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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

Between:

DEPARTMENT FOR INFRASTRUCTURE
(Formerly Department for Regional Development)
Appellant/Defendant

-and-

NORTHSTONE (NI) LIMITED
Respondent/Plaintiff

Before: McCloskey LJ, Maguire LJ and Huddleston J

Appellant: **David McMillen QC and Paul McLaughlin QC, instructed by Departmental Solicitor's Office**
Respondent: **Michael Bowsher QC and Richard Coghlin QC, instructed by Carson McDowell LLP.**

Lexicon

Northstone (NI) Ltd	"Northstone"
Department for Infrastructure	"The Department"
John McQuillan (Contracts) Ltd	"McQuillans"
Instructions for Tendering	"IFT"
Most Economically Advantageous Tender	"MEAT"
Pre-Contract Questionnaire	PQQ
Tender Submission Package	TSP
Tender Submission – Quality Submission	TS – QS
Tender Submission – Contract Form	TS – CF
Tender Submission – Price Submission	TS - PS

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McCloskey LJ (delivering the judgement of the court)

Introduction

[1] The Department for Infrastructure ("the Department") appeals against the judgement and order of Horner J whereby certain declarations were made in favour of Northstone (NI) Ltd ("Northstone") in its claim for relief.

[2] The central question, one of law, arising in these appeals is whether the relevant conduct and decisions of the Department were in accordance with the terms of the contracts award process in question, the governing legislation and the overlying legal principles.

[3] The focus of Northstone's challenge is the Department's handling and determination of a competitive tender process in which Northstone and others, in particular John McQuillan (Contracts) Limited ("*McQuillans*"), were competitors. These two operators, together with others, were in competition for a total of eight road resurfacing contracts relating to various regions of Northern Ireland, to have a minimum duration of one year and a maximum duration of three years. There were, in effect, eight separate contract award processes within the ambit of a single procurement competition.

[4] The material events unfolded between November 2014 and November 2015. Northstone tendered for all eight of the contracts and McQuillans tendered for seven of the contracts. In brief compass, the Department received and then assessed the various tenders submitted by all bidders. Six of McQuillan's tenders were ranked first. Only one of Northstone's tenders was ranked first. Officials then determined to engage bilaterally and privately with McQuillans. Following discussions with the Department, McQuillans withdrew two of their six aforementioned tenders. Following this the Department decided that McQuillans were the successful tendering party, and would be offered the contracts, in respect of the other four.

This signalled the beginning of several interrelated Departmental decisions having legal effects and consequences.

[5] The Department determined that the tendering party ranked second in respect of the two discrete contract award processes from which McQuillan's decided to withdraw would be promoted to first place and would be offered the contracts. In respect of three of the four contract awards to McQuillans, Northstone was ranked second. Two further identifiable decisions in the mix were that Northstone and another bidder were offered the contracts in respect of the discrete contract award process in which they had been ranked first.

The Underlying Proceedings

[6] The legality of the Department's post-tender assessment interaction with McQuillans lies at the heart of Northstone's legal challenge. By its Writ and Statement of Claim the remedies pursued by Northstone were:

(i) A declaration that the procurement process was unlawful in specified respects;

(ii) An order setting aside the Department's decision to award the three contracts to McQuillans arising out of the discrete tenders in which Northstone had been ranked second;

(iii) Interim suspensive and injunctive relief; and

(iv) Further, or in the alternative, damages.

Northstone also sought the remedy of an order setting aside the Department's decision to award one of the contracts to the operator identified as Patrick Keenan.

[7] Northstone's case, as pleaded, is that the impugned contract award decisions are vitiated by breaches of the Department's duties of equality of treatment and transparency and, further, manifest error.

[8] The following successive passages in the Statement of Claim conveniently expose the core of the dispute between the parties:

> "*After assessment of the MEAT in respect of each contract, and having wrongfully failed to consider the matter in the course of its marking of McQuillan's Quality Submissions, the* [Department] *then proceeded to consider how McQuillan's tender for each Contract inter-related with its tenders for the other Contracts in respect of which it had been assessed as MEAT …*

> *Upon such consideration the* [Department] *realised that McQuillan's had put forward the same key personnel and resources in its Quality Submission for each of the Contracts in which it had been assessed as the MEAT and that it was therefore manifestly impossible for the personnel and resources that McQuillans had proposed to allocate to each of the Contracts in respect of which it had submitted a Tender to be actually allocated to each of the Contracts in which it had been assessed as MEAT. This realisation caused the* [Department] *… to doubt whether McQuillan's Quality Submission demonstrated that it would have the operational capability to perform the Contracts in which it had been assessed as MEAT …*
>
> [This] *should have precipitated a revision of the marks awarded in the course of the assessment of McQuillan's tenders …*
>
> *The* [Department's] *failure to perform such a revision at this stage of the Competition was a further manifest error …*
>
> *Instead of revising the marks awarded to McQuillans in the course of its assessment of its Quality Submission, the* [Department] *resolved internally to devise a mechanism for the resolution of the doubts about McQuillan's operational capabilities ….*"

Northstone's case is that the relevant conduct of the Department thereafter was unlawful in the respects specified above.

The Competition Rules

[9] It is appropriate to begin with the OJEU Contract Notice (03 November 2014) which contains the following material passage:

> "*The contracting authority considers that this contract may be suitable for economic operators that are small or medium enterprises …*
>
> *However, any selection of tenderers* ***will be based solely on the criteria set out for the procurement*** *and the contract will be awarded on the basis of the most economically advantageous tender.*"
>
> [emphasis added]

As the following passages indicate, the initial stage of the process involved expressing an interest and submitting a Pre-Qualification Questionnaire ("PQQ").

[10] The competition rules were contained in the "Instructions for Tendering" ("*IFT*"). This explained that the Department was conducting a single competition designed to give rise to the award of eight separate contracts for asphalt resurfacing in eight defined areas of Northern Ireland. Each of the contracts being procured had a separate identification number. Paragraph 10 of the IFT stated:

> "*Contracts will be awarded separately by the Contracting Authority in the order set out in Table 1 below.*"

The "Scope of the Works" (paragraph 12) included the following:

> "*Many of the work activities to be carried out will require the successful Economic Operator to employ and use skilled personnel and specialist equipment and resources associated with such work activities.*"

[11] Paragraphs 14 and 17 of the IFT stated:

> "*The Contracting Authority is seeking to identify an Economic Operator that has all of the right skills to undertake the project and is considered most capable of working in partnership, to identify the optimal solution and of delivering it as efficiently and safely as possible …*
>
> ***Multiple Tender Submissions***
>
> *This competition is one of eight Term Contracts … being let at this time. Where an Economic Operator is tendering for multiple competitions it* ***MUST****:*
>
> ***SUBMIT A SEPARATE AND FULLY COMPLETE TENDER SUBMISSION PACKAGE FOR EACH CONTRACT ….***
>
> *The Contracting Authority's base Quality Submission document … is identical for each Contract.*"

In **paragraph 27** it was stated *inter alia*:

> "*The Contracting Authority reserves the right to disqualify any Economic Operator who:*
>
> - *Provides information or confirmations which later prove to be untrue or incorrect; and/or*

- *Does not supply the information required by this IFT or the TSP or as directed otherwise by the Contracting Authority during the procurement process; and/or*

- *Fulfils any one or more of the criteria detailed in Regulation 23 of the Public Contract Regulations 2006.*

The Contracting Authority reserves the right to require the submission of any additional supplementary or clarification information as it may, at its absolute discretion, consider appropriate."

There is a related passage in paragraph 39 under the rubric "False Information":

> "*Economic Operators must ensure that all information included within their TSP is accurate. The inclusion of information that is found to be false or misleading will result in the Economic Operator's exclusion from this procurement process."*

[12] Withdrawal from the competition is possible, per paragraph 42:

> "*Economic Operators who have registered an 'Expression of Interest' may withdraw this at any time. A withdrawal of interest should be accompanied by a reason for withdrawal."*

It is appropriate to juxtapose this provision with the "Delay in Award" provision in paragraph 55:

> "*The Contracting Authority will make every effort to award a contract within 90 days of the closing day for the submission of Tenders. Tenders shall therefore remain open for acceptance for a minimum of 90 days from the Tender submission date. If the Contracting Authority cannot for any reason make an award during this 90 day period, the Contracting Authority will seek confirmation from a successful Economic Operator that their tender is still open for acceptance before an award is made. If an Economic Operator does not confirm that their Tender remains open for acceptance, the Tender will be deemed to have been withdrawn."*

Paragraph 55 modifies the well-established rule of contract law whereby an offeror may withdraw its offer at any time prior to acceptance. Bidders in this competition could not withdraw their tenders until the period specified had expired.

[13] The strictness and exclusivity of the competition rules resonate strongly in the following passage at paragraph 43:

> "*Tenders **MUST NOT** be qualified in any way, but must be submitted strictly in accordance with the Tender Data and these instructions. Tenders **MUST NOT** be accompanied by any covering letter or any statements that could be construed as rendering the tender equivocal and/or placing it on a different footing from other tenders …*
>
> *Only Tenders submitted without qualification and strictly in accordance with the Tender Data as issued …. will be accepted for consideration …*
>
> *The Contracting Authority's decision on whether or not a Tender is acceptable will be final and the Economic Operator concerned will not be consulted.*"

This is followed by:

> "***QUALIFIED TENDERS WILL BE EXCLUDED FROM FURTHER CONSIDERATION AND THE ECONOMIC OPERATOR NOTIFIED.***"

In comparable vein, paragraph 44 provides that every tender must be submitted in the relevant pro-forma which must be completed fully and without modification, together with "*all specially requested supporting information*" (Appendices)*:*

> *"All questions **MUST** be answered*".

[14] The subject matter of Section B2 of the IFT is "Tender Evaluation and Award". Paragraph 47 explains the quality/price ratio (or weighting) thus:

> "*Quality Submission Weighting: 30%*
>
> *Price Submission Weighting: 70%*."

Paragraph 48 re-emphasises the importance of completing the form of tender in full and providing all required information. Paragraph 49 appears to envisage an initial "health check" of each completed tender by the Department. Paragraph 50 ("Quality Assessment Mark") states *inter alia*:

> "*Failure by an Economic Operator to submit the Quality Submission …. in full compliance with the requirements of the competition may result in their TSP being rejected from the competition …*
>
> [The Quality Submission] *will be scored only on the information provided by the closing date and time for submissions. If any answer, or specifically requested*

> *supporting appendix, to any question in* [the Quality Submission] *is missing, the Economic Operator will not be requested to provide it and* [the Quality Submission] *will be assessed accordingly*".

