

Group Briefing
June 2018

Word Wars: This year's “*Word Perfect*” Public Procurement Case Trilogy

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This is the third seminal judgment this year on the public procurement procedure used to evaluate tenders to provide the Immigration Service and Legal Aid Board with interpretation services (*Word Perfect Translation Services Limited v The Minister for Public Expenditure and Reform* (No.3) [2018] IECA 156). In this case, the Court of Appeal found two manifest errors had been made by the Office of Government Procurement and set aside the decision to award interpretation services to *Translations.ie*.

BACKGROUND

On 12 October 2015, the Office of Government Procurement published a request for tenders to establish a Framework Agreement for the Provision of Interpretative Services. The Framework Agreement included eight lots; this series of disputes concerns the fourth lot for tender: *Lot 4- the provision of interpretation services to the Immigration Service and Legal Aid Board*. To date *Lot 4* has generated three important judgments.

1. Damages: *Word Perfect* (No. 1) [2018] IECA 35

The first judgment (*Word Perfect Translation Services Ltd. v. Minister for Public Expenditure and Reform* (No. 1) [2018] IECA 35) concerned damages, with the Court of Appeal finding that:

» Member States are required by EU law to provide remedies by reference to the *Francovich* criteria.

(i.e. damages may be awarded where claimants can demonstrate an objective breach of EU law which is either “grave or manifest” or “inexcusable” *Okunade v. Minister for Justice* [2002] IESC 49, [2003] 3 IR 153).

» The criteria for damages is a matter to be determined and estimated by national law. Hogan J. stressed: the high bar to a claimant recovering damages pursuant to the *Francovich* criteria should inform any assessment of whether damages can be an adequate remedy (para. 59).

2. Three Requirements to “Discover” a Rival’s Tender Documents - *Word Perfect* (No. 2) [2018] IECA 87

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.

The second judgment (*Word Perfect Translation Services Limited v The Minister for Public Expenditure and Reform* (No.2) [2018] IECA 87 provided a test for discovery applications in public procurement challenges. The Court of Appeal determined that to obtain discovery of a rival's tender documentation, an applicant was required to establish that the documents in question were:

- i. Relevant to the arguments outlined in the pleadings in the main dispute; (*BAM PPP PGGM Infrastructure Cooperative BV v. NTMA* [2015] IECA 246)
- ii. Necessary to these arguments; and
- iii. Indispensable for the fair disposal of the procurement challenge.

Finally, recognising the sensitivity of the information proffered by business rivals in public procurement processes, Hogan J. stipulated that "*only named solicitors and counsel retained by Word Perfect*" should be permitted to have sight of the discovered material.

3. How to Make a Robust Award of Contract and *Word Perfect* (No.3) [2018] IECA IECA 156

The most recent judgment (*Word Perfect Translation Services Ltd. v The Minister for Public Expenditure & Law Reform* [2018] IECA 156) was also made on appeal from the High Court and the Court of Appeal decision was also delivered by Hogan J. In a succinct and clear judgment which stressed the importance of following stipulated procedure, the judge addressed *Word Perfect's* four grounds of appeal as follows.

- i. **He allowed the first ground of appeal: A manifest error was made in the assessment of interpreter**

skill retention. Hogan J. identified the legal test for manifest error in public procurement cases as that prescribed by Fennelly J. in *SIAC Ltd v Mayo County Council* [2002] IESC 39 [2002] IR 147,175-176. An applicant had to show an error had clearly been made. Where a failure to respect the principles of equality, transparency and objectivity was clearly made out, a manifest error should always be found. Hogan J. then considered the facts presented, to find that the winning tenderer (similar to the applicant) had failed to demonstrate measures designed to **ensure** their interpreters retained their translation skills.

- ii. **He allowed the second ground of appeal: A manifest error was made in the evaluation of one aspect of the required documents- on the interpretation of what the requirement for a "narrative" obliged applicants to provide.** Hogan J. looked at the language used in the published procedural requirements (e.g. "*a narrative summarising the information provided*"). He determined the requirement was for a written narrative. This had not been provided by the winning tenderer, *Translations.ie*, a fact which should have significantly diminished the final score awarded to them.

- iii. **He dismissed the third ground of appeal: A manifest error was made by the High Court in determining that the lack of consistency of the evaluation deliberations did not affect the validity of the process.** The High Court determined that the test of manifest error applied to the final decision: it was not targeted at the taking of notes at meetings which preceded this decision. In

agreeing with this evaluation, Hogan J. stated "*...evaluators should have the freedom to explore, consider and reflect on the strengths and weaknesses of the various tenders.*" (para.32)

- iv. **He dismissed the fourth ground of appeal: *Word Perfect* was entitled to reasons in respect of the areas where it had performed better than its competitor, *Translations.ie*.** This was not a requirement of either article 6 of the European Communities (Public Authorities Contracts Review Procedures) Regulations 2010 (SI No. 130 of 2010) or of the case law of the CJEU.

Finally Hogan J. determined that (not least given the closeness of the contest) he had no alternative but to make an order setting aside the decision to award the contract to *Translations.ie*. (*following the reasoning of Finlay Geoghegan J. in Gaswise Ltd. v. Dublin City Council* [2014] IEHC 1, [2014] 3 IR 1).

CONCLUSION

The *Word Perfect Case Trilogy* places a spotlight on public procurement processes. Importantly, it also provides much-needed answers to important questions like: *how are damages assessed? what is discoverable? and how can awarding parties avoid awards being revoked?*

The most recent Court of Appeal judgment is a very useful reminder that Courts will look at the process undertaken and assess whether it is consistent with what the published tender documents actually said, in quite specific detail. The level of scrutiny in respect of the meaning of particular words and phrases in the tender documents is a sobering reminder of the importance of choosing words carefully and then applying them fully in practice.

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