2007. If Brent was right, RMP were well out of time.

132 Pill LJ noted that:

When considering when grounds for proceedings first arose it is necessary to bear in mind that the Regulations prescribe the procedure which a contracting authority must follow before entering into a contract with a supplier of goods or services ... It follows that a failure by the contracting authority to comply with any step in the required procedure involves a breach of duty sufficient to support a claim under the Regulations. Moreover, because the procedure governs the whole process from the formation of the intention to procure goods or services to the award of the contract and is structured in a way that

²² [2009] EWCA Civ 490

²³ [2009] EWHC 962 (TCC)



is intended to ensure equal treatment and transparency throughout, a failure to comply with the procedure at any stage inevitably undermines the integrity of all that follows.

133 In doing so, he expressly recognised the problem that whilst grounds for bringing proceedings may exist well before the procedure reaches the award of a contract, the Regulations do not expressly identify the point at which that will occur. The relevant chronology was as follows:

- (i) On 9 October 2006, Brent resolved in principle to participate in LAML;
- (ii) On 7 November 2006, the RMP were told by Brent's brokers that Brent "had committed to going into the Mutual" but that there was uncertainty whether it would be ready by the next renewal date (1 April 2007) and there would be some insurance that would be sought outside it anyway. Accordingly there was to be a full tender exercise;
- (iii) At a meeting on 13 November 2006, Brent resolved to approve participation in LAML;
- (iv) In December 2006 Brent invited tenders for cover generally from 1 April 2007;
- (v) On 18 January 2007, Brent began membership with LAML;
- (vi) Because incorrect documentation had been used, a replacement invitation to tender was issued on 1 February 2007. RMP tendered in time; LAML did not participate;
- (vii) On 7 March 2007 a representative of Brent told RMP, informally, that Brent's insurance would be dealt with through LAML. In response RMP looked at Brent's website and located the decision of 13 November 2006;
- (viii) RMP sought formal confirmation by letter of 19 March 2007, and received it by letter from Brent of 27 March;
- (ix) Brent made payments to LAML from 16 March onwards;
- (x) By letter of 4 May 2007 RMP's solicitors raised with Brent the question of breach of the regulations;
- (xi) Proceedings were begun on 6 June 2007.

134 Brent submitted that grounds for the bringing of proceedings first arose in November 2006 when they resolved to approve participation in LAML or, alternatively, on 18 January 2007 when they became a member of LAML. Brent said that either time runs or it does not and a claimant cannot (if out of time from the date a breach has been apprehended) improve his position by waiting for the actual breach to occur.

135 The Judge at first instance, Stanley Burnton LJ, held that:

In my judgment, therefore, for the purposes of the Regulations in the present case "grounds for the bringing of the proceedings" first arose when the breach which forms the subject of the claim occurred. It would have been different if the claim were for an injunction to restrain a breach of the Regulations; but it is not.



It is therefore necessary to determine when the breach of the Regulations first occurred. It seems to me it was when the appellant abandoned the tender process and awarded the contracts to LAML. That occurred in March 2007. Until then, it could have lawfully awarded the insurance contracts to a company participating in the tender process.

- 136** The Court of Appeal agreed. The key here was the date when Brent abandoned the tendering process and made payments to LAML. Only then were Brent committed to taking policies from LAML. Before March 2007, RMP had not sustained the damage which was the basis of their claim. It may be that RMP could earlier have made an application for interim relief but that did not start time running on the claim actually made.
- 137** In any event, in the view of the Court of Appeal, there was good reason for extending the period within which the proceedings could have been brought, within the meaning of Regulation 47(7)(b). As late as February 2007, Brent issued an invitation to tender and, late in the month, RMP submitted a tender in response within time. Accordingly, Brent should not be allowed to defeat, on the ground of delay, the claim brought by RMP at the time it was.