[15] Pausing, it is clear from paragraphs 47 – 50 that there are three inter-connected stages of Departmental conduct following receipt of each economic operator's tender:

(i) The tender submission package ("TSP") is examined with a view to ensuring that it is complete and compliant.

(ii) The completed form of contract ("TS-CF") is examined for the same purpose.

(iii) The Quality Submission ("QS") is assessed and marked in the manner specified.

There is a fourth stage, reserved to those competing economic operators who achieve the "*minimum standard*" for each of the questions in their Quality Submission ("QS"). This entails opening their "Commercial Envelope" and assessing the price tendered. This is set out in paragraph 51, which contains a familiar warning:

> "*Failure by an Economic Operator to submit the Schedule of Rates and Prices ("TS-PS") in full compliance with the requirements of the competition may result in their TSP being rejected from the competition.*"

This is followed by an exposition of how the calculation of the "Price Assessment Mark" is to be undertaken.

[16] The next, sequential, stage of the tender assessment process is described in paragraph 51 under the rubric of "Price Assessment Mark". This explains to interested parties the methodology to be applied by the Department in this discrete exercise. Paragraph 52 prescribes a mechanism for dealing with tenders considered to be "*abnormally low*" according to the assessment tool explained. In such cases, the general rule is that the competing economic operator shall not be automatically excluded. Rather:

> "*If any Tender is considered to be abnormally low, the Contracting Authority shall engage with the Economic Operators to seek assurances and satisfy itself there is reasonable justification for the overall price or individual rates tendered. Any failure to provide such information in writing, where requested, may exclude the tender from further consideration. Having considered the justification provided, if the Contracting Authority is of the view that the tender is*

> *abnormally low the Contracting Authority may reject the tender. Where the Contracting Authority decides to accept any Tender following this scrutiny, the Economic Operators may be required to submit a Tender Declaration, which acknowledges the risks associated with its tender, signed by a duly Authorised Representative of the Economic Operator.*"

There is a specified form to be completed in the last mentioned eventuality.

[17] Next the IFT, in paragraphs 53 – 57, prescribe the discrete exercise of "Tender Overall Assessment Score". This is clearly designed to be a further stage of the tender evaluation process. Having reiterated the 30%/70% weighting regarding the "Quality Assessment Mark" and "Price Assessment Mark" respectively, paragraph 53 states:

> "*The Preferred Economic Operator is the Economic Operator who achieves the highest Overall Assessment Score in terms of Quality and Price (MEAT).*"

Paragraph 54 indicates that a tender "*shall be rejected*" where a tendering economic operator fails to maintain the "*Minimum Standards*" specified in Sections C, D and E of the PQQ.

[18] Paragraph 55 of the IFT contains a number of provisions arranged under the rubric "Contract Award". It begins with three inter-related provisions:

> "*The Contracting Authority does not bind itself to accept the lowest or any tender …*
>
> *The Contracting Authority may reject any tender where it feels there is an affordability issue …*
>
> *In the unlikely event of not accepting any tender for a competition, the Contracting Authority shall be entitled to abort the competition …*"

There follows a table setting out the Department's "*Minimum Financial Standing Requirement for Each Contract*".

[19] Next, in paragraph 56 the subject of "Multiple Awards" is regulated in these terms:

> "*Economic Operators who have been invited to tender for more than one contract shall not take this as an indication that they have been deemed to be economically and financially suitable to undertake more than one contract …*

> *The award of multiple contracts (2 or more) to an individual Economic Operator shall be limited to the aggregate of the minimum Construction Line Notational Category values shown in the Table above …*
>
> *Where the award of multiple contracts to an individual Economic Operator is being assessed, the Contracting Authority shall do so in the order shown in the Table above.*"

The next succeeding provision of the IFT, paragraph …, "Delay in Award", has been reproduced in [12] above.

[20] The final provisions of paragraph 55 are concerned with "*Standstill*". Next, in paragraph 56, the "*Debrief of Economic Operators*" is regulated in these terms:

> "*The Award Notification Letter shall advise Economic Operators of the number of tenders received; its Price Submission Ranking and percentage difference of its Model Price from that of the Preferred Economic Operator …*
>
> *In addition, unsuccessful Economic Operators shall be informed of the outcome of Completeness and Compliance checks if undertaken that were identified as a 'Fail'.*"

[21] The next section of the IFT is entitled "Quality Submission" ("QS"). This is a free standing document to be completed by tendering economic operators. At the beginning it is described as one of three documents which, together, constitute the "Tender Submission Package" ("TSP") for the competition. Another introductory statement cautions:

> "*The Quality Submission Questionnaire (TS-QS) is in three Sections as set out below. All information sought in all parts should be provided and all questions answered.*"

The text continues: this discrete document "*… shall be read in conjunction with the accompanying … IFT.*" It is divided into three sections: Health and Safety, Organisation and Management and Sustainability. The text continues:

> "***Failure by the Economic Operator to complete all questions fully and in accordance with all requirements therein and return the TSP including all specifically requested supporting information by the specified final submission date/time may result in the Economic Operator's TSP being rejected.***"

This Guidance further states:

> "*The Contracting Authority reserves the right to require evidence or additional evidence in relation to any answer given to questions in this questionnaire.*"

[22] Paragraph 10 of the Guidance states:

> "*The Economic Operator must, without undue delay, inform the Contracting Authority of any changes to the information provided in response to any questions in their Tender Submission Package that may arise at any time during their participation in this procurement process.*"

Paragraph 13 contains another familiar warning:

> "*Unless specifically requested in the questionnaire, additional supporting information beyond that typed into the text boxes will not be assessed.*"

Paragraph 15 is framed in the following cautionary language:

> "*Economic Operators must ensure that their response to each question is relevant and focused on addressing the question asked.* ***Each response will be evaluated only on the information provided in the response text box (ES) for that particular question and any specifically requested supporting information for that particular question. No marks will be awarded for a particular question for information given in response to any other question or elsewhere in the TSP.***"

[23] This is followed by the three above noted sections. In the "Health and Safety" section, specified information is requested in relation to four discrete topics. The "Scoring Interpretation" makes clear that the Department's evaluation will be on a pass/fail basis. This is undertaken purely on the basis of evaluative judgement, without recourse to any kind of algorithm.

[24] The second of the three "QS" sections is "Organisation and Management". Pausing, this is the most important aspect of the IFT in the context of this appeal. The architecture of this is a series of instructions to tendering economic operators, together with several scoring allocation tables or so-called "*weighted marks*". "*Organisation and Management*" has four discrete elements: project delivery team, quality delivery, resources and best value. Together, each competing economic operator's submission can be awarded a maximum score of 85 marks, the breakdown whereof is 30, 25, 15 and 15.

[25] The first of these four components ("Project Delivery Team") has an allocated maximum score of 30 weighted marks. Within this component there are three

discrete elements, each expressed in the form of an instruction. The first of these is Paragraph 2-01(i) which contains the following instruction:

> "*Provide an organisational chart including names, highlighting the key roles and percentage of time allocated for all personnel whom you propose would be directly responsible for the management and delivery of this Term Contract. This chart should include the line of command and communication links between parties. Sub-contractors if used shall be clearly identified.*"

The second instruction is contained in paragraph 2-01(ii):

> "*Provide a narrative on the roles, responsibilities and experience of the named key site personnel for the management and delivery of this Term Contract as listed below. Key personnel should include, but need not be limited to …*
>
> *Contracts manager, site supervisor/engineer, general foreman, traffic safety and control officer, health and safety manager, quality manager, environmental manager, sub-contractors (if applicable)* [and] *consultants (if applicable).*"

The response to this instruction will be in the form of a narrative, with 8,000 characters maximum.

Paragraph 2 – 01(iii) contains the third of the instructions to tenderers in this discrete section, requiring the provision of –

> "*… a Competence Development Plan for all personnel (including sub-contractors) whom you propose would be directly responsible for, the management and delivery of this Term Contract. Indicate how personnel shall remain competent and adequately trained during the term of the contract.*"

Immediately following these first three instructions is the first of the scoring tables. This specifies a maximum score of 30 "*weighted marks*" ranging from 5 ("excellent") to 0 ("fail").

[26] The second component of "Organisation and Management" is "Quality Delivery". This requires that five discrete "*indicators*" be addressed within the terms of the general instruction:

> "*Provide details of how your Quality Management System will benefit the delivery of the contract requirements.*"

Again, a narrative type response is envisaged. The ensuing scoring table specifies a maximum score of 25 weighted marks, ranging from 0 ("fail") to 5 ("excellent").

[27] The third element of the "Organisation and Management" section is "Resources". This requires each competing economic operator to address three specified "*indicators*". These are:

> "*1. A list of all plant and equipment to be utilised for this contract, including Sub-contractors' plant and equipment if required …*
>
> *2. Location of all key offices and depots …*
>
> *3. Details for the management, resourcing and maintenance of plant and equipment including sub-contractor's plant and equipment if required.*"

This is followed by a scoring table specifying a maximum score of 15 weighted marks, with the same range as before.

[28] The fourth component of "Organisation and Management" is "Best Value". This contains the following single instruction to competing economic operators:

> "*Provide details of how your organisation will ensure that it and its Suppliers/Sub-Contractors will deliver a quality performance in accordance with the Key Performance Indicators …. in order to deliver innovation and best practice for this contract.*"

The response is required to address each of eight specified indicators, in the form of a narrative type text. A maximum score of 15 weighted marks is available.

[29] The third, and final, section of the QS is "Sustainability." The focus of this is how the tendering party proposes to provide contractual services in environmental, social and economic respects. Once again, a narrative response is expected. This element attracts a maximum score of 15 weighted marks.

[30] "Appendix 1" which follows draws together the evaluation/marking matrix for the QS. This *inter alia* highlights the hierarchy of the scoring mechanisms. The "Organisation and Management" section attracts 85 of the 100 weighted marks available. Within this the majority of the marks, 55, are awarded for the discrete topics of project delivery team and quality delivery. Together, these account for 55% of the overall "*total quality mark*" and almost 70% of the maximum "*organisation and management*" mark. The remaining 15 marks are allocated to "Sustainability.

[31] Included within the IFT is a discrete document entitled "Conditions of Contract". This document falls to be considered together with Section C of the IFT

("Contract Specific Information") (paragraphs 58 – 85). The first paragraph of Section C makes clear that the "Conditions of Contract" document forms part of the package of "Tender Documents".

