

## Procurement – Recent developments in Northern Ireland

***Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No.2) [2008] NIQB 105***

***McLaughlin and Harvey Ltd v Department of Finance and Personnel (No.2) [2008] NIQB 91***

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The development of procurement jurisprudence continues apace in the High Court in Northern Ireland. Two recent judgments have been handed down arising out of procurement exercises carried out by the Central Procurement Directorate ("CPD"), both designed to select contractors for inclusion in large Framework Agreements. Both Claimants successfully showed that the CPD had made errors in its procedure for determining which tenders were the most economically advantageous.

***Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No.2) [2008] NIQB 105***

The Claimant's ("Henry Bros") consortium tendered for inclusion within a framework agreement for the provision of design and construction work in the context of modernising the schools infrastructure in Northern Ireland.

The Defendant on 19 June 2007 issued Invitation to Tender ("ITT") documents to entities which had passed the pre-qualification stage. Admission to the framework agreement was to be granted to the tenderers whose bids were most economically advantageous. Tenders were to be evaluated by reference to qualitative criteria (weighted at 80%) and commercial criteria (weighted at 20%).

The commercial assessment was to be based on the submission by tenderers of fee percentages. Once successful tenderers had been chosen for the framework agreement on this basis, contracts would be awarded by reference to the fee percentages and the successful tenderer for a particular contract, once chosen, would enter discussion with the Department's "cost manager" in order to arrive at a final price for the contract. This was designed to avoid a 'low bid, high claim' culture identified by the Department among providers, and to arrive at more accurate forecasts at the start of a project as to its total cost.

Henry Bros was excluded from the procedure after assessment of the ITT responses. It alleged breach of Public Contracts Regulations 2006 ("the 2006 Regulations") and EC law on the basis that the Defendant had not required tenderers to submit a price for or to cost a representative sample contract. It alleged that it was therefore impossible for the Defendant to assess which tender was the most economically advantageous, since the natural meaning of 'economically' required that there must be analysis of the comparative price or cost.

Giving judgment on 3 October 2008, Coghlin LJ. began by setting out the following principles in relation to the criteria which a contracting authority may use in assessing which tenders are the most economically advantageous:

- the criteria had to be linked to the subject matter of the contract (regulation 30(2));
- the criteria had to comply with the fundamental principles of Community law, and could not confer on the contracting authority an unrestricted freedom of choice (citing Case 31/87 *Beentjes* [1988] ECR 4636, among other cases);
- subject to those qualifications, the contracting authority has discretion as to the criteria it adopts, and the list in regulation 30(2) is not exhaustive (citing for example Case C-19/00 *SIAC Construction* [2001] ECR I-7725); and
- factors which are not purely economic may influence the value of the tender from the point of view of a contracting authority (citing for example Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213 - see paragraph 64 of the ECJ's judgment in that case).

Coghlin LJ. rejected the Defendant's submission that its discretion to choose criteria meant that, in awarding admission to a framework agreement, it was entitled to omit criteria relating to price or cost *altogether* (see paragraph 25 of his judgment). He noted the view expressed by Humphrey Lloyd QC at paragraph 182 of his judgment in *Harmon v House of Commons* [1999] All ER (D) 1178 to the effect that, in determining which tender is the most economically advantageous, "*price is the starting point for the exercise*". Coghlin LJ. also noted that regulation 2 of the 2006 Regulations defines a framework agreement as establishing the terms of the subsequent contract, "*in particular the terms as to price [...]*".

Coghlin LJ. then dealt with the Defendant's submission that it was sufficient to have established a 'pricing mechanism' (in the form of fee percentages) at the stage of admission to the framework agreement, which might later be applied to determine overall cost to the contracting authority when letting individual contracts. Coghlin LJ rejected this argument on the facts, observing that the fee percentages on their own could not determine the total price of a specific contract, but rather needed to be supplemented with rates and costs. In the Defendant's adopted procedure, the discussion of rates and costs was to take place after an individual contract was let, in discussions with the Defendant's cost manager.

It followed that the procedure adopted by the Defendant failed to comply with the 2006 Regulations, and was not consistent with the principles of transparency, equal treatment and effective competition. Furthermore Coghlin LJ found that the Defendant's decision to rely on fee percentages proceeded on an incorrect factual assumption that costs would always be the same in the construction industry, which was sufficient to amount to a manifest error of assessment (paragraph 28).

However Coghlin J expressly refrained from holding that fee percentages could *never* be legitimately used as a pricing mechanism when selecting tenderers for a framework agreement. Instead he expressed the view that fee percentages could only be so used (consistently with the 2006 Regulations and Community law) where prices for individual contracts were established competitively once tenderers had been selected.

### *Time limits*

Relying on the decision of the Court of Appeal in *Jobsin v Department of Health* [2002] 1 CMLR 44, the Defendant then submitted that the relevant breach had taken place at the time the Defendant sent the ITT documents to tenderers, with the result that Henry Bros' claim was brought outside the time limit laid down by regulation 47(7)(b). Coghlin LJ cited the judgment of Stanley Burton LJ in the High Court in *Risk Management v Brent LBC* [2008] EWHC 1094 (Admin) and held that distribution of the ITT documentation did not amount to a breach of the 2006 Regulations, despite the fact that it referred to a procedure which was unlawful. Instead, on the facts of the present case, Coghlin LJ noted that the Defendant had specifically reserved the right, in the ITT documentation, to amend the applicable criteria at any time until its decision. It followed that the relevant unlawful act did not take place until the impugned procedure was *implemented* in the form of the decision to exclude Henry Bros.

