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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **28/02/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

BETWEEN:

EASYCOACH LIMITED

Plaintiff:

and

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant:

McCLOSKEY J

I INTRODUCTION

[1] This litigation arises out of a contract procurement exercise undertaken by the Department for Regional Development ("*the Department*") culminating in the rejection of the Plaintiff's tender and the enunciation of a decision that the contracts being procured, which were for the provision of certain personal transport services, would be awarded to two commercial competitors (Quinns' Coach Hire Limited – hereinafter "Quinns" - and Out and About Enterprises Limited – hereinafter "Out and About"). This was what is conventionally described as a public procurement exercise.

II THE PROCUREMENT PROCESS IN OUTLINE

[2] The contract procurement documents make clear that the contractual service being procured was designed to offer pre-bookable transport for

persons who, due to disability or age, find public transport difficult or impossible to use. The stated aims of the programme were to target social need and to complement the work of existing service providers involved in programmes designed to promote social inclusion for people with reduced mobility. This service has been in existence in various guises for approximately two decades. The methodology adopted was to procure this service by dividing Northern Ireland into four separate geographical areas. It is undisputed that, within the ambit of Directive 2004/18/EC, this contract procurement exercise was conducted under the so-called "open" procedure. The exercise of evaluating tenders was broken down into three separate stages:

(a) A preliminary stage, whereby the compliance of tenders with the specified mandatory requirements was determined.

(b) A second stage, at which the application of the selection criteria was made, entailing a determination of whether tenderers had demonstrated minimum standards of technical and professional ability in certain specified respects.

(c) A final stage, entailing the application of award criteria and identification of the successful bidder/s. The Department's affidavit evidence includes the following material averments:

> "*The selection criteria were formulated to ensure that only tenderers who demonstrated the ability to deliver the services would have their tenders considered at the award stage. It was decided that the assessment of selection criteria should be pass/fail and it was deemed necessary that all the selection criteria should be passed for a tenderer to be considered suitable to progress to the award stage …*
>
> *The award criterion was the most economically advantageous tender which involved consideration of a range of qualitative issues and a cost component …*
>
> *The primary award criteria were individually weighted, with sub criteria identified and separately weighted …*
>
> *A weight of 30%* [was] *attributed to cost and 70%* [was] *attributed to …* [the others]".

The evidence establishes that stages (a) and (b) merged to form a single, combined stage.

[3] It is clear from the "Instructions to Tenderers" that there were four separate selection criteria, the function whereof was to ascertain whether the bidder could attain certain minimum standards. There were described as (a) providing transport services, (b) operating a transport company, (c) providing transport services to people with disabilities and (d) managing a booking centre, including scheduling customer journeys. Each of the four **selection criteria** focussed on the period of *the previous three years*. Every bidder was required, with reference to each of the four criteria, to "*… provide details of a relevant project within the last three years which demonstrates your ability to successfully* [perform or provide the specified service]".This was followed by the specification of each of the four selection criteria/minimum standards, duly augmented. Thus, for example, the first selection criterion required bidders to provide, with reference to a relevant project within the previous three years, particulars of matters such as the customer organisation, project value, duration, key personnel roles and delivery of project objectives on time and within budget. The outworkings of all four selection criteria were couched in comparable, though not identical, terms. Stated succinctly, the selection criteria focussed on the demonstrable previous experience, competence and expertise of bidders. As regards the third and final stage of the process, there was a total of seven award criteria: that of contract price accounted for 30% of the available marks whereas, of the remaining six, each was accorded a variety of percentages individually, representing the balance of 70%.

[4] The decisions under challenge were communicated to the Plaintiff by letter dated 11th April 2011 which stated, *inter alia*:

> "*… your tender has not been successful. DRD intends to enter into contracts for the provision of the above services as follows:*
>
> - *Northern Contract Area – Quinn's Coach Hire*
> - *Eastern Contract Area – Quinn's Coach Hire*
> - *Southern Contract Area – Quinn's Coach Hire*
> - *Western Contract Area – Out and About Enterprises*".

This letter incorporated a table of scores which showed that the Plaintiff had been ranked third in respect of all four geographical contract areas. In each instance, the winning bidder's score was substantially higher than that allocated to the Plaintiff. The evidence includes four separate "Debrief" documents. Each of these details the scores allocated to the Plaintiff in respect of every contract award criterion and sub criterion, with

corresponding comments. The latter have the appearance of the composite evaluation panel notes.