[32] Pausing, there is an obvious nexus between an economic operator's tender and the terms of the contract/s which the bidder aspires to secure and perform. Thus, the contract document could, in principle, inform the exercise of construing aspects of the tender documents and the IFT. In this appeal the main provision of the contract document which the parties have highlighted for the court is **Clause 77** which, under the rubric "Quality Submission" states:

> "*The Contractor hereby warrants that the representations contained in the Quality Submission are accurate in every respect and may be relied upon by the Employer. Where the standards represented exceed the minimum originally specified in the Specification the Quality Submission shall not constitute a qualification to the Contractor's Tender.*"

This may properly be described as a benchmark. On behalf of the Department attention was also drawn to clauses 73(3) and 82, which concern the possible engagement of sub-contractors by a successful bidder.

Factual Matrix

[33] The parties' representatives co-operated commendably in response to the court's request for a schedule of agreed material facts. The outline in [34] – [57] following draws on parts of this welcome aid.

[34] Northstone's claim arises out of a competition for the parallel award of eight out of 12 public contracts for road resurfacing services in different regions within Northern Ireland known as the Term Contracts for Asphalt Resurfacing 2015. They were:

(i) ARN1 (2015) relating to the Causeway Coast and Glens of Antrim with an estimated annual value of £3 million - £8 million and a maximum duration of five years.

(ii) ARS1 (2015) relating to Armagh, Banbridge and Craigavon and with an estimated annual value of £5 million - £10 million and a maximum duration of three years.

(iii) ARE2 (2015) relating to Lisburn and Castlereagh with an estimated annual value of £2.5 million - £5.5 million and a maximum duration of five years.

(iv) ARE1 (2015) relating to Belfast with an estimated annual value of £3.5 million - £8.5 million and a maximum duration of three years.

(v) ARN3 (2015) relating to Antrim and Newtownabbey with an estimated annual value of £2 million - £3.5 million and a maximum duration of five years.

(vi) ARW3 (2015) relating to Fermanagh and with an estimated annual value of £2 million - £6.5 million and a maximum duration of three years.

(vii) ARS3 (2015) relating to North Down and Ards and with an estimated annual value of £2 million - £6 million and a maximum duration of three years.

(viii) ARN2 relating to Mid and East Antrim with an estimated value of £1.5 million - £4.5 million and a maximum duration of three years.

[35] On 5 November 2014, the Department published a contract notice advertising a competition for the award of fixed term asphalt resurfacing contracts. Following a pre-qualification stage 11 operators were invited to submit tenders for those lots in which they had expressed interest. The contracts were divided into 8 lots, each one representing a separate geographic territory. Each lot was described in the contract notice with an estimate of the value of the work. The initial term of each contract was to be 12 months, extendable at the discretion of the Department up to a maximum duration set out in the Instructions for Tendering ("IFT") document and paragraphs 1(i)-(viii) above.

[36] The competition was conducted in accordance with the "restricted procedure" and contracts were awarded to the most economically advantageous tender ("MEAT"), with a separate competition for each lot. The MEAT was determined in accordance with award criteria set out in the IFT and were weighted Price (70%) and Quality (30%). The rules for the competitions were also set out in the IFT. Clause 10 stated: "*Contracts will be awarded separately by the Contracting Authority in the order set out in Table 1 below.*" Table 1 ranked the order in which the contracts would be awarded, with the contract estimated to give rise to the largest expenditure ranked highest.

[37] All eight competitions were run in parallel with no restriction upon the number of lots for which an operator could submit a tender. Operators who wished to enter multiple competitions were required to submit a separate tender for each. Operators who submitted multiple tenders were permitted to submit a fully or partially identical QS. Each QS was assessed separately by a Departmental panel.

[38] Northstone tendered for all eight contracts. John McQuillan (Contracts) Limited ("McQuillans") tendered for seven of the eight contracts (excluding ARW3 – Fermanagh). Northstone submitted a separate organisational chart with each tender identifying the personnel proposed for each contract. The same members of staff

were identified in multiple charts, representing more than 100% of staff time for 14 out of a total of 22 named staff members. An agreed chart depicting the proposed use of staff time across all Northstone tenders was included in the evidence.

[39] McQuillans tendered for seven of the contracts (excluding ARW3 – Fermanagh). In its QS for each of the seven contracts pursued McQuillans provided an identical organisational chart in response to the question at Section 2-01 in which it allocated 100% of its time to the specified members of staff. The Court below found that the total personnel identified in the chart was at most sufficient for four contracts. McQuillan's responses to the remaining parts of Q2-01 were similar but not identical in each tender.

[40] The terms and conditions of the contracts to be awarded were the Infrastructure Conditions of Contract, Term Version, August 2011 with amendments. An amendment was made to Clause 77 to provide that a successful operator would thereby be required to warrant that the representations contained in its Quality Submission were:

> "*accurate in every respect and may be relied upon* [by the Department]. *Where the represented standards exceeded the minimum originally specified in the Specification, the Quality Submission shall not constitute a qualification to the Contractor's tender.*"

[41] McQuillans was the competing economic operator which achieved the highest overall assessment score in terms of Quality and Price by adding the Quality Assessment Mark (Clause 50 IFT) and the Price Assessment Mark (Clause 51 IFT) (the "*Preferred Economic Operator*" under Clause 53 of the IFT) in six out of the eight competitions. Northstone was the Preferred Economic Operator in one competition (ARW 3 – Fermanagh) and Patrick Keenan was the Preferred Economic Operator in the remaining one (ARN 1 – Causeway Coast and Glens).

[42] At this stage of the contracts award process the Preferred Economic Operators identified for each competition were:

ARN 1	Patrick Keenan	[Northstone ranked 2nd]
ARS 1	McQuillans	[Whitemountain ranked 2nd]
ARE 2	McQuillans	[Whitemountain ranked 2nd]
ARE 1	McQuillans	[Whitemountain ranked 2nd]
ARN 3	McQuillans	[Northstone ranked 2nd]
ARW 3	Northstone	[F P McCann ranked 2nd]
ARS 3	McQuillans	[Northstone ranked 2nd]
ARN 2	McQuillans	[Northstone ranked 2nd]

Northstone were ranked third in ARS1, ARE2, and ARE1.

[43] The minutes of a meeting of the "TNI Procurement Committee" which took place on 15th September 2015 recorded the following under the rubric "AOB":

> *"(Jim McClean) raised a query relating to the award of multiple lots within term contracts. Pat Doherty advised that communication with Contractors may resolve issues relating to operational capabilities and that DSO advice should be sought. Jim McClean to seek DSO advice on multiple lots relating to operational capability."*

There was a further meeting on 24 September 2015, in respect of "Term Contract for Asphalt Resurfacing 2015." Under the rubric of "Assessment, Issues for Consideration" the agenda was the following

> ***"(c) Multiple Awards (IFT Clause CL55 – page 37)***
>
> *i. Resources*
>
> *[1] EO2 Duplication of Key Personnel/Operatives/Sub-Contractors/Plant in Quality Submission for each of the 6 contracts.*
>
> *ii. Order of Assessment/Withdrawal of MEAT from one or more Tender/ Intention to Award*
>
> *iii. Meeting(s) with tenderers before Intention to Award Stage (see attached extracts from Contractors/DSO/Counsel correspondence from a previous Contract)."*

There are no minutes of this meeting. There were four Departmental officials in attendance.

[44] On 2 October 2015 the Department wrote to McQuillans pursuant to Clauses 46 and 52 IFT, seeking justification for certain tendered rates in respect of its tenders for ARN3, ARS 2, ARE 2, ARN 2 and ARS 1. The letters stated *inter alia*:

> *"With reference to paragraph 50 of the IFT in your Quality Submission confirmation is required that the project delivery team, sub-contractors, operatives, squads, sub-contractors and plant would be available in the numbers and percentage of time detailed in your Quality Submission should you be awarded this contract. Where this has been provided (e.g. Contract Manager) please confirm which persons would be assigned to this contract. Your response is required by 3pm on 7 October 2015."*

On the same date, the Department wrote separately to McQuillans in connection with its tender for contract ARE1. It informed McQuillans that its tender for this competition was considered abnormally low in accordance with paragraphs 46 and 52 of the IFT. It requested justification for some of its tendered rates and also made the same request under Paragraph 50 IFT for confirmation in relation to the identity of the proposed project delivery team.

[45] On 2 October 2015, letters were also sent to Northstone and Patrick Keenan in respect of ARW3 and ARN1, seeking justification for some of their tendered rates in these competitions.

[46] McQuillans wrote to the Department on 7 October 2015 with reference to all six contracts in which it had been identified as the Preferred Economic Operator (ARE1, ARE2, ARS1, ARS3, ARN2 and ARN3), stating:

> *"On the individual merits of each contract we are satisfied that we can deliver the works as set out in the contract documentation and it was on this basis we tendered for the works.*
>
> *Notwithstanding this we may have some concerns in relation to the capacity of the company to deal with the 5 competitions we have requested to remain within, given the level of uncertainty which exists in relation to budgets, the variability of expenditure levels and the unpredictable nature of the pattern of annual expenditure.*
>
> *Given this we would wish to meet with you to discuss the potential award of any contracts and whether there are any decisions which may be required which would be to the mutual benefit of our company and TNI, given the matters which may be raised."*

[47] On 7 October 2015, by a separate letter in respect of the Term Contract ARE1, McQuillans indicated that it wished to withdraw from that competition. That letter stated as follows:

> *"We note from the letter our bid is considered abnormally low overall in relation to the weighted average of the other tenderers.*
>
> *We would confirm that in consideration of the list of items for this Contract we are concerned the full allowance has not been factored into the rates for the particular issues which may be encountered in the Belfast Contract and that we can complete the works under this Term Contract in accordance with the tender documentation as provided.*

Given this it is we would wish to withdraw from this tender Competition." (sic)

[48] On 7 October 2015 Mc Quillans also responded, via five separate letters, to the Department's requests in relation to contracts ARN 2, ARN 3, ARS 1, ARS 3 and ARE 2. Included in each letter was information said to be relevant to the price tendered and concerning the personnel proposed for that contract. The responses contained the price justifications requested and the identity of the personnel which McQuillan proposed to use to perform each of the five contracts.

[49] A meeting attended by representatives of McQuillans and the Transport NI Procurement Branch of the Department was held on 19 October 2015. The Department sought confirmation that McQuillan could deliver the last mentioned five contracts on the basis that they had tendered. McQuillans' concerns, "… *in relation to the capacity of the company to deal with the five competitions given the level of uncertainty which exists in relation to budgets"* were noted. McQuillans' representatives explained that they had a concern with the timing of the award of the contracts in November/December 2015 which did not provide a bedding in period or scope for ramping up of the resource which would be afforded if the contracts had been awarded during the summer months. Jim McClean and Roisin Wilson said that they were not, "*… in a position to nor could they give a guarantee as to the available budget or resulting workload as a result of the January monitoring round*." McQuillans were asked to confirm which of the five contracts they wished to be considered for and to confirm that they could provide the project delivery team and resources tendered for each of these contracts.

