



Innovation

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*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.*

## Projects Brief

# Tender Litigation

## Northern Ireland Tender Litigation

A number of decisions in the Northern Ireland High Court have been handed down recently which illustrate the challenge in managing major projects including PPP projects. While many of these decisions are interlocutory they provide valuable insights into the challenges which can face awarding authorities and also as to the thinking of the Courts in applying relevant procurement law principles.

### **J & A Developments Limited v. Edina Manufacturing and Others [2006]**

J & A was invited to submit a tender for the construction of offices. Notwithstanding that the Procurement Regulations did not apply to the contract, the conditions of tender stated that the tendering procedure was in accordance with the principles of a code of practice. While the Code imposed no obligation upon the defendants to accept the lowest tender, they bound themselves to accept either no tender at all or one at the price at which it was submitted; subject to the possibility of negotiations with the lowest tenderer for a reduction in price in return for an appropriate modification to the specification of the work (only if these negotiations failed could the next lowest tenderer be approached). Although J & A submitted the lowest tender, the defendants invited three tenderers to lower their quotes and ultimately accepted an offer lower than J & A's tender in breach of the Code. The Court (Sir Liam McCollum) held that the Code was incorporated into the tendering process and any failure to follow the procedure was a breach of a collateral contract between the contracting parties and the employer. Damages were awarded to the plaintiff.

### **Natural World Products Limited v. ARC 21 [2007]**

ARC 21 sought to award a contract for the provision of organic waste services. The Court (Deeny J) held that, in breach of both the duties to consider fairly the bids of all tenderers in a project and in breach of the Public Regulations (allowing for supplementary information to be provided), the awarding authority had decided that it would be inappropriate to take account of an alternative facility, which the bidder alleged would be available to it for support in the event that the facility to be constructed might not have been able to cope with the relevant tonnages. An injunction was granted requiring the awarding authority to reconsider the bid of the applicant company.

### **Partenaire Limited v. Department of Finance and Personnel [2007]**

This concerned a project to award a very large contract for the refurbishment/build of the NICS office estate. The applicant alleged that four representative examples of errors had been committed by the DFP in the evaluation of its tender. The Court (Coghlin J) granted an interlocutory injunction ruling that there was a fair issue to be tried, that the balance of convenience rested in favour of granting the injunction, that an undertaking in damages had been made and that an early trial date had been set.

### **Henry Brothers (Magherafelt) Limited and others v. Department of Education for Northern Ireland [2008]**

The plaintiffs sought an interim injunction against the DE as they objected to the DE's criteria for choosing between tenderers for a large construction framework agreement. The relevant criteria required each of the tenderers to specify their respective fee percentage within hypothetical ranges of contract value. The Court placed importance upon establishing an objective evaluation of the cost of a contract in the course of assessing the most economically advantageous tender. The fee percentages were arguably flawed in that they made no attempt to determine the actual cost of the works objectively.

The Court (Coghlin J) declined to grant an injunction, but commented that there was a serious question to be tried with regard to whether the criteria were lawful in view of the issues in respect of objectivity in evaluating the tenders. This case then proceeded to full hearing.

At the substantive hearing the Court (Coghlin J) held that one of the award criteria was inconsistent with EC Law (including by inadequate element of price as a criterion) and held in favour of the plaintiffs. At a third hearing the Court (Coghlin L J) set aside the framework agreement.

### **Sheridan Millennium Limited v. Department for Social Development and Laganside Corporation [2008]**

In this case, the Court had granted an application for leave to bring judicial review against a decision by the DSD (to terminate the applicant's appointment as a preferred developer); and of Laganside Corporation (that it could not make a recommendation as to whether DSD should enter into an agreement with the applicant). The respondents argued that although they were public bodies the decisions were made during the due diligence stage (a confidential process which excludes judicial review). The Court (Gillen J) disagreed, stating that the fact that a due diligence examination had been prescribed did not preclude judicial review. Having granted further discovery in November 2007, the Court (Gillen J) in January 2008 rejected the applicant's case on the basis that the company's deficiencies were the real reason it had lost its status.

### **McLaughlin and Harvey Limited v. Department of Finance and Personnel [2008]**

The plaintiff sought an order suspending the procurement process being conducted by the defendant with the aim of concluding a construction framework agreement. The plaintiff claimed that the defendant had marked its tender with a methodology which had not been disclosed in advance and that this was in breach of the EU obligations of transparency and in a way which was unfair to the plaintiff. The defendant argued that the methodology contained no new criteria but was a perfectly legitimate working out in detail of material which had been included in the tender documents.