Amaryllis v HM Treasury

- 138** Here Amaryllis submitted a pre-qualification questionnaire in respect of a framework agreement for the supply and installation of furniture on a national basis. The agreement was to be divided into six lots. Amaryllis was informed by letter on 17 March 2008, that it had come through the first stage on four of the lots. On 9 April 2008 there was a meeting between the parties at which the question of Amaryllis' unsuccessful tender on Lot 1 was raised. Although there was a considerable dispute as to the way in which the topic was raised, it appeared to Mr Justice Coulson to be "beyond argument" that Amaryllis wanted to know why their bid on Lot 1 was unsuccessful and that HMT did not give them very much information in response. Amaryllis wrote to HMT on 15 April 2008 seeking an explanation. HMT responded on 21 April 2008 in a letter which the Judge again felt did not provide a clear or cogent explanation as to how and why Amaryllis had been unsuccessful.
- 139** On 23 May 2008, Amaryllis said it would not be submitting a tender for Lots 2-5 because it had no confidence that any tender submissions would be given a fair and valid assessment. On 4 June 2008, Amaryllis indicated its intentions to bring proceedings, but again requested reasons as to why the Lot 1 bid was rejected. Amaryllis were of the view that they had to commence proceedings by 16 June 2008, three months after they had received notice of their rejection on Lot 1. They duly did so even though HMT had not provided any response to the June letter. Amaryllis made a number of claims. First, it appeared that no marks were allocated to section F which dealt with previous experience, when the tender information stated that all sections would be marked. Amaryllis also complained that HMT had evaluated the responses without having informed any tenderer as to the relative importance ascribed to each question - in particular the importance and weighting to be given to the environmental management issues. The Judge described this as being a bit like being required to do an exam without knowing what marks were available to any given question. Finally, Amaryllis complained that it was given a zero under a business heading on the basis that it brought in furniture rather than manufacturing it itself.



- 140** HMT said that Amaryllis were not entitled to bring a claim because it had not provided notice of its intentions and had not brought its claim in time. As stated above, under Regulation 47(7)(a) of the Public Contracts Regulations 2006, a party is required to provide written notice of the breach and its intentions to bring proceedings. Here, Mr Justice Coulson thought that adequate notice was provided. The regulations were clearly identified in the June 2008 letter and both Amaryllis' intentions and the actual breach complained of were clearly identified. Finally, the Judge said that the adequacy of the notice had to be considered against the backdrop of the (lack of) information provided by HMT.
- 141** Further, HMT said that Amaryllis did not act promptly. The Judge said that the starting point is when the specific breach of the regulations actually occurred. That will often be when the actual decision is made to exclude a tenderer. However, here the grounds for bringing the proceedings first arose when the irrevocable decision was taken by HMT to exclude Amaryllis on Lot 1. Therefore, the relevant date was the date on which HMT wrote to inform Amaryllis that its bid had been unsuccessful, 17 March 2008. Note too that the three-month period is intended to be a maximum period. Even if the proceedings have been commenced within that period, it is still necessary for the court to consider whether or not they have been commenced "promptly". Therefore, here, even though proceedings were brought within the three-month period, the Judge had to review what had actually happened.
- 142** Between 17 March and 22 April 2008, there was no culpable delay on the part of Amaryllis. It received a letter at the start of Easter week and a meeting was arranged in the first full working week after Easter. Amaryllis then wrote on 15 April 2008, receiving an inadequate answer on 22 April 2008. HMT focused on the fact that between 22 April 2008 and 4 June 2008, little, if anything, outwardly happened to progress this matter. However, the Judge disagreed that nothing relevant happened during this period. The evidence was clear that Amaryllis was involved in making enquiries with other potential tenderers to try and piece together the possible reasons for their exclusion. Amaryllis knew that it had been excluded. It was entitled to gather what information it could about the reasons for its exclusion and then balance the results of those researches against the risk of commencing proceedings against a party with whom it had an ongoing commercial relationship. Finally, no criticism of Amaryllis could be made of the period 4 June to 16 June 2008, the period when it was awaiting a response to a letter from HMT.
- 143** In addition, the Judge thought it fair to compare Amaryllis' speed of reaction with HMT's conduct during the relevant period. HMT was anything but prompt. Indeed, had it been necessary to consider whether Amaryllis needed any extension of time, Mr Justice Coulson felt that HMT's conduct during the relevant period was likely to have been the main cause of any delay and that no prejudice would have been suffered by HMT as a consequence of that delay. Therefore Amaryllis would have had a real prospect of demonstrating good reason for any delay, had it been necessary. Accordingly, the Judge concluded that Amaryllis was duly entitled to pursue its claim against HMT.