III THE PROGRESS OF THE LITIGATION

The Initial Challenge

[5] The Plaintiff's case was initially formulated in correspondence. The Department's solicitor replied accordingly. This was followed by the issue of a writ which, in turn, stimulated an application by the Department for an order pursuant to Regulation 47H of the Public Contracts Regulations 2006 seeking the termination of the contract imposed by Regulation 47G(1) precluding the Department from entering into the contracts in question. The court, applying the principles of good arguable case and the balance of convenience, refused this application. Thereafter, the Plaintiff's case was pleaded in its Statement of Claim which, reduced to its core, formulated the following challenges:

(a) A structural challenge to certain aspects of the contract selection criteria grounded on a complaint of lack of objectivity and/or transparency.

(b) A contention that the two successful bidders did not in fact satisfy the contract selection criteria in certain respects, giving rise to a manifest error on the part of the Department and/or a violation of the principle of equality of treatment.

Initially, the Plaintiff also made the case that the impugned decisions were vitiated on the freestanding ground of unlawful State aid: ultimately, this discrete challenge was not pursued. The principal remedies pursued by the Plaintiff are an order setting aside the contract award decision; a declaration that the contract should have been awarded to the Plaintiff; and damages. The main features of the ensuing phase of the proceedings were the exchange of further pleadings, discovery of documents and the receipt of certain representations to the court on behalf of the two successful bidders. One outcome of these events was discovery by the Department of a series of documents, some of them redacted. Certain redactions were reconsidered and revoked as the trial progressed.

The "Due Diligence" Exercise

[6] From an early stage of these proceedings, it was represented to the court on behalf of the Department that the impugned decisions to award the relevant contracts to the two bidders in question would not inexorably result in the execution of contracts with the two successful bidders. Rather, there would be no execution of contracts until the Department had conducted an

exercise labelled by it as "*due diligence*". This issue assumed increasing prominence as the proceedings advanced. This culminated in a ruling by the court which was motivated by, *inter alia*, its concern that the litigation framework before it was incomplete, with the result that the outcome of these proceedings would not necessarily achieve finality. This prompted the court to stay the proceedings for a finite period, of one month's duration, to enable the Department to conduct the "Due Diligence" exercise, if it chose to do so. The court did not make any mandatory order. In thus ruling, it was apparent to the court that if the Department chose to conduct this exercise, the Plaintiff would make detailed representations, supported by relevant evidence, to the effect that the two winning bidders did not achieve compliance with some of the contract selection criteria.

[7] During the period which then intervened, the Department purported to conduct this exercise. The evidence of what then transpired was initially very limited. In written form it consisted of the following:

(a) A letter compiled by the Plaintiff's solicitors containing the representations which the Department was invited to consider in the exercise. The contents establish that its overarching purpose was to persuade the Department that the two successful bidders did not satisfy the selection criteria. Notably, this letter urged the Department to conduct the "due diligence" exercise, to the extent that any failure to do so would be reflected in an amended Statement of Claim.

(b) The Department's initial response, communicated by its solicitor, which was to the effect that it "*… intends to investigate the various matters you have referred to in your letter …*".

(c) Further written representations from the Plaintiff's solicitors.

(d) An e-mail (dated 10th November 2011) from the Department's solicitor stating:

> "*The learned judge stayed the action for a period during which time the Department investigated the various complaints made on behalf of the Plaintiff about the two successful tenderers in the impugned procurement process …*
>
> *The Department has considered the submissions made by* [the two successful tenderers] *in response to the various complaints and is satisfied that both their*

tenders were complete and accurate in all material respects".

As the the trial progressed, the evidence bearing on this discrete exercise was duly augmented. The Department's claim that both winning tenders were "*complete and accurate in all material respects*" was robustly challenged by the Plaintiff.

[8] The upshot of the "due diligence" exercise was that the Department affirmed the impugned decisions and the Plaintiff's challenge continued accordingly, with the automatic stay remaining in place.

Enlargement of the Plaintiff's Case

[9] The expansion of the Plaintiff's case, which entailed significant amendments of the Statement of Claim, occurred in three phases. First, in advance of the trial, the court permitted a narrowly formulated amendment designed to challenge the Department's conduct of the "due diligence" exercise and the outcome thereof on specified grounds. Second, on the third day of trial, it became apparent to the court that there was a not insignificant mismatch between the evidence being led by the Plaintiff, both documentary and oral, and the case pleaded. This gave rise to a heavily amended draft Statement of Claim. Having heard arguments from both parties, the court permitted certain amendments and disallowed others. In thus ruling, the main factors which I took into account were the inaccessibility of certain witnesses to the Plaintiff's legal representatives until they were called at the trial to testify on *subpoena duces tecum*, some late discovery of documents by the Department, which continued as the trial progressed and the late production of certain documents by third parties pursuant to Khanna subpoenae. In short, the litigation was proving to be organic in nature. I took into account further the self-evident desirability of adjudicating on all issues of substance truly in dispute between the parties with a view to achieving finality. Finally, I was satisfied that the Department would not be prejudiced, having regard to the twin mechanisms of an adjournment (proving inevitable in any event due to the court calendar), following several days of hearing, and the court's discretionary powers in respect of costs.