The Court (Deeny J) applied established principles for interlocutory injunctions and concluded that the plaintiff had shown that there was a serious issue to be tried. The Court noted that a full trial was likely in the relatively near future, namely, mid 2008 and with judgment in or around autumn 2008. On balance, the Court refused to grant an injunction but would seek to facilitate an early trial.

At the substantive hearing, the Court held that there had been inadequate disclosure of the criteria and subcriteria as well as weightings and sub-weightings. The Court held in favour of the plaintiff. At a later hearing, the Court set aside the framework agreement.

### **Scott v. Belfast Education and Library Board [2007]**

In this case the plaintiffs sought an injunction to restrain Belfast Education and Library Board from proceeding with a tendering process for the award of contracts for building works and for maintenance works. The Court (Weatherup J) held that:

- (i) there was an implied contract between the awarding authority and a tenderer;
- (ii) the principle of transparency meant award criteria must allow reasonably informed bidders to interpret the criteria in the same way;
- (iii) the authority must interpret and apply the criteria in the same way throughout the process;
- (iv) the authority had to consider tenders fairly and in good faith;
- (v) the authority had to avoid disreputable conduct; and
- (vi) the authority had to ensure "the absence of any material ambiguity in the tender documents that would significantly affect the tender.

### **McConnell Archive Storage Limited v. Belfast City Council [2008]**

Belfast City Council issued a tender notice in OJEU for the provision of services of storing and retrieving their records over five years (and with a possible extension for five further years). In July 2007 the Council wrote to the plaintiff advising that, “subject to the ten working day standstill period” and to a form of contract being drawn up, the plaintiff had been successful. This was a reference to the **Alcatel** notice. An unsuccessful bidder had the second highest number of points but scored low on costs. It sought a debriefing and made submissions. Subsequently, the Council considered that it had evaluated the challenger’s bid erroneously. This was on the basis of the interpretation of the tender documentation as to costs of retrieving records from storage. The Council later wrote to the plaintiff informing it that the Council had “therefore decided to simply rescore the relevant tender on the correct basis, which involves no alteration or amendment to the figures which had already been provided in that bid”. The Council then wrote to the plaintiff and others informing them that the challenger had been found to have submitted the most economically advantageous tender. A further ten day standstill period was imposed.

The Court (Deeny J) held that there was a contract to consider all tenders in accordance with the tender documentation (citing **Natural World Products Ltd. v. Arc21 [2007]** and **Blackpool and Fylde Aero Club Limited v. Blackpool BC [1990]**).

The Court rejected the submission by the plaintiff that, having sent an **Alcatel** notice to the plaintiff, it was not then permissible for the defendant having “awarded the contract” to the plaintiff to award it to another tenderer. An **Alcatel** notice did not constitute a binding legal contract. The Court held that a contracting authority was at liberty during the standstill period or extension thereof to reopen the contract assessment and award the contract afresh when it was satisfied that it was right to do so because the initial decision to award the contract to another tenderer was in fact grounded on illegality, bad faith or material unfairness or misinterpretation.

### **Federal Security Services Ltd. v NI Court Service [2009]**

In this case, one of the bidders to provide a Part B service (security services) was found to be without a statutorily required licence. The awarding authority considered that the relevant tender documentation was ambiguous and determined that the procurement should be aborted and rerun. A challenger contended that, rather than abort the competition, the award ought to have been made in favour of the next available bidder. The High Court (McCloskey J) held that it was within the permissible discretion of the awarding authority to determine to rerun the competition and dismissed the application.

### **Federal Security Services Ltd. v Chief Constable Police Service of Northern Ireland and Another [2009]**

In 2008 a tender was issued for the provision of security services (Part B services) to the Police. Federal (the incumbent) was notified on 22 December 2008 that it was unsuccessful. It requested reasons. The contract was concluded on 22 December 2008 with another tenderer. No standstill period was applied. The Police contended that monetary damages were the only remedy (citing Regulation 47(9) of the Public Contracts Regulations). On the other hand Federal argued that an **Alcatel** period should apply. The Court (Deeny J) granted an interim injunction restraining the Police from proceeding, citing the fundamental principles of EC Law including that those principles might in particular situations require the use of a standstill period in contract procedures which were normally exempted from that obligation. It held that the exceptional circumstances in this case warranted the use of the **Alcatel** period and these included:

- (i) the Police were aware of the transborder interest in the contract from another Member State;
- (ii) the contract value was high (£60 million);
- (iii) Federal had submitted the lowest price tender; and
- (iv) the Police were aware that Federal was disputing the procedure by which the contract was awarded.