Conclusion

- 144** Both these cases demonstrate the importance, if you intend to make a challenge to a publically procured project, of acting promptly. Whilst it is true that both



these cases also suggest that the courts will take a fair and reasonable approach in deciding whether the three-month time limit has been complied with or not, you must bear in mind that they will only do so, if it is appropriate in *all* the circumstances.

C ELECTRONIC TENDERING

- 145** Increasingly, employers are requiring the submission of tenders in electronic form - a natural progression in this electronic day and age. However, these systems are not fool proof, and the courts in England and Canada have already had to grapple with disputes arising out of problems with electronic tendering. Interestingly, in both cases, the courts felt that the onus was very much on the party submitting the tender to leave itself enough time to deal with any potential problem.

*JB Leadbitter & Co Ltd v Devon County Council*²⁴

- 146** Leadbitter claimed that its tender had been wrongly excluded from a procurement process being undertaken by Devon in relation to a four-year framework agreement. The invitation to tender ("ITT") required tenders to be supplied electronically to a secure portal by noon on 16 January 2009. Because of a power failure that day, which prevented one party from submitting its tender on time, Devon extended the deadline by three hours. An integral part of each tender was the need to include case studies. Leadbitter took advantage of the additional time to make a final check and sent in its bid at 12.05pm. At 4.45pm, Leadbitter realised that in error the case studies had not been included. It immediately attempted to submit them to the secure portal, but this was not possible. Leadbitter called Devon's helpdesk shortly before the 3pm deadline and also spoke to a procurement officer again before 3pm. However, the case studies were not submitted in any form before the deadline. Devon rejected the bid as a complete tender, including the case studies, had not been submitted on time.
- 147** Leadbitter alleged that in rejecting the tender, Devon was in breach of the European regulations and its obligation to treat tenders equally and in a non-discriminatory way. Leadbitter also said that as a general principle of community law, Devon owed an obligation to act proportionately in relation to its treatment of the tenders. Mr Justice Richards reviewed the ITT process. This made clear that a fully compliant tender submission was to be made without qualification, and that the main elements of the tender, including case studies, must be uploaded to the relevant system and submitted on time. It was stressed that a failure to comply may mean that the tender will not be considered. Tenders had to be submitted electronically to the secure portal. The submission of the complete tender was a once-only option. No other method of submission was allowed.
- 148** Leadbitter said that Devon had the power to waive strict compliance with the requirements of the ITT as to the time and method of submission of tenders. It did so, for example, in extending the original noon deadline. The refusal to do so as regards Leadbitter, amounted to unequal and discriminatory treatment. The Judge disagreed. The deadline was extended for all tenderers and in fact Leadbitter took advantage of this. Leadbitter here were arguing for special treatment for itself only. Further, the Judge did not consider that Leadbitter could argue that its tender, as submitted before the deadline, contained an error, which could be corrected in

²⁴ [2009] EWHC 930 (Ch)



accordance with the ITT. The tender was incomplete, because it did not include the case studies.