[10] A further expansion of the Plaintiff's case occurred at a very late stage of the trial, when the parties' written submissions were formulated. This was permitted by the court, somewhat generously, on the basis that the Department was given an adequate opportunity to respond. As a result, in its ultimate incarnation, the Plaintiff's Statement of Claim advanced the following six freestanding complaints:

(a) Unlawfully formulated selection criteria, due to lack of objectivity and/or lack of transparency.

(b) Lack of transparency and/or manifest error in the Department's application of the selection criteria.

(c) Manifest error and/or inequality of treatment in concluding that Quinns satisfied one of the mandatory requirements (concerning one aspect of vehicle licences).

(d) Manifest error in the application of the selection criteria to Quinns and "Out and About", in varying respects.

(e) With specific reference to the "due diligence" exercise, the commission/perpetuation of the same manifest errors.

(f) Breach of an implied contract, the terms whereof were that the Department would evaluate the Plaintiff's bid fairly and would not decide to award the contracts to bidders whose tenders were demonstrably replete with false representations.

I would observe that the introduction of this latter new cause of action, which finds some limited support in the decided cases, albeit outwith the ambit of the EU procurement law regime, was predicated on the twin considerations of (a) the court holding, as a matter of law, that the "due diligence" exercise was not governed by the 2006 Regulations and (b) the court making findings that there were indeed material false representations in Quinns' tender.

[11] While the Statement of Claim in its ultimate incarnation undoubtedly broadened the scope of the Plaintiff's challenge, it had the merit of providing necessary clarification and supplying previously absent particularisation of each of the heads of claim. While I have summarised its effect above, the pleading is reproduced in Appendix 2 hereto, on account of its bulk and intricacy. The progressive and successive amendments which I have outlined in paragraph [10] above underlined the importance of pleadings in litigation of this kind. It is timely to emphasize the need for clarity, logical presentation and full particularity in pleadings in cases of this kind – the more so where one party is (or both are) pressing for an expedited hearing and there is a substantial audience, both within and outwith the litigation, eagerly awaiting the court's judgment.

IV STATUTORY FRAMEWORK

The Public Contracts Regulations 2006

[12] Some of the provisions of the Public Contracts Regulations 2006, as amended ("*the 2006 Regulations*") featured with particular prominence in the parties' respective arguments. The text of these is somewhat bulky and I have, therefore, included them in an appendix to this judgment. Regulation

4(3) enshrines the now familiar duties requiring a contracting authority to treat economic operators equally and in a non-discriminatory manner and, further, to act transparently. Part 3 of the 2006 Regulations governs the procedures culminating in the award of a public contract. By Regulation 12, it is incumbent on the contracting authority to employ either the open procedure (Regulation 15) or the restricted procedure (Regulation 16) in all circumstances, with the exception of those cases where the negotiated procedure or the competitive dialogue procedure is permissible. **[**The present case is concerned with the open procedure.**]** Where the open procedure is adopted, the contracting authority must comply with all of the provisions of Regulation 15. A contracting authority is empowered by Regulation 15(11) to exclude from evaluation a tender which either (a) is ineligible on one of the grounds specified in Regulation 23 or (b) fails to satisfy specified minimum standards of economic and financial standing or technical or professional ability. Regulation 15(12) provides that minimum standards of this kind must be specified in the Contract Notice and have to be "*related to and proportionate to the subject matter of the contract*". It is clear that the incorporation of minimum standards of economic and financial standing and/or technical or professional ability (commonly described as "selection criteria") is not obligatory.

[13] The subject matter of Part 4 of the 2006 Regulations is "Selection of Economic Operators". Within this discrete segment of the statutory framework the contracting authority is empowered to reject the tenders of certain economic operators on prescribed grounds. Where the contracting authority requires economic operators to satisfy minimum standards of economic and financial standing, the information to be provided may include matters such as bank statements, proof of professional indemnity insurance and statements of accounts. By Regulation 24(4), it is permissible for a bidder (or a Regulation 28 consortium) to rely on the capacities of other entities *or* (as the case may be) other members of the consortium, regardless of the legal nature of the nexus between those concerned. The subject matter of Regulation 25 (appended) is "Information as to Technical or Professional Ability". This is concerned with the ability of bidders to satisfy any prescribed minimum standards of technical or professional ability. It empowers a contracting authority, in making this assessment, to have regard to various matters. These are concerned essentially with the bidder's track record, expertise and experience, with the focus on the previous five year period. In view of its resonance with the third of the Plaintiff's grounds of challenge, I reproduce at this juncture Regulation 25(3) in its entirety:

> *"(3) Where appropriate –*
>
> *(a) an economic operator or a group of economic operators as referred to in regulation 28 may rely on the capacities of other entities or members in the group, regardless of the legal*

nature of the link between the economic operator or group of economic operators and the other entities; and

(b) the economic operator or the group of economic operators shall prove to the contracting authority that the resources necessary to perform the contract will be available and the contracting authority may, in particular, require the economic operator to provide an undertaking from the other entities to that effect."

While the wording of Regulation 25(3) is far from felicitous, it appears to me to contemplate three basic possibilities:

(a) A tender by an economic operator, acting solely on his own account.

(b) A tender by an economic operator which relies to some extent on the capacities of other entities who have not joined in the tender.

(c) A tender by an economic operator and one or more other persons acting jointly, being a "*consortium*" within the ambit of Regulation 28(1), in which reliance is placed on the capacities of all or some members of the consortium. It is clear from Regulation 28(2) that there is no requirement that the consortium members form a single legal entity at the tendering stage. However, where such a tender succeeds, the contracting authority is empowered to impose this requirement.

Having regard to the value and volume of contracts embraced by the EU procurement regime and taking into account economic and commercial realities, scenarios (b) and (c) are, clearly, more likely to arise in practice than scenario (a). Scenario (b) arises for particular consideration in these proceedings, by reason of the third of the Plaintiff's grounds of challenge.

[14] Regulation 26 (appended) empowers a contracting authority to require a bidder to provide additional information. This power is strictly circumscribed: the additional information requested can only supplement or clarify information provided in accordance with Regulations 23, 24 or 25. I shall revisit presently the significance of Regulation 26 in the context of the fifth of the Plaintiff's grounds of challenge. Regulation 28 is the provision dealing with tenders by a consortium, mentioned in paragraph [13] above. Regulation 29A is a procedural provision concerning notification, being (*inter alia*) the outworkings of Regulation 15(11) and reinforcing the rule that in an open procedure competition where the contracting authority opts to incorporate "selection criteria", a bidder who fails to satisfy such criteria will

not proceed to contract award stage. This combination of provisions in the Regulations also points up the distinction between selection criteria and award criteria. This important distinction is reinforced still further by what follows immediately, in Part 5, under the banner of "The Award of a Public Contract". Regulation 30 (appended) enacts the general rule that a contracting authority shall award a public contract on the basis of the offer which either is the most economically advantageous or offers the lowest price. Where the first of these standards is adopted, the contracting authority "***shall***" apply award criteria which must comply with two requirements. Firstly, they must be "*linked to the subject matter of the contract*" being procured. Secondly, they shall **include** "*quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion*". The **weighting** to be allocated to each of the award criteria lies within the discretion of the contracting authority, the main requirement in this respect being one of transparency, viz. the weightings must be published. By virtue of Regulation 30(5), a hierarchical ranking order of importance is a permissible alternative to weightings. The requirement of objectivity also appears in Regulation 30(5).

[15] Regulation 31 regulates the content of the requisite OJEU contract award notice and is linked to Regulation 32 (appended), which describes the requirements to be observed in the communication of contract award decisions. In short, disappointed bidders must be informed in writing in a notification which shall include the contract award criteria the reasons for the decision, including the characteristics and relative advantages of the successful tender and both their own scores and that of the winning bidder. At this point, by virtue of Regulation 32A, the "standstill" period is triggered. The suite of provisions governing the standstill period which follow highlight the distinction between a contract award decision (on the one hand) and the necessarily subsequent act of entering into, or executing, the relevant contract (on the other). I shall reflect further on this distinction at a later stage of this judgment. The standstill period is of ten days' duration, expiring at midnight at the end of the 10th day after the date of the transmission made under Regulation 32(1). These provisions are linked to Regulation 47G(1), which provides that where proceedings are initiated to challenge a contract award decision, the contracting authority "*… is required to refrain from entering into the contract*". This moratorium continues until one of a range of specified events materialises: the "terminating" event will not untypically be the promulgation of the judgment and final order of the court. Where this occurs, the contracting authority is at liberty to let the contract, unless the moratorium is extended further.