[50] Next, by letter dated 22 October 2015 McQuillans withdrew from ARS1 and confirmed that in respect of the four remaining contracts ARE2, ARN3, ARS3 and ARN2 their resources were as per their submission and were available to perform all four contracts.

[51] The final outcome of the eight competitions was:

ARN 1	Patrick Keenan	[Northstone ranked 2nd]
ARS 1	Whitemountain	[McQuillans ranked 1st, but withdrew]
ARE 2	McQuillans	[Whitemountain ranked 2nd]
ARE 1	Whitemountain	[McQuillans ranked 1st, but withdrew]
ARN 3	McQuillans	[Northstone ranked 2nd]
ARW 3	Northstone	[F P McCann ranked 2nd]
ARS 3	McQuillans	[Northstone ranked 2nd]
ARN 2	McQuillans	[Northstone ranked 2nd]

[52] On 3 November 2015, the Department issued award notification letters to each of the first ranked economic operators, informing them of the intention to

award the contract following the conclusion of the standstill period which was due to expire at midnight on 16 November 2015.

[53] On the same date, the Department also issued letters to Northstone informing it of the identity of the successful operator and of the intention to award the contract after the expiry of the standstill period in each competition in which it had been unsuccessful.

[54] On 23 November 2015 Northstone issued a writ commencing these proceedings claiming that a breach of the Public Contract Regulations occurred in two ways:

(i) Manifest Error

Northstone contended that the total resources identified in the McQuillan Quality Submission were not sufficient to perform six contracts. It argued that the evaluation of the Quality Submission for later competitions should therefore be revised and discounted to reflect the possibility that the resources identified should have been "allocated" for use in an earlier contract and should be excluded from evaluation in later competitions.

(ii) Breach of Equal Treatment and Transparency

Northstone contended that there was a breach of equal treatment and transparency arising out of McQuillan's decision to withdraw its tender in respect of two competitions.

On 1 July 2016 the High Court ordered that the automatic stay should be lifted, thereby permitting the Department to award all contracts.[1]

[55] On 28 January 2016 the Department informed Term Contractors of a restriction on the award of multiple contracts in the future. It stated:

> *"In order to ensure security of service, preserve competition and encourage participation by SMEs, Transport NI has decided to limit the number of Terms Contracts that can be allocated to any single Contractor. In future tender competitions, the maximum number of contracts to be award to any single contractor will generally not exceed 50% of the contracts released for tender.*
>
> *The allocation of multiple contracts will be completed in a pre-determined order and will incorporate a review of the contractor's financial standing."*

[56] McQuillans were initially the Preferred Economic Operator in six competitions which had not occurred before. Nor had a single operator held this many asphalt re-surfacing contracts in so many territories simultaneously. Success on this scale had never occurred in the past. The evidence in the lower court was that the previous highest for a single operator was three contracts out of nine regions.

[57] When marking the responses of competing economic operators to questions 2-01 and 2-03, the Department made no allowance for the total number of competitions which they had entered or the extent to which there may be duplication across tenders. In the case of McQuillans its QS scores were not reduced despite the use of an identical organisational chart in all competitions and duplication of both personnel and plant. The organisational chart for example showed that McQuillan was putting forward four site engineers in a context where each would have to give 100% of his or her time to any contract awarded to McQuillan. This meant that on the face of the organisational chart McQuillan could provide site engineers for four contracts at most.

[58] The Department (and the Civil Service in NI) did not have a policy for when meetings should be minuted. The Department failed to comply with the Order of the Master dated 16 October 2018 which required an affidavit pursuant to RCJ Order 24 Rule 7 in respect of various categories of documents. This issue was the subject of a joint post hearing note from the parties. The case had been reviewed by the Court in advance of listing to assess readiness for trial. At that time the affidavit had not been filed and the Court was not informed that it was outstanding. The parties simply reported to the court that they were endeavouring to comply with the practice direction ahead of the scheduled hearing dates.

The Legal Framework in Outline

[59] In every case where contracts to which EU Directive 2014/24/EU (the "*Directive*") applies the legality of the contract procurement process, the conduct of the procuring authority and contract award decisions are gauged by reference to a legal framework the fundamental components whereof are the Directive and the United Kingdom's domestic law transposing measure, namely the Public Contracts Regulations 2015 (the "*2015 Regulations*"). The third component is the jurisprudence of the Court of Justice of the European Communities ("*CJEU*"). The jurisprudence of UK courts and, in some instances, that of the courts of other EU Member States may also fall to be considered.

[60] It is trite, but nonetheless salutary, to recall that the Directive has the status of supreme EU law. Summarising, it might be said that the Directive and the 2015 Regulations, in tandem, constitute a code of legal rules. This code extends beyond black letter law as it includes, via the recitals and provisions of the Directive and relevant Treaty provisions, certain identifiable governing legal principles. To all of

this is added the three distinct strands of jurisprudence identified above. The first, that of the CJEU, is, insofar as material, binding on the courts of the Member States of the EU. The second, that of UK courts, is binding on this court only if and to the extent that the doctrine of precedent in the UK legal system requires this. The third strand, that of the courts of other EU Member States, is informative rather than binding in nature.

[61] The overarching EU principles engaged are rehearsed in Recital No 1 of Directive 2014/24/EU:

> *"Whereas:*
>
> *(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition."*

The EU legislation prescribes what may be described as an overarching legal rule, namely the assessment of tenders and the making of contract award decisions must be conducted on the basis of the *most economically advantageous tender* (or "*MEAT*"). All of the other legal rules and principles may be viewed as offshoots of this central pillar. The operation of the MEAT rule entails a balancing between quality and price in a given bid. The contracting authority has the option of procuring the relevant contract exclusively on the basis of price. Both mechanisms are designed to ensure fair competition and equal and undistorted trade within individual markets. Viewed through this lens the imperative of equal treatment and transparency quickly becomes apparent.

[62] To summarise, objectivity, fairness, detachment, equal treatment, equality of opportunity, level playing field, transparency and the avoidance of manifest error on the part of the awarding authority are the hallmarks of a contract award process and the award of a contract according with the governing legal framework.

The Judgment of Horner J

[63] Horner J made the following two conclusions:

(a) There was a manifest error made by the DRD in giving McQuillans a mark of excellent in two answers, namely 2-01 and 2-03 in three tenders when McQuillans did not have the resources to perform those contracts.

(b) There was a lack of transparency, unequal treatment and breach of the principle of non-discrimination in the circumstances whereby McQuillans was able to select which of the Contracts it would perform and those it would not perform and a lack of transparency in failing to make a record of the meeting on 24 September 2015 thereby preventing the plaintiff from understanding or verifying the nature of the mechanism which the DRD used to permit one runner-up to be preferred over another runner-up.

In the Order which followed the judge made a declaration faithful to the terms of these two central conclusions.

[64] It is appropriate to draw attention to the following features of the judgment:

(i) At [33], and in other places, the judge identified the nub of the problem confronting the Department, namely that one of the bidders, McQuillans, had tendered successfully for more contracts than it could service having regard to its resources. The essence of the judge's evaluation of this issue was that the IFT lacked a suitable mechanism to deal with this conundrum.

(ii) At [44] the judge expressed himself satisfied on the basis of all the evidence (which included sworn testimony from both parties) that at all times the resources available to McQuillans were confined to performing four contracts at most.

(iii) The Department was obliged to evaluate the experience and skills of the teams submitted by, or any equivalents available to, bidders. Furthermore, the Department was required to consider whether a bidder possessed the resources and skills necessary to perform the contract when considering each "quality submission": see [68].

(iv) The judge found that McQuillans did not possess, and could not access, the resources necessary to service all of the contracts for which it was bidding. Its resources were confined to the performance of four of the contracts only: [70] and [71].

(v) There was a lack of clarity in the competition rules, an "*obvious lacuna*", via the absence of a mechanism for dealing with a bidder who had tendered successfully for more contracts than it had the resources to perform: see [78], [84] and [87].

(vi) The judge evidently accepted the evidence of the departmental official summarised at [77] of his judgment. This disclosed a three-stage approach whereby, in sequence, officials evaluated first quality assessment, second price and, third and finally, "*verification of the* [bidder's] *resources*" prior to making contract award decisions. The judge noted the Department's contention in these terms:

> "*Thus, there could be no objection to McQuillans submitting identical tenders in respect of each contract. It was at* ***the verification stage*** *that McQuillans needed to show that it had the necessary resources to complete each contract it had won.*"
> [emphasis added]

(vii) The tenders of McQuillans were in essence "*qualified tenders*", in contravention of paragraph 32 of the IFT: [85](iv).

(viii) The Department's allocation of a score of "*excellent*" to McQuillans in its responses to paragraphs 2-01 and 2-03 in its quality submission in respect of the three contracts which McQuillans was unable to perform, a fact which the Department should have realised, was a manifest error.

(ix) At [87] the judge rejected the Department's reliance on a "*verification of resources*" (third) stage, observing "*… verification of resources rather than solving the problem of the duplication of resources merely highlighted its presence and the unfair, unequal and discriminatory nature of the ad hoc solution which was devised to deal with it*".

(x) The competition rules were not clear, precise and unequivocal. The Department's interaction with McQuillans at the final, pre-contract award stage effectively unfolded in a "*no rules*" world: [88] – [89].

(xi) The Department applied a process which was opaque and lacking in transparency giving rise to unequal and discriminatory treatment of unsuccessful runners up without objective justification: [89].

The Contentious Issues

[65] As appears from the foregoing, the judge rejected the Department's contention that it had engaged in a lawful "*verification of resources*" exercise before making its contract award decisions. The Department's entitlement to conduct itself thus as a matter of law became the central pillar of its case to this court on appeal. Whither reposed this entitlement? The submission of Mr David McMillen QC and Mr Paul McLaughlin QC was that this entitlement was contained in the competition rules and derived from CJEU jurisprudence.

[66] The kernel of the Department's case emerges in the following passage from counsels' written submissions:

> "*In brief form, the Appellant says that the IFT contains clear and express rules which govern the circumstances of an operator succeeding in more than one competition and which have never been challenged. These express rules, when applied in conjunction with well-established procurement procedures for pre-award verification of the content of the tender, provide the basis upon which the competitions ought to have been conducted and contracts awarded. This was what the Department did.*"

Elaborating, Mr McMillen submitted that the effect of the judge's decision is that the Department should have applied an undisclosed procedure namely the reopening and re-evaluation of the quality submissions. This, it is said, would have been unlawful. Related to this submission is the contention that the competition rules were "*clear and workable*".