149 The Judge noted that a waiver of the ITT terms carried the very risks of unequal treatment, discrimination and a lack of transparency which a contracting authority is required to avoid. The issue before the Judge was whether the principle of proportionality required Devon to permit Leadbitter to send its case studies in after the deadline. Leadbitter accepted that it would not generally be appropriate to accept a late tender. However, Leadbitter argued that there were special circumstances here. It had passed the initial pre-tender stage. Its bid was therefore assumed to be serious. Its tender excluding the case studies was uploaded on time. The case studies were finalised before the deadline. Leadbitter was not taking advantage of its error to submit a document revised after the deadline. It had tried to upload the missing cases before the deadline and contacted Devon before the deadline to seek a solution. The submission of the missing case studies would fill a gap, not change the tender.

150 However, the Judge held that Devon was entitled to reject the Leadbitter tender. It relied on the simple proposition that a procurement process requires a deadline for the submission of tenders and that a deadline is a deadline. The ITT could not have been clearer on the requirement for a single upload and submission before the deadline. There were clear statements of policy in Devon's code of business conduct that late tenders would not be considered. Whilst the deadline was extended for three hours to accommodate a particular tenderer, this extension was agreed before the expiry of the existing deadline. It was caused by an event outside the control of the tenderer in question and it applied to all tenderers. Fairness to all tenderers, as well as equal treatment and transparency, required that the key features of the ITT, including the deadline, should be observed. Whilst there may be circumstances where proportionality will require the acceptance of the late submission of a tender, these will be rare and most obviously where this results from the fault on the part of the procuring authority. Accordingly, Leadbitter's claim was dismissed.

*Coco Paving (1990) Inc v Ontario (Transportation)*²⁵

151 Here the Ontario Court of Appeal overturned a decision that a bid submitted by Coco to the Ministry of Transportation ("MTO") was compliant with the terms of the tender, despite the fact, which was undisputed, that it was submitted late and after the prescribed tender deadline. Three other tenderers had been able to submit a bid on time but Coco had not, due to problems with computers. One interesting fact about the appeal was that it was made not by the MTO but by another company, BOT, who would be the lowest bidder if Coco's bid was found to be non-compliant.

152 The reason the Canadian Court of Appeal found against Coco can be found in the terms of the MTO tender procedure. The language was crystal clear that no bids received after the deadline would be accepted for consideration. Accordingly, there was no discretion available to the court to find a way for a late bid to be compliant. The court had to carry out a balancing exercise between the rights of the tenderer who had complied with the terms of the tender procedure and the tenderer who had not. The deadline of the bid was "sacrosanct in the competitive

²⁵ 2009 ONCA 502



tendering process". The point here, as in the Amaryllis case, was that the onus was on the tenderer and not the MTO, to ensure that its bid was received on time. Perhaps critically, there was no conclusive evidence as to why the bid was not received. The mere sending of a bid did not establish that it had been received by the MTO computers. It could simply have been "stalled in cyberspace". Other bidders had chosen to submit their bids in good time, Coco chose not to do this. The other bidders would have had time to try and sort the problem out if their bids could not get through electronically.

- 153** The MTO, like similar institutions in Europe, are under a duty to treat all tenderers in a fair and transparent way. It was not fair to the other tenderers to award a tender to someone who had submitted their bid late. The MTO would only owe Coco this duty of fairness once it had submitted a compliant bid. The tender documents did not permit the MTO to receive late bids. It was allowed, at its discretion to "waive formalities as the interests of the Ministry may require". However, for this discretion to extend to the ability to accept a non-compliant bid then express words were required.

D WHEN DOES A CHANGE TO AN EXISTING PUBLIC CONTRACT GIVES RISE TO A NEW CONTRACT?

- 154** The cases above deal with changes during the tender process. What if there are changes once the contract has been procured?

*R (on the application of Mark Austin) v Portsmouth City Council*²⁶

- 155** Here, the proceedings related to a renewed application by Mr Austin for permission to bring an application for judicial review of the Council's decision regarding the "Northern Quarter Development" in Portsmouth. The decision in question authorised the Council servants to vary the terms of a development agreement between the Council and a developer. Mr Austin challenged that decision on the basis that:

- (i) it was *ultra vires*, irrational and/or procedurally unfair; and
- (ii) the Council had acted in breach of public procurement provisions.