In any event, Coghlin LJ held that if he was wrong on the application of Regulation 47(7)(b), he would be inclined to grant an extension of time for bringing the proceedings, on the grounds of the public importance of the case and the fact that similar procedures may well be implemented by other Government departments, meaning that any defects ought to be remedied in good time.

Michael Bowsher QC appeared for Henry Bros (Magherafelt) Ltd and others

### **McLaughlin and Harvey Ltd v Department of Finance and Personnel (No.2) [2008] NIOB 91**

In this case, the Defendant conducted a tender procedure to select contractors for a framework agreement for construction projects in urban regeneration, further education, arts and sports. Successful contractors were to be chosen on the basis of the most economically advantageous bids.

The Claimant's ("M&H's") tender for inclusion in the Framework Agreement was unsuccessful. After obtaining information at a debrief meeting, M&H alleged that the Defendant had marked its tender (and the others) according to a methodology that had not been disclosed previously. M&H therefore alleged breach of the Community law requirement of transparency.

Giving judgment on 11 September 2008, Deeny J referred to the requirements in Regulation 30(2) and (3) of the 2006 Regulations. Regulation 30(2) requires a contracting authority, when determining whether a tender is the most economically advantageous, to "*use criteria linked to the subject matter of the contract*". Regulation 30(3) is in the following terms:

*Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents [...].*

These provisions reflect Article 52(2) of Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("Directive 2004/18"), which is in similar terms.

Deeny J noted that in the present case the Defendant had not formed its panel for assessing tenders until after tenders had been submitted. Once formed, the panel had prepared a "valuation guidance" document to assist it in marking each tender objectively as against each relevant question. The guidance document broke down the assessment categories which had been advertised to tenderers into 39 further criteria, and for the first time assigned weightings to those criteria.

Deeny J accepted, as a result of his factual findings as to the dealings between M&H and the Defendant prior to the submission of M&H's tender, that the 39 criteria adopted in the guidance document were "*reasonably predictable by an informed bidder and were consistent with the published criteria*". As a result, Deeny J considered that it might be arguable that the Defendant had not breached the transparency requirement when it failed to notify the 39 criteria to tenderers

before they submitted their tenders. However it was not necessary, in the light of Deeny J's subsequent conclusions, to express a firm view on this (see paragraph 44 of his judgment).

Deeny J then considered whether the Defendant had breached the requirement of transparency by applying (to the 39 criteria) *weightings* which had not been disclosed to tenderers at the time of preparing their tenders. The ECJ had held in Case C-331/04 *ATI* [2005] ECR I-10109 that to apply weightings which had not been provided to tenderers would not necessarily infringe Article 36 of Directive 92/50<sup>1</sup>, provided that the contracting authority's decision applying the weightings (a) did not alter the award criteria, (b) did not contain elements which, had they been known at the time tenders were prepared, would have affected that preparation, and (c) did not give rise to discrimination. In the present case Deeny J found it likely that the weightings would have affected M&H's preparation of its tender. It followed that in failing to supply the weightings to tenderers before they submitted their tenders, the Defendant had breached the requirement of transparency (see paragraphs 46 to 50).

In reaching this view, Deeny J rejected the Defendant's submission that the 39 criteria were not to be regarded as criteria in law, nor indeed as sub-criteria (which the ECJ had held also fell to be disclosed - see Case C-532/06 *Lianakis*, judgment of 24 January 2008, as yet unreported), but rather as some lesser category of criteria, the disclosure of which (along with their weightings) was not required.

However Deeny J then noted that the 39 criteria had been further broken down in the valuation guidance document into 186 "items". He declined to rule on whether these items fell to be disclosed pre-tender, on the basis that he was already making a finding against the Defendant in relation to the 39 criteria. However Deeny J indicated that he would have found that the Defendant's failure to disclose these items did not infringe the procurement rules. These items were items of evidence rather than criteria, they had not been given weightings by the Defendant, and disclosure of all of them would have "*undermined the efficacy*" of the tender procedure. In fact Deeny J stated that he might be prepared to "*acknowledge that the 186 were sub sub criteria*" which did not need to be disclosed in advance (paragraphs 48 and 49).

This aspect of the decision may be open to question, and a similar view was doubted by Silber J in *Lettings International v London Borough of Newham* [2008] EWHC 1583 (see paragraph 63(c)). Deeny J expressed the view that the ECJ in *Lianakis* (above) had contemplated "*that not everything taken into account by a panel needs to be disclosed in advance to the bidder*". This sits uneasily with paragraph 36 of the ECJ's judgment in *Lianakis*, where it cited previous case law to the effect that "*potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders*".

In a subsequent judgment in this case handed down on 30 October 2008, Deeny J decided that the framework agreement that had already been entered into should be set aside. The Defendant relied upon Regulation 47(9) of the Regulations which provides that once a contract has been entered into, the only remedy for a breach of the Regulations in connection with the tendering of that contract is damages. He found that that provision does not necessarily prevent a court from granting other relief in connection with a framework agreement.

Michael Bowsher QC appeared for McLaughlin and Harvey Ltd

**For more information on Michael Bowsher QC and Jorren Knibbe, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' section on [www.monckton.com](http://www.monckton.com).**

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<sup>1</sup> A precursor to Article 52 of Directive 2004/18