[67] The central focus of the submissions of Mr Michael Bowsher QC and Mr Richard Coghlin QC on behalf of Northstone was the IFT. They contended that the Department had engaged in a process which was not permitted by the IFT. McQuillans had impermissibly been allowed to alter their bid. It was clear from the competition rules, particularly the "*Organisation and Management*" section, that the skills, experience and identities of the "*key personnel*" proposed to deliver the contracts were matters of importance. While some minor differences might be permissible, there had to be an appropriate correlation between contract bid and contract performance. The IFT established how a bidder's resources were to be evaluated across multiple tenders. The IFT did not permit the evaluation of bids by reference to resources not specified therein. Nor did the IFT permit the amendment of bids. The Department had unlawfully allowed McQuillans to make post-tender changes to its bids.

[68] Mr Bowsher further submitted that insofar as "verification" of a bidder's resources was an appropriate exercise for the Department to undertake this (our summary) should have been part and parcel of the Department's evaluation and scoring of each quality submission. Further, McQuillans' bids were infected by misrepresentations of fact.

[69] The headlines of each party's case are as above. There are other features of each party's elaborate and lucid submissions which will be addressed in our consideration of the decided cases.

The Contentious Issues Considered

[70] Any exercise of reviewing the leading cases not infrequently begins with the valuable summary of the main legal rules and principles in the judgment of Morgan J in *Lion Apparel Systems v Firebuy* [2007] EWHC 2179 (CH) at [29] – [38] and/or the

comprehensive code of guidance contained in the judgment of the CJEU (5th Chamber) in *Siac Construction v County Council of the County of Mayo* (Case C-19/00) at [32] – [44]:

> *"32. The Court has held in this regard that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, inter alia, Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 16).*
>
> *33. In accordance with that objective, the duty to observe the principle of equal treatment of tenderers lies at the very heart of Directive 71/305, as amended (Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraph 33).*
>
> *34. More precisely, tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority (see, to this effect, Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 54).*
>
> *35. As for the criteria which may be accepted as criteria for the award of a public works contract to what is the most economically advantageous tender, Article 29(1), second indent, of Directive 71/305, as amended, does not list these exhaustively.*
>
> *36. Although that provision thus leaves it to the adjudicating authorities to choose the criteria on which they propose to base their award of the contract, that choice may relate only to criteria aimed at identifying the offer which is economically the most advantageous (Case 31/87 Beentjes [1988] ECR 4635, paragraph 19).*
>
> *37. Further, an award criterion having the effect of conferring on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer would be incompatible with Article 29 of Directive 71/305, as amended (Beentjes, cited above, paragraph 26).*
>
> *38. The mere fact that an award criterion relates to a factual element which will be known precisely only after the contract has been awarded cannot be regarded as conferring any such unrestricted freedom on the adjudicating authority.*

> *39. The Court has already ruled that reliability of supplies is one of the criteria which may be taken into account in determining the most economically advantageous tender (Case C-324/93 Evans Medical and MacFarlane Smith [1995] ECR I-563, paragraph 44).*
>
> *40. However, in order for the use of such a criterion to be compatible with the requirement that tenderers be treated equally, it is first of all necessary, as indeed Article 29(2) of Directive 71/305, as amended, provides, that that criterion be mentioned in the contract documents or contract notice.*
>
> *41. Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (see, by analogy, Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31).*
>
> *42. More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.*
>
> *43. This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure (see, along these lines, Commission v Belgium, cited above, paragraphs 88 and 89).*
>
> *44. Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known precisely only in the future is in principle capable of guaranteeing compliance with that condition."*

[71] The effect of the principle formulated at [34] of *Siac* is that bidders are entitled to equality of treatment throughout the entirety of the contract procurement process, from beginning to end. Furthermore, as [41] makes clear, transparency furthers the ends of equal treatment. It is the handmaiden of equality of treatment of all competitors. At [42] there is a material reference to the hypothetical *reasonably well informed and normally diligent tenderer* (hereinafter "*the reasonable bidder*"). The obligation on the contracting authority is to ensure that the competition rules are designed so that, applying this objective prism, every bidder will understand the award criteria in the same way. The contours of this test and, in particular, its fundamentally objective character were expounded *in extenso* by the Supreme Court in *Health Care at Home Limited v Common Services Agency* [2014] UKSC 49 at [5] – [16].

[72] In a series of decisions, the CJEU has made clear that in determining the MEAT it is permissible for the contracting authority to apply both qualitative and quantitative criteria provided that these are compliant with other basic rules and principles, namely they must be linked to the subject matter of the contract, may not confer an unrestricted freedom of choice on the contracting public authority, are expressly specified in the tendering documents and comply with fundamental principles of Community law, in particular the principle of non-discrimination. See, for example, *Concordia Bus Finland* (Case C-513/99) at [60] and [64].

[73] Certain features of the principle of equality of treatment and transparency are highlighted in the decision of this court *in Clinton v Department for Employment and Learning and DFP [2012] NICA 48 at [24]:*

> *"[24] Once tenders have been submitted those tenders in principle can no longer be amended either at the request of the contracting authority or of the tenderers. The principle of equal treatment precludes negotiation. For an authority to provide clarification runs the risk of making the authority appear to have negotiated with the tenderer. Tenderers cannot complain that there is such an obligation when the lack of clarity in their tender is attributable to their failure to exercise due diligence in the drafting of the tender. Article 2 of the Directive does not preclude the correction or amplification of a tender where on an exceptional basis it would be appropriate to allow such correction or clarification, particularly when it is clear that mere clarification or correct obvious material errors provided that such an amendment does not in reality lead to the submission of a new tender. The authority must treat the various tenderers equally and fairly in such a way that a request for clarification does not appear to have unduly favoured or disadvantaged the tenderer to whom the request is addressed (SAG ELV v Slovensko and Others [2012] EUECJ C-599/10 (29 March 2012 (paragraphs 36 et seq))."*

This passage (though not in express terms) invites reflection on what may be expressly permitted by the individual competition rules, subject of course to the qualifications noted in the immediately preceding paragraph.

[74] One of the distinctive EU legal rules with some resonance in the context of this appeal is the requirement that the procurement competition rules be framed in clear, precise and unequivocal terms. This is expressed forcibly in *European Commission v Netherlands* (Case C-368/10) at [109] – [110]:

> *"109 The principle of transparency implies that 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 and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract (see, inter alia, Case C-496/99 P Commission v CAS Succhi di Frutta [2004] ECR I-3801).*
>
> *110 As the Advocate General stated in paragraph 146 of her Opinion, it must be held that the requirements relating to compliance with the 'criteria of sustainability of purchases and socially responsible business' and the obligation to 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' are not so clear, precise and unequivocal as to enable all reasonably informed tenderers exercising ordinary care to be completely sure what the criteria governing those requirements are. The same applies, and all the more so, in relation to the requirement addressed to tenderers that they state in their tender 'in what way [they] fulfil' those criteria or 'in what way [they] contribute' to the goals sought by the contracting authority with regard to the contract and to coffee production, without precisely indicating to them what information they must provide."*

In that case the contract award criteria under scrutiny included certain requirements relating to sustainability expressed in general terms.

[75] The aforementioned decision reinforces the detached, objective nature of the exercise to be performed by the reviewing court in cases where the competition rules fall to be construed. This requirement of objectivity, in the view of this court, precludes the reception of evidence from either a bidder or the contracting authority consisting of subjective views and opinions about the meaning of any competition rule. As stated above, the reasonably well informed and normally diligent tenderer is a hypothetical person. The court becomes this hypothetical person in cases where it is necessary to construe the competition rules.

[76] At first instance in *Clinton* (*ante*) [2012] NIQB 2, the High Court elaborated on both the characteristics of the hypothetical reasonable bidder and the role of the court, at [38]:

> *"The **Siac** test exhorts the court to attempt, so far as reasonably practicable, to occupy the shoes of the hypothetical tenderer. The test provides some insight into the characteristics and attributes of such a tenderer: well, but not necessarily fully, informed and usually careful and attentive, but not invariably a paragon of diligence. The incorporation of the adjectives "reasonably" and "normally" in the test convey the notion of a*

> *tenderer who may be vulnerable to a certain (though not excessive) degree of error, inattention and other human weakness. In other words, the Siac hypothetical tenderer is a terrestrial, rather than celestial, being, hailing from earth and not heaven. In its determination of this issue, I consider that the court should approach the matter not as an exercise in statutory construction or as one involving the interpretation of a deed or contract or other legal instrument. To adopt such an approach would not, in my view, be consonant with the Siac test. Rather, the court's attention must focus very much on the "industry" concerned, in which the professionals and practitioners are not lawyers."*

To the knowledge of this court the correctness of this passage has not been questioned in any binding decision. Furthermore the diligence of counsel brought to our attention a decision of the Irish High Court endorsing this approach, *Gaswise Limited v Dublin City Council* [2014] IEHC 56 at [22] – [23].

[77] *Clinton* was decided just before the decision of the CJEU (10th Chamber) in *Ministeriet* (etc) *v Manova* (Case C-336/12), where the court stated at [31] – [32]:

> *"31 The principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification (see, to that effect, Case C-599/10 SAG ELV Slovensko and Others [2012] ECR, paragraphs 36 and 37).*
>
> *32 However, the Court has explained that Article 2 of Directive 2004/18 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors (SAG ELV Slovensko and Others, paragraph 44)."*

At [34] – [37] the court set out the limitations on a contracting authority's entitlement to seek clarification of a tender:

> *"34 First of all, a request for clarification of a tender, which may not be made until after the contracting authority has*

> *looked at all the tenders, must, as a general rule, be sent in an equivalent manner to all tenderers in the same situation (see, to that effect, SAG ELV Slovensko and Others, paragraphs 42 and 43).*
>
> *35 Next, the request must relate to all sections of the tender which require clarification (see, to that effect, SAG ELV Slovensko and Others, paragraph* 44)."

[78] In *EVN-AG v Republik Osterreich* [Case C-448/01] the public authority concerned in the national proceedings invited tenders for the award of a public contract for the supply of electricity. The published award criteria included "*impact of the services on the environment in accordance with the contract documents*." Furthermore, the successful bidder had to undertake to supply electricity produced from renewable energy sources (with certain limitations) and provide proof of the production or purchase of renewable energy in specified terms. This criterion had a very high weighting of 45%. In making its preliminary reference to the CJEU the national court highlighted the admitted inability of the relevant public authority to effectively verify the accuracy of the material information provided by bidders.

[79] The First Chamber held, firstly, that the application of a weighting of 45% to the contested award criterion was compatible with EU public procurement legislation. The Chamber then turned to examine the "verification question" referred. The Chamber formulated this question at [45] in these terms:

> "*The referring body is therefore essentially asking whether the Community law provisions governing the award of public contracts preclude a contracting authority from applying an award criterion which is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be* ***effectively verified***."
>
> [Our emphasis.]