- 156** On 23 March 2004 the Council had entered into a development agreement with Centros Miller Portsmouth Ltd Partnership (as it was then known), relating to the Northern Quarter Development. The developer was a joint venture in which the Miller Group had a 50% stake. The development agreement envisaged that the Council would take an assignment of the leasehold interest in the site, which was at the time vested in the developer. The developer would demolish the existing buildings on the site and clear it. The developer would then erect a high quality mixed-use city centre development. Subsequently, the Council would lease the developed site back to the developer for 250 years in return for commercial income. The lease would provide for a minimum rental payment to the Council of £400,000 per annum.

- 157** The development agreement entitled the developer to request the Council to prepare and pursue a compulsory purchase order ("CPO") under the Town and Country Planning Act 1990 in order to facilitate redevelopment of the site. Pursuant

²⁶ [2009] EWHC 322 (Admin)



to the developer's request, the Council issued a CPO that directly affected Mr Austin's property.

158 In January 2008 Miller Group's interest in the developer was acquired by an investment company called Delancey. This resulted in a change of the developer's name, but not its legal identity. As a consequence of the change of control, the relevant guarantors had to be changed, with the approval of the Council. Having taken professional advice, and deliberated the matter internally, the Council proposed a number of amendments to the development agreement. The amendments were intended to take account of the changes to the commercial property market conditions, and the impact of the recession. One of the amendments resulted in a percentage reduction in the return to the Council from rents due under the lease. However, the minimum rental payment of £400,000 per annum remained unaltered.

159 Mr Austin took multiple steps to challenge the CPO and to raise legal objections to the approved development scheme and the original development agreement. The end result of his applications was that there was no longer any prospect of a legal challenge to the validity of the original development agreement or the CPO. The only prospect of the CPO ceasing to have effect was if the development scheme altered substantially, and as a consequence the developer decided not to request the Council to exercise its powers under the CPO.

160 Mr Austin argued that he had three grounds of complaint about the decision taken by the Council regarding the 2008 amendments:

- (i) the Council had an obligation to notify him and other interested parties directly in writing that a meeting regarding the amendments was taking place instead of leaving them to find out about it by looking on the Council's website;
- (ii) the Council stated that it had taken into consideration the rights of affected parties, irrespective of the fact that Mr Austin had no chance to make representations at the meeting because he did not see the document listing the proposed amendments and therefore had no opportunity to make representations about its terms; and
- (iii) the Council was in breach of the regulations – when the Miller Group ceased to be a shareholder in the developer, the Council should have made the development the subject of a fresh tendering exercise.

161 Only the third issue is considered here.

No prospect of successful challenge on public law grounds

162 Geraldine Andrews QC was of the view that in any case, it was clear that there was no reasonable prospect of a successful judicial review. Applying *Pressetext Nachrichtenagentur GmbH v Republik Osterreich*,²⁷ Ms Andrews QC noted:

Amendments to the provisions of a public contract during its currency only constitute a fresh award of a contract for the purposes of public procurement legislation if they are materially different in character to demonstrate an intention by the parties to re-negotiate the essential terms of the contract. An internal re-organisation of the existing contractual

²⁷ [2008] ECR I-0000



partner by a change in its shareholding structure would not constitute a material change. Nor would price changes envisaged in the original contract and objectively justified.

- 163** Thus, even if Mr Austin could establish sufficient status, the Council could not lawfully re-tender the development contract in the present case.

