



Partnership

ARTHUR COX

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Procurement Law Update

# Caselaw Briefing

Arthur Cox has a widely acclaimed and leading Public Procurement law practice.

Our team has a wealth of experience in advising on all aspects of the procurement process, both in Northern Ireland and the Republic of Ireland. We regularly advise on the application of the EC Directives and national Regulations, as well as the extensive body of relevant EU, Irish and UK case-law that has developed in this area.

We advise public and private sector clients alike on the procurement of works, supplies and services, and our experience is across all sectors, but particularly in accommodation, education, waste, energy, transport, health and ICT.

We are currently advising on the procurement of some of the most significant projects being undertaken in Ireland and Northern Ireland.

*This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.*

## NI High Court rules on below-threshold procurement by utility

On 28 August 2009, the NI High Court (Morgan LCJ) gave judgment in *Deane Public Works Ltd v NI Water Ltd*, a case involving the elimination of a bidder at selection stage in a below-threshold procurement. The case confirms that the common law doctrine of implied contract applies to procurements by public sector utilities and the fundamental principles of equal treatment and non-discrimination extend to the assessment and evaluation of Pre-Qualification Questionnaires (PQQs). The decision also emphasises the importance of avoiding ambiguity and errors in procurement documentation and responses and gives some guidance on seeking further information from applicants.

The case arose as a result of a tender exercise conducted by the defendant, NI Water, for the provision of a new ring sewer on the western extent of Omagh. The defendant was a utility for the purposes of the Utilities Contracts Regulations 2006; however, the value of the contract fell below the applicable financial threshold.

The pre-qualification questionnaire issued by NI Water asked applicants to provide a summary of three projects which demonstrated their ability to undertake the scope of works. Each of these projects had to have been completed "within the last five years" or should have been substantially complete.

The plaintiff, Deane Public Works, submitted its PQQ on 29 August 2007, providing three examples of projects with which it was involved. One of these projects was stated to have run from November 2001 to April 2002. The PQQ contained a declaration by Deane that all of the information submitted was true and accurate.

Following assessment of the PQQs, Deane was informed that it was unsuccessful and subsequently in a debriefing session was informed that it had received no points for this particular project as it had fallen outside of the five year period. Had this particular project been taken into account, Deane would have qualified and been invited to tender for the project.

Deane submitted at the debrief meeting that the dates given for this project had in fact been incorrect - work actually commenced on 8 January 2001, the certificate of completion was dated August 2001, certain reinstatement works were carried out in June 2002 and the final account was paid to Deane in October 2003. However, Deane was not offered an opportunity to submit any further information; nor was any opportunity taken to clarify these matters further. NI Water refused to reassess the PQQ and Deane's elimination was confirmed.

Deane consequently initiated High Court proceedings against NI Water, claiming that it had been unfairly treated in the course of the tendering process.

In considering these matters, Morgan LCJ firstly confirmed that an implied contract came into existence between the defendant and the applicants. The tendering process had been highly formal, it involved a considerable sum of money, the project in question concerned works located within 20 miles of the border, it was advertised in Northern Ireland and the Republic of Ireland, and was of cross-border interest. The judge held that those factors strongly supported the view that a contractual relationship existed between NI Water and those who submitted PQQs. The nature of the tendering process suggested that it was one where it was appropriate to imply obligations of non-discrimination and equal treatment not only in terms of the advertisement of the competition but also in relation to the evaluation of the PQQ submissions.

The Court went on to determine that the term "within the last five years" referred to a period commencing exactly five years prior to the date of the return of the PQQ. The projects therefore had to have been completed after 29 August 2002. The Court found in relation to the project in question that the works were handed over to the client in mid-August 2001 and that was the relevant date of

completion. Any later works carried out by Deane were found to have been either minor in nature or concluded under a separate contract, and were therefore of no assistance to the plaintiff.

The plaintiff also complained that two other applicants placed above it in the evaluation process had benefited from NI Water having approached them to clarify certain errors in their submissions.

Applicants had been asked to identify, in relation to submitted projects, the costs attributable to work they had carried out on those projects. One applicant had entered a figure of zero, which if correct would have suggested that it had done no work on the project. Having contacted the applicant's referees and established that it had worked on the project, the defendant contacted the applicant and allowed it to provide the correct figure on the basis that it had clearly misunderstood the question. The applicant's submission was then scored on that basis.

Applicants were also scored on their health and safety policy. One applicant omitted to include a copy of this although it was clear from the remainder of the submission that such a policy existed. That applicant was contacted and permitted to submit its policy which was then marked.

In this regard the Court found that there was no unequal treatment of the plaintiff. In the first instance, the answer provided by the applicant was clearly wrong; it was apparent that the question had been misunderstood. This was not the case with the plaintiff's response to the PQQ and it was therefore within NI Water's discretion to decide not to pursue the matter with it. Similarly, in relation to the health and safety policy, it was plain that this was already in place and it was "entirely appropriate" for NI Water to seek this.

The plaintiff's case was dismissed.

## Further Information

For further information on this case or any other aspect of Public Procurement law, please contact:



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