A close reading of [44] – [46] confirms that the issue was one of verification of two distinct types of information provided by bidders, namely (a) information relating to its actual use of renewable energy sources during the preceding two year period and (b) information relating to its proposed use of such sources, if successful, during the first two years of the contract period: see [16] – [18]. Pausing, the word "*proof*" in [18] is of some little importance.

[80] In order to correctly understand what the Sixth Chamber decided it is necessary to reproduce [47] – [52] in full:

> *"47. It should be recalled that the principle of equal treatment of tenderers which, as the Court has repeatedly held, underlies the directives on procedures for the award of public*

contracts (see, in particular, ***Case C-470/99 Universale-Bau and Others*** *[2002] ECR I-11617, paragraph 91, and* ***Case C-315/01 GAT*** *[2003] ECR I-6351, paragraph 73) implies, first of all, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (****SIAC Construction****, paragraph 34).*

*48. More specifically, that means that when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers (****SIAC Construction****, cited above, paragraph 44).*

49. Second, the principle of equal treatment implies an obligation of transparency in order to enable verification that it has been complied with, which consists in ensuring, inter alia, review of the impartiality of procurement procedures (see, to that effect, ***Universale-Bau and Others****, paragraphs 91 and 92).*

50. Objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria.

51. It is thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure.

52. Therefore, an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement."

[81] The verb "*to verify*" and its derivatives feature in the above passages and, indeed, in earlier parts of the judgment. A close analysis of the phraseology is essential. This court considers that in [49] the noun "*verification*" clearly refers to the exercise of reviewing the conduct of the contract awarding authority *ex post facto* through the prism of transparency in order to ensure that it has observed the hallowed principle of equal treatment. In contrast, in the three paragraphs which follow, [50] – [52], the focus is on the conduct of the contracting authority in its evaluation of bids i.e. at the tender assessment stage. This is particularly evident from the sentence beginning "*Objective and Transparent Evaluation ….*" (above). We

consider it clear that in this passage the Chamber is asking the question: what could the authority lawfully do in order to verify effectively whether the information provided by bidders satisfied the award criteria? It is important to recognise that the Chamber was not posing this question in the terms of a general legal abstraction. Rather, it was focusing intensely on what the procuring authority concerned could lawfully do in the specific context of the competition rules devised by it for the contract procurement exercise in question.

[82] In answering this question the First Chamber devised a solution possessed of two elements, one general and one particular. At the general level, the Court determined that in contract procurement exercises governed by the Directive the competition rules must include mechanisms whereby the procuring authority can effectively verify the information provided by bidders. Where the rules fail to do so the particular award criteria infringe EU law public procurement principles. The reason why they do so is that the rules/criteria fail to satisfy the principle of transparency in a manner which will ensure equal treatment of all bidders. The particular, specific aspect of the First Chamber's resolution of this issue had its focus exclusively on the competition rules of the contract procurement exercise involved in the Article 267 TFEU reference in question. The Chamber held, in terms, that those rules were deficient in this respect.

[83] Given the foregoing analysis this court considers that the decision in *EVN* does not enunciate any principle of EU law supporting the Department's argument. Quite the contrary: if and insofar as this court should hold that the Department's competition rules in the procurement exercise under scrutiny did not contain mechanisms for verifying the accuracy of information contained in competing economic operators' tenders at the tender evaluation and scoring assessment stage, the rules would be in breach of the principle clearly promulgated in *EVN*.

[84] Another decision invoked by the Department is *Public Interest Lawyers v Legal Services Commission* [2010] EWHC 3277 (Admin). This is a first instance decision of the English High Court. The claimant challenged decisions of the Legal Services Commission ("LSC") whereby contracts for the provision of certain types of publicly funded legal services were awarded. One of the three grounds of challenge advanced was what the judge described in shorthand as "*verification of quality standards*": see [1]. The contours of this ground are set forth at [57]:

> "*The first ground of challenge contends that the* [LSC] *has acted unfairly and unlawfully and in breach of the duties of equal treatment and transparency by failing to take adequate steps to verify that those who have been awarded contracts satisfy all criteria laid down in the tender …. one term concerning the experience which a supervisor must have, the other relating to the ratio of supervisors to case workers.*"

The following distinction at [11] of the judgment of Cranston J must be appreciated:

> "*Ultimately the public law and generic mental health contracts were to be awarded to every bidder who satisfied the essential criteria ie on a non-competitive basis. The tender for work in high security hospitals was awarded on the basis of the application of selection criteria and was therefore a competitive process.*"

This dichotomy was reflected in the competition rules, as [30] confirms: for so-called "*low volume*" categories of publicly funded work tenders would be "*non-competitive*", whereas in contrast for predicted high volume categories the contract procurement exercise was one of "*competitive bids by reference to additional selection criteria.*"

[85] The detailed judgment of Cranston J repays careful reading. It is clear from [28]ff that the contract procurement competition embodied a series of rules contained (as is conventional) in the information to tenderers (the "IFT" equivalent in this appeal). The staged nature of the exercise, by reference to a series of particular dates and milestones, must also be appreciated. What emerges from this analysis is that the competition rules expressly devised a mechanism, noted particularly at [31] and [33] of the judgment, for the "*pre-contract verification check*" in respect of specified quality matters. In short, the scheme of the competition rules was the following: the submission of bids, the evaluation of bids, the notification of outcomes to bidders and a pre-contract verification check in respect of successful bidders.

[86] The challenging party was successful on the ground identified in the first quotation at [83] above as the "*first ground of challenge.*" The reason for its success is explained in [65] of the judgment. Fundamentally, whereas the competition rules required that a successful bidder be subjected to the exercise of verification of the quality standards specified in its tender prior to any contract award, in fact contracts were awarded before this verification process had been completed. This emerges from [31] – [46] of the judgment read as a whole, in conjunction with the final sentence of [57], the opening two sentences of [65] and [66]. See firstly [65]:

> "*In my judgement, however, verification has fallen short. In general terms that is because it was not completed at the time the contracts were entered.*"

In summary, the contract award decisions were vitiated because they were in breach of the competition rules. Cranston J formulated the consequence of this at [66] in the following succinct terms:

> "*In each case an applicant may have been awarded a contract despite not meeting the necessary standards. There is a breach of the equality standard in the Public Contract Regulations 2006.*"

[87] We consider that *Public Interest Lawyers* is a case sensitive decision relating to what the specific competition rules permitted and required of the contracting authority concerned (LSC) and how the authority failed to observe those rules. It does not establish any principle endorsing the legality of the impugned post-tender evaluation and scoring conduct of the Department in this case. Thus, analysed, in our opinion the decision in *Public Interest Lawyers* provides no support for the Department's case.

[88] The last of the decided cases falling to be considered is *Ambisig v Ambiente (etc)* [Case C-601/13]. The first striking feature of this decision is that it is focused on the legality of a contract award criterion. That, as Mr McMillen correctly argued, is not this case. The criterion in question permitted the contract awarding authority to evaluate the experience and academic and professional expertise of the team members put forward by the bidder to perform the contract. The Fifth Chamber decided that this was lawful in the particular circumstances. The *ratio decidendi* of the court's decision is ascertainable in the following passages at [31] – [35]:

> "*31 The quality of performance of a public contract may depend decisively on the 'professional merit' of the people entrusted with its performance, which is made up of their professional experience and background.*
>
> *32 This is particularly true where the performance of the contract is intellectual in nature and, as in the main proceedings in the present case, concerns training and consultancy services.*
>
> *33 Where a contract of this nature is to be performed by a team, it is the abilities and experience of its members which are decisive for the evaluation of the professional quality of the team. That quality may be an intrinsic characteristic of the tender and linked to the subject-matter of the contract for the purposes of Article 53(1)(a) of Directive 2004/18.*
>
> *34 Consequently, that quality may be included as an award criterion in the contract notice or in the relevant tendering specifications.*
>
> *35 In the light of the foregoing, the answer to the question referred is that, with regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, Article 53(1)(a) of Directive 2004/18 does not preclude the contracting authority from using a criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members*."

[89] Thus, in the case sensitive context of *Ambisig* the contract award criterion requiring the demonstration of particular experience and expertise of the members of the team put forward by the bidders to perform the contract was considered compatible with EU procurement law. The reach of the decision in *Ambisig* extends no further. Given this analysis we consider that this decision does not advance the Department's case.

[90] The court has completed its review and analysis of the relevant jurisprudence identifying in particular those cases highlighted in the parties' respective submissions. The argument of Mr McMillen and Mr McLaughlin also drew attention to certain passages in Arrowsmith, The Law of Public and Utilities Procurement (3rd Edition). First, at paragraph 7-188, the author states:

> "*It can be argued that when a tenderer proposes in its offer to use either staff with particular attributes – such as particular qualifications – or specific named staff, the directive in fact requires the authority to include (or national law to apply) a* ***legal obligation*** *for the tenderer to comply with this offer as part of the contract, when this proposal is taken into consideration in applying the award criteria. This could be an obligation for the staff involved to hold the required attributes, an obligation for the authority to use named staff* ***or equivalent****, or (if it is considered that equivalent staff might not be available because of the unique or special nature of the proposed staff) an obligation for the authority to use named staff.*"

[91] We can identify nothing in this passage purporting to promulgate a legal principle of general application. Nor is there anything which has – or could have – the effect of diluting the overarching EU legal rules and principles outlined above. Furthermore, this passage does not speak to the task of the court, which is to construe the contract award criteria prescribed in the competition rules in every case. Indeed, everything in this passage is subject to these three qualifications. Moreover, the general orientation of this passage, considered as a whole, is directed to the contract performance stage and the issue arising at that stage of whether the successful competing economic operator is in fact performing the awarded contract in accordance with the terms of its tender. One of the merits of this passage is to draw attention to the important distinction between prediction and reality, expectation and event. Prediction and expectation belong to the tender evaluation stage. Reality and event, in contrast, belong to the contract performance stage.

[92] Furthermore, one must be alert to the context to which the passage in question belongs. It is contained in a section of the text examining the inter-relationship of selection criteria and award criteria, as both the preceding and the following passages, at paragraphs 7-187 and 7-189 make clear. Independently, this court would endorse the author's focus on the terms of the competition rules in the final part of paragraph 7-188 ("*Inclusion of a specific change clause …*"). We consider

that, properly analysed, here one finds a correct emphasis on the terms in which the competition rules (award criteria) devised for a given contract procurement exercise are formulated.

[93] The court has also considered paragraphs 7-195 to 7-1979 of the text. The subject matter of these passages is the breadth of the discretion available to the contracting authority when formulating contract award criteria and weightings. We consider that, properly analysed, no issue of this kind arises in these proceedings. In this respect, Mr McMillen was correct to emphasise that Northstone is not challenging any of the competition rules.