### **Application of Watters and Others (Sport NI) [2009]**

In this case Sport NI administered a programme entailing an investment of up to £87 million (£15 million as to a 50 metre swimming pool and the balance for 21 targeted Olympic/Paralympic sports) all in connection with the London 2012 Olympic and Paralympic Games. It required that relevant details for Stage 2 be filed with Sport NI “before 4pm precisely on Friday 28 November 2008”. The applicant was engaged to file relevant Stage 2 documentation on behalf of Belfast City Council. The relevant documents were filed 2 or 3 minutes after the deadline. The Council decided not to extend the deadlines and thus the applications were eliminated.

The Court (Morgan LCJ) held that:

- (i) the applicant had sufficient standing (including on grounds of public interest) (citing **Re D’s Application [2003] NI 295**) having regard to the following elements:
  - (a) the potency of the public interest content of the case;
  - (b) the greater the amount of public importance involved the more ready the court should be to hold in favour of the necessary standing;

- (c) the focus of the courts was more upon the existence of a default or abuse on the part of the public authority than the involvement of a personal right or interest on the part of the applicant;
- (d) the absence of another responsible challenger would frequently be a significant factor;
- (ii) it was not “unreasonable” to exclude the applicant (citing **Leadbitter v. Devon County Council** [2009] EWHC 930 (Richards J)) (and supporting a statement of Professor Arrowsmith) that, even if there is a discretion to accept late submissions, there is no requirement to do so if it were, as here, the result of default on the part of the tenderer (as applied on the facts of **Leadbitter**). The Council had taken into account and given weight to the fact that transparency and equality of treatment required that deadlines should be honoured; the applicant had not demonstrated that the delay was caused or contributed to in any material way by Sport NI;
- (iii) the giving of weight to the deadline did not constitute a fettering of Sport NI’s discretion but rather constituted an exercise of that discretion;
- (iv) transparency and equality of treatment meant that those who had submitted in advance of the deadline should be treated differently from those who had not; and
- (v) a full statement of reasons was given in the minutes of Sport NI and made available to the applicants.

However, the Court also noted that it was within the discretion of Sport NI either to reject an application or to reduce an offer of award. The Court held that that aspect was not considered by Sport NI and that the option of a reduced award was a material consideration to which the attention of Sport NI should have been directed and accordingly the decision of Sport NI was unlawful. The matter was accordingly remitted to Sport NI.

### **Deane Public Works Ltd v. Northern Ireland Water Ltd [2009]**

Deane sought to be included on a restricted list on foot of a Pre-Qualification Questionnaire (PQQ). The matter arose under the Utilities Directive and had a value of £2.5 million, below the EC financial threshold. Deane was required to submit details of three relevant projects which “must have been completed within the last five years or currently be substantially complete.”

The critical dates were:

- (i) the ITT was published on 20 July 2007;

- (ii) on 27 August 2007 it had been confirmed by telephone that projects which had been completed outwith the five year qualifying period would be awarded zero points; and
- (iii) on 29 August 2007, the plaintiff submitted its completed PQQ.

One of its relevant projects was stated to have commenced in November 2001 and been completed in April 2002. The plaintiff was informed that it was unsuccessful on the basis that the project had fallen outside the five year period. If that project had been taken into the reckoning it was agreed that the plaintiff would have been successful. The plaintiff relied on the interpretation of “completed” and “within the last five years”. The certificate of completion in respect of the project was dated 15 August 2001. The plaintiff also called in aid the fact that certain other works had been undertaken on foot of the project in the course of 2002 and final accounts were only agreed in October 2003.

The Court (Morgan LCJ) held that:

- (i) the contract was of transborder interest (being located close to the land frontier of the Republic of Ireland and in which there had been at least one application from a tenderer in the Republic of Ireland) and having regard to the size of the project;
- (ii) this was a procurement in which it was appropriate to imply obligations of non-discrimination and equal treatment;
- (iii) EC Treaty obligations of equal treatment and non-discrimination ought to be applied to the assessment and evaluation of bids and as a matter of domestic law they ought to be implied into the tender contract;
- (iv) the Court considered this consistent with the decision of Deeny J in **Natural World Products Ltd. v. Arc21** and not inconsistent with the decision of Morgan J in the English High Court in **Lion Apparel Systems v. Firebuy Ltd** (2007) (Directive and Regulations provided legal relationship which fully governed legal obligations between the parties);
- (v) the term “within the last 5 years” was straightforward and identified a period commencing with the submission of the PQQ and carried back from that date for a period of five years exactly;
- (vi) if the period were to run from 1 January 2002 until 29 August 2007 that would be for a period plainly in excess of five years;
- (vii) the Court differentiated the characteristics (as to personnel etc.) which were to be exhibited “for” three years from 2004 to 2007 - there was no ambiguity as to “within the last five years”; and

(viii) the term “completed” did not extend the date of completion beyond the issuing of the certification of completion (August 2001) and accordingly the defendant was entitled to exclude the plaintiff’s cited project.