Conclusion

- 164** Ms Andrews QC dismissed Mr Austin's applications for two reasons. The first related to the fact that he lacked sufficient interest in the Council's decisions regarding amendments to the development agreement. The second²⁸ was based on the fact that amendments to the development agreement were not sufficiently significant. Only amendments affecting a contract's essential terms can give rise to a requirement for re-tendering. A change in the bidder's control or objectively justified changes to contract pricing would not be considered essential for these purposes.

- 165** This case actually raises an important issue. When do amendments to a public contract constitute a fresh award? The answer appears to be, only if they produce a contract which is materially different in character. The lead case, as outlined above, is the *Presstext* decision, a case which concerned the supply of press agency services by the Austrian Press Agency (APA) to the Austrian Government. The contract included the issue of press releases and a text service known as OTS. Over time Supplemental Agreements were signed in 2001 and 2005. This meant that there were changes to the contract. The pricing model was altered as a result of the national currency change from schillings to the euro. Also, the OTS part of the overall arrangement was transferred to a new contractor, albeit a wholly owned and controlled subsidiary of APA.

- 166** *Presstext* was a business rival to APA, and had offered its news agency services to the Austrian Government on many occasions. Consequently it brought proceedings claiming that :

the restructuring of APA in 2000 and the two Supplemental Agreements signed in 2001 and 2005 each gave rise to unlawful de facto awards of new contracts which ought to have been put out to tender.

- 167** The ECJ said that all this did not give rise to a new contract. In discussing when a change to an existing public contract gives rise to a new contract, it said:

amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive ... when they are materially different in character and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract.

- 168** The ECJ then went on to give guidance as to what "material" might mean, setting out three occasions when there might be a material change such that the contract would need to be re-advertised:

An amendment ... when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted;

²⁸ And perhaps more important from a public procurement point of view.



... when it extends the scope of the contract considerably to encompass services not initially covered; or

... when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

169 So, for example, the currency change, which had not been anticipated in the original contract, could on the face of it amount to breach of the principles of equal treatment and transparency. However, in reality it was a minimal change and certainly did not shift the economic balance of the contract in favour of the contractor.

170 The novation or change in contractor too, in theory, was a material change, unless it was provided for in the initial terms of the contract.²⁹ However, here, on the facts of this case, the new contractor was a wholly owned subsidiary of the original contractor. This meant that the original contractor ultimately was still responsible for compliance with the contract and so, again, in reality there was no material change and no new contract.

171 The key, therefore, is that you must ensure that changing requirements do not take the resulting contract outside the scope of your original OJEU advertisement.

172 However, what if there are variations to your contract – a not unusual situation? If these are wide enough, they may amount to a new contract in terms of needing to re-advertise, or they may even amount to a breach of the principles of transparency.

173 Firstly, and unsurprisingly, if a contracting authority wants to amend one of the essential conditions of the tender then it would be precluded from doing so. If it wanted to change some of the conditions of the invitation to tender after the tenderer has been selected, then it should provide for that possibility - including the detailed rules for doing so - in the invitation to tender notice itself. If this is not provided for in the invitation notice then it would breach the rules of transparency and equal treatment.

174 This is what happened in the case of *Commission v Succhi di Frutta* (2004),³⁰ a case about a tender for the supply of fruit juice and fruit jams to the people of Armenia and Azerbaijan. At the time of tender, payment was to be by the supplier withdrawing apples or oranges (as the case might be) held in the Commission's intervention stocks. However, later, largely because of questions over seasonal supply of fruit, alternative fruits were allowed to be brought into the equation.³¹ *Succhi di Frutta* said that allowing this case was a breach of transparency and equal treatment. The ECJ agreed:

all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents, so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way

175 And this meant:

not only in the tendering procedure concerned with assessing tenders and selecting the successful one, but up to the end of the stage during which the relevant contract is performed.

²⁹ Change in a consortium member would be treated differently: *Re Make-doniko Metro* C-57-01.

³⁰ Case C-496/99P

³¹ Ultimately, nectarines were substituted on the basis that 1.4 tonnes of nectarines were the equivalent of 1 tonne of apples.