[94] The decisions in *EVN* and *Public Interest Lawyers* are noted by Professor Arrowsmith at paragraphs 7-210/211 of the text. Paragraph 7-210 begins in these terms:

> "*It appears that there is a general requirement that criteria applied in the procurement process must be subject to and capable of verification: failure to verify can involve treating like cases differently (those who do not meet the criteria being treated like those who do) in violation of equal treatment.*"

This court's detailed analysis of the decision in *EVN* is set forth in [76] – [80] above. As indicated, this court's assessment is that *EVN* decided that in furtherance of the inter-related principles of equal treatment of competing economic operators and the transparency of the contract award process, the competition rules must include mechanisms whereby the procuring public authority can effectively verify the information provided by bidders. If the competition rules are deficient in this respect, the award criteria infringe EU law public procurement principles. Thus, as reasoned and concluded above, verification of the information contained in bids is not a general principle of EU procurement law. The relevant competition rules must, therefore, contain effective verification mechanisms.

[95] We agree with Professor Arrowsmith's observations, in paragraph 7-210, on the intensity of verification. This court considers that this issue will be governed by two overarching touchstones in every case. The first is what is permitted by the relevant competition rules. The second is the overarching EU public procurement principles as outlined in [58] – [60] above. At paragraph 7-211 one finds the terminology of "*the verification principle*." If and insofar as the author is suggesting that the EU law public procurement principles include a "*verification principle*", this court respectfully differs for the reasons we have given. In the same passage, Professor Arrowsmith offers the view that this principle "*… cannot be interpreted as requiring a contracting authority to seek information from tenderers if the authority has other reliable sources of information*". This court confines itself to expressing reservations about the correctness of this proposition, given its *prima facie* incompatibility with the principles of equal treatment of all competing economic

operators and transparency. We would add that this proposition may fall to be tested and determined in some suitable future case.

[96] Next, at paragraph 7-211 Professor Arrowsmith states that "*These principles*" were applied in *Public Interest Lawyers*. As already observed, the author would appear to be espousing only one principle in the preceding passages and we do not repeat our analysis of this. Nor is it necessary to repeat our examination of the decision in *Public Interest Lawyers* in [83] – [86] above. As this indicates, we consider that the *ratio* of this decision is that the conduct of the contract awarding authority concerned with regard to the verification of information provided in bidders' tenders was unlawful because it infringed the applicable competition rules. In short, the authority failed to complete the verification process required and permitted by its rules prior to contract award and commencement, in breach of such rules. This aspect of our analysis of what *Public Interest Lawyers* decided does not feature in paragraph 7-211 of Professor Arrowsmith's text. Subject to that we agree with the author's assessment of the second aspect of what is to be drawn from [65] – [66] of the judgment of Cranston J, namely that there was a breach of the principle of equality of treatment because certain successful bidders may have been awarded contracts despite not satisfying the standards prescribed by the competition rules.

[97] It is of self-evident importance that this court maintain its focus on what we have described in certain parts of this judgment, in short-hand, as the offending conduct of the Department. This conduct is outlined, in summary, in [8], [41] – [51] and [56] above, as well as in certain other passages. Based on our analysis of the decided cases above, we conclude that there is nothing in the relevant jurisprudence, European or domestic, which establishes any principle endorsing the legality of the contract award conduct of the Department under scrutiny. Thus, the first of the two central pillars of the Department's case is rejected.

[98] The second central pillar of the Department's case is that its impugned conduct was lawful as it accorded with the rules of the contract procurement process in question. This places the spotlight firmly on the terms of the IFT. Pausing, we consider that this raises two separate questions. First, is this contention correct? Second, if "yes", did this conduct also conform to the relevant principles of EU law?

[99] The governing principle thus engaged is expressed in *SIAC Construction* at paragraph [41]:

> "The award criteria must be formulated, in the contract documents of the contract notice, in such a way as to allow all reasonably well-informed and diligent tenderers to interpret them in the same way."

The importance of the understanding of the reasonably well-informed and diligent tenderer was reiterated in *Commission v The Netherlands* [2013] All ER (EC) 804 at 109. There the court said that award criteria must be drawn must be drawn up -

> *"… in a clear, precise and unequivocal manner in the notice of a contract document so that first, all reasonably well-informed tenderers exercising care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenderers submitted satisfied the criteria applying to the relevant contract."*

It has been held that if the hypothetical reasonable bidder could understandably and plausibly have construed the criteria in a manner differing from that intended by the procuring public authority, it follows that such criteria are insufficiently transparent: see, for example, *Federal Security Services Ltd v NICS* [2009] NIQB 15 at [52].

[100] There is a further principle of EU procurement law, equally well established, which falls to be considered at this juncture. In *Ministeriet for Forskning, Innovation etc v Manova* A/S KC-336/12 the ECJ said:

> "The principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification …"

The effect of this principle is, as this passage indicates, at least twofold. First, as a strong general rule, a competing economic operator's tender cannot be altered following its submission. Second, again as a strong general rule, post-tender negotiations between a procuring authority and a bidder are prohibited.

[101] We have conceived it appropriate not to describe these two last mentioned restrictions as absolute prohibitions, for the reason that in principle they <u>may</u> be lawful in certain circumstances provided that the conduct in question is (a) permitted by and compliant with the competition rules of the contract procurement exercise in question and (b) compatible with the overarching principles of EU procurement law. So far as this court is aware, there is no decision binding on this court at variance with this formulation.

[102] Mr McMillen specifically identified four provisions of the IFT in support of the contention noted at [98] above. Some of these have been highlighted in our outline of the IFT in the third chapter of this judgment. The first is paragraph 27 which provides *inter alia* that the contracting authority –

> "*… reserves the right to require the submission of any additional, supplementary or clarification information as it may, in its absolute discretion, consider appropriate.*"

It is necessary to consider this discrete provision in the context of the overall design and architecture of this procurement competition and all the surrounding rules contained in the IFT. Furthermore, the construction of this provision must be harmonious with the governing EU legal rules and principles.

[103] In considering this particular aspect of the Department's case the court, while maintaining its gaze on the IFT as a whole, is focusing particularly on section B2 – "Tender Evaluation and Award." In this context it is convenient to recall that the "TSP" has three components: the "TS-CF" (the contract forms), the "TS-QS" (the quality submission) and the "TS-PS" (the price submission). The appropriate references in the IFT are paragraphs 48 – 51. As already noted, paragraph 51 is concerned with the TS-PS only, which bidders must provide in the "Commercial Envelope." The contents of this are not considered at all unless the bidder achieves the "Minimum Standard" for each question within the QS.

[104] In our outline of the IFT above we have drawn attention to the repeated warnings to interested parties about the overarching importance of complying with the competition rules in formulating and submitting their tenders. Fundamentally, bidders were enjoined to provide all that is required by the terms of the competition rules and do so in the stipulated format. The repeated emphasis throughout the IFT on the need to provide in the TSP accurately and comprehensively all information requested is to be expected as a matter of both commercial and administrative sense. Furthermore, it promotes the level playing field required by the EU legal rules and principles.

[105] However, this fundamental requirement, while obviously strict, is neither absolute nor draconian. This is evident from the terms of several of the competition rules reproduced in the third chapter of this judgment. This assessment is based on the language used. In this context it is appropriate to draw attention to certain provisions of the IFT, with some accompanying observations. In particular and inexhaustively:

(i) At the apex of the IFT it is stated in paragraph 1 of Section A:

> "*Tender submission packages (TSPs) must be submitted in accordance with these instructions. TSPs not complying with these instructions in any way may be*

rejected by the Contracting Authority whose decision in this matter shall be final".

By this provision the Department clearly purports to reserve to itself a discretion to admit a TSP which is not fully compliant with the competition rules as expressed in the IFT.

(ii) In one of the extensive provisions of paragraph 27 (*supra*) the Department "*reserves the right*" to require the provision of such further information "*… as it may, at its absolute discretion, consider appropriate*". This is probably the most powerful illustration of a reservation of an expansive discretion.

(iii) In the same paragraph, the Department "*reserves the right to disqualify*" any competing economic operator who -

> "*… provides information or confirmations which later prove to be untrue or incorrect; and/or does not supply the information required by this IFT or the TSP* ***or as directed otherwise by the Contracting authority*** *during the procurement process …*"
>
> [Emphasis added.]

Thus the provision of untrue or incorrect information in a bid does not automatically give rise to disqualification. Similarly, this provision expressly contemplates a Departmental request, or direction, to a bidder to provide information not contained in its tender.

(iv) Pausing, paragraph 27 makes no attempt to clarify the relationship, if any, between the discretionary powers outlined in (i) and (ii).

(v) In yet another clause within the lengthy paragraph 27, the Department reserves the right "*to waive any requirements of this procurement process (to the extent permitted by law)*".

(vi) Equally, there is no attempt to clarify the relationship between the discrete clause in paragraph 27 noted in (ii) above and the statement in paragraph 39 that the inclusion of any false or misleading information in a bid "*will result*" in the bidder's "*exclusion*" from the procurement process.

(vii) It is clear from the terms of paragraph 48 that in the event of an assessed failure by a bidder "*… to provide the required information, complete a satisfactory response to any question or supply documentation that is requested within the specified timescales*" triggers a Departmental

discretion: this "*may*" (not "*shall*") result in the bid "*being rejected from the competition*".

(viii) The Department's discretion is also specifically expressed in paragraph 15 of the QS Guidance:

> "*Economic operators must ensure that their response to each question is relevant and focused on assessing the question asked.* ***Each response will be evaluated only on the information provided in the response text box (ES) for that particular question and any specifically requested supporting information for that particular question***".

(ix) Paragraph 4 of the QS Guidance is another illustration of a purported reservation to the Department of a discretion to admit a bid which is not fully compliant with the competition rules (reproduced in [21] above).

(x) Paragraph 9 of the QS Guidance is another clear illustration of a purported reservation to the Department of a discretion to pursue further information of a bidder, namely "*… to require evidence or additional evidence in relation to any answer given to questions in this questionnaire*".