### Conclusion

1. The cases illustrate that the Courts require all interested persons to adhere strictly to the terms of relevant tender documentation and further to have regard to the EC requirements of Equality, Fairness, Objectivity and Transparency.
2. They highlight the difficulties facing a contracting authority in avoiding ambiguities and deciding upon the most appropriate course of action when they arise.
3. Finally, the cases highlight the way in which a project is open to delay by an interlocutory injunction notwithstanding that the issues have yet to be teased out and determined at full hearing.

## European Court Developments

### Award Criteria - How Much Should the Bidder know?

The extent of the obligation upon an authority to disclose in advance any sub-criteria and their marks/weightings to be applied to the (main) award criteria in a procurement has been the subject of a recent landmark decision of the ECJ in *Lianakis and Others v. Dimos Alexandroupolis* (2008) (“*Lianakis*”).

The main guidance from *Lianakis* and previous authorities is that:

- » sub-criteria should be stated in the tender documents; but
- » whether the marks/weightings for the sub-criteria must also be stated in advance or if it is permissible to develop the marks/weightings of sub-criteria after receiving the tenders is unclear; and
- » the importance of the distinction between (pre-)qualification and award criteria.

#### Facts

The authority had referred to the required award criteria in the contract notice, but not the sub-criteria and their weighting factors. These were not disclosed until *after the submission of the tenders*.

#### Decision

Tenderers must be aware of all the elements to be taken into account by the authority when assessing tenders and their

relative importance. The authority was not permitted to stipulate the weightings and sub-criteria after the issue of the relevant contract documents (e.g. invitation to tender).

The decision was founded upon the key underlying requirements of the Procurement Regulations, namely: *equality, fairness and transparency*.

#### Reconciliation with Previous Cases

In *ATI v. ACTV Venezia SPA* (2005) (“*ATI*”) the ECJ suggested that it may be permissible for an authority to disclose the weightings of the sub-criteria after the submission of tenders in certain circumstances. That case was endorsed in *Lianakis* but the Court distinguished or differentiated the case on its facts. In *ATI* the authority had disclosed the sub-criteria, but not their respective weightings, whereas in *Lianakis* the authority had disclosed neither the sub-criteria nor their weightings.

This might suggest that it is only necessary to disclose sub-criteria in the tender documents and not the weightings attached to them.

The English Court of Appeal in *Lettings International Ltd. V. London Borough of Newham Lettings* (2007) seemed to take the more restrictive approach that weightings needed to be disclosed in advance if the authority intended to use them.

The safer course would be to apply the principle of Transparency and disclose the weightings/marks for both criteria and sub-criteria thereby ensuring that a bidder is not misled.

#### Distinction between Pre-Qualification and Award Criteria

The ECJ was also ruled upon the legality of the main award criteria, which related to the experience and technical and professional ability of the firm.

These criteria were unlawful because the determination of a tenderer’s suitability and the award of a contract are two distinct procedures governed by different rules. The suitability of tenderers is checked in accordance with criteria of economic and financial standing and of technical or professional ability; the award of contracts is based on the criteria of lowest price or of the most economically advantageous tender.

#### Conclusion

It would be prudent for authorities to limit risk by both formulating any sub-criteria that they wish to use and the marks/weightings for these in advance, and to state these in the tender documents, so that they are known to tenderers when they submit their tenders.

The decision also reminds us of the importance of separating pre-qualification and award criteria.

### **Maintaining a Level Playing Field Where the Incumbent is Involved in the Competition**

In *Europaiki Dynamiki v Commission [EC] - 2008* the applicant sought an annulment of the decision by the Commission to award a contract in respect of services in support of CORDIS, a tool enabling framework programmes for European research to be implemented. The successful tenderer had the known intention of sub-contracting to the existing contractor. It was argued that this situation favoured the successful tenderer and breached the principle of equal treatment in two primary respects.

Firstly, the unpaid handover period during which the winner would work alongside the incumbent would benefit the existing contractor since it alone did not need to include in its financial offer the cost of the unpaid handover period. The Court held that the potential advantages of the successful tenderer connected to an existing contractor

must be neutralised but only to the extent that it was technically easy to do so, where it was economically acceptable and where it did not infringe the rights of the incumbent or said tenderer. In this case it would be unreasonable to waive the requirement for the unpaid period on the ground that one of the tenderers might be connected to the incumbent as this period facilitated the acquisition of the service required in an economical manner.

Secondly, the successful tenderer, due to its relationship with the incumbent, possessed information that had not been supplied to the applicant. The applicant argued that it was necessary to have access to this information in order to properly formulate its bid. The Court held that the delay in providing this information to the other tenderers constituted a procedural defect and violated the principle of equal treatment as it could have deprived them of the chance of securing the contract.

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