176 This was a case where the Commission had not reserved any right to amend the contract terms, and where it was plain that the right to accept different fruits from intervention stocks might have significantly altered the tendering process. It was also a case in which the failure to give all tenderers the same rights affected competition, and infringed the principles of transparency and equal treatment. This was also a question which was considered in the case of *R. (Law Society) v Legal Services Commission*,³² a case concerning the award of contracts for the provision of legal services funded by public resources – i.e. legal aid. Clause 13 of the proposed contract provided that the LSC could amend any of the terms of the Contract if it considered this “necessary or desirable or to facilitate a Reform of the Legal Aid Scheme.”

177 In other words, this was probably an attempt, amongst other things, to ensure that the LSC would not lay itself open to similar challenges to those brought by *Succhi di Frutta*. That failed and proceedings were brought, claiming that this wide right of amendment was contrary to the general rights of transparency and equality. The Court of Appeal agreed, saying that:

this is an extreme case where the contracting authority has reserved to itself a virtually unlimited power of amendment, subject only to some limited procedural conditions. Indeed, the power to amend is better characterised as a power to rewrite the contract.

178 For this reason, it breached the requirements of transparency. Finally, it is worth noting what limited guidance the Court of Appeal did give on this issue:

The judge said that the fact that there was clarity as to the technical specifications at any given moment did not provide sufficient precision within Regulation 9(7) and sufficient prospective clarity during the performance of the contract. In the case of technical specifications, what was required was a definition of the object of the contract in sufficiently precise terms to enable interested undertakings to assess whether to present a bid and (Regulation 9(4)) to prevent the technical specifications constituting an unjustified obstacle to the opening up of public procurement to competition.

The judge accepted that it would be possible to amend the technical specifications during the life of the contract to take emergent technology into account without going through a fresh procurement procedure. Where the effect of a change did not alter the economic balance of the contract, a power to amend might not violate Regulation 9(7). But a power to amend could only be narrow, and had to be based on objective criteria.

In our judgment the extreme and unusual features of the power in this case impel the conclusion that the Unified Contract does not comply with the requirement in Regulation 9(7) that technical specifications in terms of performance or functional requirements must be “sufficiently precise to allow an economic operator to determine the subject matter of the contract”.

CONCLUSION

179 So in our case law round-up we have come back full circle to where we started with questions of transparency as set out in the *Lianakis* decision.

180 Patently, the timing of tender submissions in any tender process is critical. The message from the courts is that late bids can unfairly advantage the non-compliant bidder over the compliant bidders who have met the tender requirements. If the

³² [2007] EWCA Civ 1264



employer is allowed to consider these bids, then this can erode the integrity of the bidding process. Perhaps employers need to consider addressing in their tender process the possibility of computer system failure and should also ensure that they have a way of determining when bids have been received. Those submitting bids should equally ensure that they do so in good time, which means here in good time to try and deal with any problem there may be in uploading or transmitting the bid.

- 181** With new legislation on the horizon, and a number of legal cases looming, this is a fast moving area of law. Given the current economic uncertainties, it becomes even more important to win new work. The cases demonstrate that the unsuccessful tenderers are looking even more closely at the reasons why their bids failed. Further, more contractors are likely to look to public authorities for work, which may mean that there will simply be more disappointed tenderers, who will be looking for a proper explanation as to why they were unsuccessful and who will be perfectly prepared to go to court to seek redress.
- 182** Therefore those involved in preparing and evaluating public tenders must be sure that their processes are open and fair and fall within the guidelines. Although all the aggrieved tenderer is likely to want is to be added to the framework or to win the work he lost out on, subject to the up and coming court judgments, the penalties for failing to do this are likely to lie in damages. However, these may be substantial.
- 183** Alternatively, local authorities may find themselves forced to follow their counterparts in Northern Ireland and re run their tenders. And that, of course, will lead to delays and additional costs.

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