(xi) In Section B2 of the IFT there is a proliferation of Departmental discretions: in paragraphs 48, 49, 50 and 51. These discretions are exercisable with regard to the TS-CF, the TS-QS and the TS-PS. In short, a bidder's failure to complete these documents in full compliance with the competition rules triggers a Departmental discretion to admit the bid rather than rejecting it. As regards the TS-CF (only) there is a discrete Departmental discretion to request a bidder to provide "*any incomplete/missing Part(s) within two working days of a request to do so.*"

[106] Superficially, a competing economic operator's failure to comply fully with the competition rules in the formulation, content and submission of its tender may not result in rejection or disqualification. Rather, certain types of Departmental discretions may fall to be exercised. Whether there is a discretion to be exercised depends upon the nature of the default in question and, fundamentally, the terms in which the discretion is expressed. Furthermore, there are different types of discretion. They include waiver of the rule in question and a request to provide further documents or information. This is not designed to operate as an exhaustive assessment of this topic. There is, however, one overshadowing qualification which looms large: in every instance where the Department determines to exercise an

applicable discretion or decides not to do so, it must act compatibly with the overarching EU procurement rules and principles outlined above.

[107] Via the foregoing moderately lengthy preamble, we pose the question: was the Department's impugned conduct authorised by paragraph 27 of the IFT? In order to answer this question it is necessary to identify with precision the conduct in which the Department engaged. This conduct is described in *inter alia* paragraphs [8], [41] – [51] and [56] above. In short, the Department's officials completed the exercise of assessing, evaluating and scoring all tenders received, including McQuillan's tenders for seven of the eight contracts being procured, before proceeding to engage privately and bilaterally with McQuillans and none of the other competing economic operators. In this context, the key finding made by the trial judge was that whereas McQuillans had bid for seven of the eight contracts being procured, it had resources to perform only four of them. This had obvious implications for the assertions and representations made by McQuillans in completing the relevant parts of the QS section of its tender, in particular paragraphs 2-01 (i) – (iii).

[108] This court considers that this key fact was, or should have been, evident to the Department's officials at the stage when they carried out their assessment of McQuillan's tenders. This should at once have raised serious and relevant questions for the officials concerned. Metaphorically, red lights should have been flashing. Indeed, it would be surprising if, extending the metaphor, as a minimum, amber lights were not ignited. The fundamental question which the officials should have confronted was how the IFT should operate in this situation. They did not, however, do so. Rather, they proceeded on the basis of the fiction that McQuillans had the resources – which they plainly did not have – to perform all seven of the contracts for which they were bidding in the event of their bids being assessed to be the most economically advantageous tenders. Based on this fiction the Department's officials embarked upon an exercise entailing full assessment and scoring of McQuillan's tenders.

[109] Against the background outlined immediately above, the Department contends that the post-scoring exercise in which it engaged entailed, in the language of paragraph 27 of the IFT, "*… the submission of …. additional, supplementary or clarification information …*" from McQuillans. Properly construed, the court considers that "additional" information and "supplementary" information are synonymous. Thus the first question is whether the Departmental conduct under scrutiny entailed eliciting additional or clarificatory information from McQuillans. The court considers it clear that the answer is "No." In thus concluding, the court would emphasise the importance of analysing the <u>substance and reality</u> of what actually occurred in the conduct of the Departmental officials concerned.

[110] Viewed through this prism, this court considers it clear that the Department did not request McQuillans to provide <u>additional</u> information and McQuillans did not do so. All of the information bearing on the issue of McQuillan's capacity to

perform all of the contracts for which it was bidding and, more specifically, the issue of duplication of their resources was already in the Department's possession, via McQuillan's tenders. Nothing new was requested and nothing new was provided. Nor was this an exercise in clarification. There was nothing to be clarified, as the terms of McQuillan's seven tenders were clear and unambiguous.

[111] Accordingly, this court concludes that the impugned conduct of the Department cannot be legally justified by reference to paragraph 27 of the IFT. This is the first reason why the Department's case based on paragraph 27 must be rejected.

[112] There are further reasons for this conclusion. The first is that, having regard to the overarching EU procurement legal rules and principles, which provide the bench mark against which any given set of competition rules must be evaluated by the court, paragraph 27 did not permit the Department in any event to request the provision of additional or clarificatory information after it had completed the tender evaluation and scoring exercise. In short, this exercise had to be undertaken and completed on the basis of all information actually provided by the bidder supplemented by, as appropriate, such additional or clarificatory information as could be lawfully requested and provided. The fundamental purpose of receiving such information could only lawfully be to inform and guide the Departmental officials in the exercise of evaluating McQuillan's multiple tenders and computing the scores to be allocated. But in this case McQuillan's tenders had already been fully evaluated and the corresponding scores had already been assessed at the stage of the Department's interaction with McQuillans. This the court considers unlawful, for the reasons given.

[113] The next reason for rejecting the Department's case based on paragraph 27 of the IFT is that provided by the judge, namely that the Department's post-tender assessment and scoring conduct was manifestly lacking in transparency and infringed the overarching principle of equality of treatment of all competing economic operators. In short, McQuillans were given preferential treatment which none of the other bidders enjoyed. They were, in effect, permitted to dictate the Department's final contract award decisions in six of the eight procurement competitions. In effect McQuillans, rather than the Department, became the final decision maker. We consider that this was the antithesis of the ethos of the EU public contracts procurement regime. We further concur with Horner J that the Department's conduct and decision making gave rise to a "no rules" scenario. In effect, a game of pure chance was permitted by the Department to materialise. The runners up in all four of the contracts ultimately "awarded" to McQuillans might just as easily have been the winners, the outcome being dictated by the whims and choices of McQuillans.

[114] The fourth reason for rejecting the Department's case based on paragraph 27 of the IFT is that its offending conduct vis-à-vis McQuillan's constituted unvarnished negotiation with a bidder. We have at [100] – [101] above considered

the strong general rule in play in this respect. For the reasons given the court is satisfied that paragraph 27 did not authorise this type of conduct. Furthermore, the conduct in question was manifestly antithetical to the overarching EU procurement legal principles of equal treatment of all competing economic operators and transparency throughout the entirety of the contract procurement process. Finally, the Department's conduct violated the general prohibition against the post – tender submission of bids by bidders.

[115] Reverting to our overview of the governing legal rules and principles at [59] – [62] above, the hallmarks of objectivity, fairness, detachment, equal treatment, equality of opportunity, level playing field and transparency were manifestly lacking in the conduct of the Department for the reasons given.

[116] Furthermore, for the same reasons, the Department's invocation of paragraph 27 of the IFT provides no answer to the first of the judge's two principal conclusions, namely that the Department's scoring of McQuillan's tenders constituted a manifest error as it was based on the fiction that McQuillans had the resources to perform all of the contracts for which it had tendered.

[118] In addition, bearing in mind the court's construction of other related provisions, we consider it clear that the third part of paragraph 43, considered in both its immediate and wider contexts, applied to the Department's assessment of a tender prior to completing the exercise of evaluation and scoring. "*Acceptability*" is, plainly, a standard to be applied before proceeding to other stages of the contract award process. It relates directly to the basic requirement of providing in and with a tender (a) everything that is required by the competition rules and (b) in the form prescribed by the same rules. We consider this construction of paragraph 43 consistent with our construction of the other IFT provisions examined above.

[119] The next of the IFT provisions invoked by the Department is the following statement in paragraph 9 of the "Guidance for Completing Quality Submission":

> "*The Contracting Authority reserves the right to require evidence or additional evidence in relation to any answer given to questions in this questionnaire.*"

The words "*this questionnaire*" denote sections 2 and 3 of the QS. The court considers it clear that the purpose of reserving this particular discretion to the Department was to inform and facilitate the task of evaluating and scoring these parts of the TS-QS. We repeat our analysis, reasoning and conclusion in [112] and [118] above. The language of this paragraph manifestly fails to extend this discretion beyond the tender evaluation and scoring stage. Furthermore, this construction is consistent with the court's construction of the other related IFT provisions examined above.

[120] Paragraph 15 of the same document, on which the Department also relies, states:

> "*Economic Operators must ensure that their response to each question is relevant and focused on addressing the question asked.* ***Each response will be evaluated only on the information provided in the response text box(es) for that particular question and any specifically requested supporting information for that particular question.***"
>
> [Emphasis added.]

The court's analysis and construction of this discrete provision is that it contemplates something quite different from the post-tender assessment and scoring exercise in which the Department engaged with McQuillans. Giving effect to the applicable principles, we consider that the terminology of "*specifically requested supporting information for that particular question*" is directed exclusively to the terms of the competition rules. In short, the machinery of the competition was to pose a series of questions which invite answers, many of them in narrative form and the provision of specific supporting documents/information. Construing the IFT as a whole, we are satisfied that this provision is to be confined in this way. Furthermore, and in any event the purpose of this provision was to inform the assessment and scoring of tenders. It was not designed to have any operation at the post-tender assessment and scoring stage.

[121] Finally, the fact that a successful bidder could lawfully engage sub-contractors is not to the point. Notably, this issue did not feature in the Department's interaction with McQuillans after evaluating and scoring all tenders. Nor was the possible substitution of named individuals to cater for retirement *et al* the issue. McQuillans, metaphorically, in the face of an unyielding tide raised a white flag. In this factual matrix, the Department's resort before this court to certain provisions of the "Conditions of Contract" is a mere diversion, remote from the competition rules and detached from the reality of the prevailing facts. The central question raised in these proceedings is whether the impugned conduct of the Department was in accordance with the competition rules and the governing rules and principles of EU procurement law. This court has concluded that it was not.

Our Conclusions Summarised

[122] The court has, in [69] – [121], addressed and resolved the two main issues on which the Department's case rested. We have concluded that the Department's post-tender evaluation and scoring interaction with McQuillans and resulting related contract award decisions:

(i) were not in accordance with the governing EU legal rules and principles; and

(ii) were not permitted by the competition rules.

Furthermore, to design and operate this competition in such a way as to rank first six contract bids from an operator who had the resources to perform only four contracts at most defies common sense and commercial reality. We agree with the judge that this amounted to manifest error on the part of the Department.

[123] This court further agrees with the judge that the Department's conduct entailed an egregious breach of the principle of transparency. The Department engaged in a secret, bilateral and unrecorded process with one of multiple bidders. This is the very antithesis of what transparency requires. Furthermore, both the substance of this engagement and its consequences for other bidders infringed the principle of equality of treatment. In short, McQuillans were accorded special treatment in a clandestine and purely bilateral process and, in consequence, the level playing field was distorted for other bidders.

[124] It follows that the court agrees with the two principal conclusions expressed in [92] of the judgment of Horner J, reproduced in [63] above. To the extent that our analysis and reasoning are additional to those of the trial judge this will be apparent from a reading of this judgment. If and insofar as there are any differences between this court's analysis and reasoning and those of the trial judge these are largely matters of emphasis and linguistic expression.

[125] Finally, at the conclusion of the hearing and subsequently the court directed certain questions to the parties' representatives. This gave rise to certain points of contention between the parties. In the event the composition of this judgment has been undertaken without reference to these contentious issues.

[126] For the reasons given the appeal is dismissed and the judgment and order of Horner J are affirmed.