[16] Finally, Regulation 47 (appended) creates a cause of action, by providing that the twofold obligation imposed on a contracting authority (a) to comply with the appropriate provisions of the Regulations and (b) to also

comply with "*any enforceable Community obligation in respect of a public contract*" is "*a duty owed to an economic operator*": see Regulation 47A. By Regulation 47C, a breach of any such duty is stated to be "*actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage*". It is further provided that proceedings shall be brought in the High Court. Prior notice of intention to initiate proceedings must be given to the contracting authority, per Regulation 47(7).

Directive 2004/18/EC

[17] I consider that the recitals and provisions of the Public Procurement Directive must be examined by the court mainly for the purpose of ascertaining whether they shed any illumination on the fifth of the Plaintiff's grounds of challenge and, in particular, the Department's contention that the "due diligence" exercise (paragraphs [6] – [8], *supra*) was not governed by the 2006 Regulations. The Directive is a measure of the European Parliament and the Council, dated 31st March 2004, the subject matter whereof is "*the co-ordination of procedures for the award of public works contracts, supply contracts and public service contracts*" (hereinafter "*the Directive*"). The European Court of Justice consistently resorts to the recitals and preambles of Directives and Regulations in order to ascertain their overall purpose and as an aid to construction of their provisions. See, for example, ***Nehlsen –v- Brenen*** [1979] ECR 3639, paragraphs [4] – [7]. The European Court has also held:

> "*… In applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 18 … of the Treaty*".

[***Marleasing SA –v- Comercial Internacional de Alimentacion SA*** [1990] ECR 4135, paragraph 8].

Commenting on this doctrine of purposive construction, Lord Clyde stated in ***Cutter –v- Eagle Star Insurance*** [1998] 4 All ER 417, at p. 426:

> "*The adoption of a construction which departs boldly from the ordinary meaning of the language of the statue is … particularly appropriate where the validity of legislation has to be tested against the provisions of European law. In that context it is proper to give effect to the design and purpose behind the legislation and to give weight to the spirit rather than the letter …*

> *But even in this context, the exercise must still be one of construction and it should not exceed the limits of what is reasonable*".

Further, the European Court has repeatedly stated:

> "*Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied*".

[***Cilfit –v- Ministry of Health*** [1982] ECR 3415, paragraph 20].

[18] Recitals (1) and (2) of the Directive gather together a series of EU rules and principles, both general and specific, which provide a clear insight into the Directive's aims and objectives and, further, constitute barometers to which reference may be made in the determination of specific issues relating to the construction and application of the provisions contained in this measure. Recital (46) states:

> "*Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: the lowest price and the most economically advantageous tender*".

Within the remaining provisions of recital (46) there is clear emphasis on the principle of equal treatment in the award of contracts and the "*obligation of the necessary transparency*", designed to enable all tenderers "*… to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender*". The award of a contract by the application of the most economically advantageous tender criterion entails an obligation on the contracting authority to assess tenders "*… in order to determine which one offers the best value for money*". This exercise must be performed on the basis of suitable economic and quality criteria which, in turn, must be linked to the object of the contract being procured (as defined in the technical specifications) and the value for money of each tender to be measured. Recital (46) continues:

> "*In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively*".

Subject to this overarching requirement, criteria designed to meet environmental or social requirements (not applicable in the present context) are permissible.

[19] It is appropriate to examine at this juncture the legal meaning of the term "*economic operator*", in view of one of the discrete elements of the Plaintiff's third ground of challenge, which requires the court to compare and contrast the terms "*economic operator*" and "operator" in the exercise of construing the true meaning of the latter in the contract procurement structure. The genesis of the term "*economic operator*" is found in Article 1(2)(a). It is clear from this provision that the primary meaning of "*economic operator*", in most contexts, is an entity which has (or entities which have) tendered for a contract to which the Directive applies: *autrement dit* a tenderer, or bidder. Article 1(8) provides further:

> "*The terms 'contractor', 'supplier' and 'service provider' mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services. The term '**economic operator**' shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification. An economic operator who has submitted a tender shall be designated a 'tenderer'.*"

Article 2 of the Directive provides:

> "***Principles of Awarding Contracts***
>
> *Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way*".

The subject matter of Chapter V is "Procedures", wherein Article 28 prescribes the following umbrella obligation:

> "*In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive*".

I consider that Article 28, taken together with Recitals (2) and (3), makes clear that the object of the Directive is not one of total usurpation or occupation of

the legal rules governing the award of affected contracts within Member States. The subject matter of Chapter VII is "Conduct of the Procedure". Article 44 provides:

> "*Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52 and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3*".

Section 2 of Chapter VII is concerned with "Criteria for Qualitative Selection". Within these provisions, Article 44 clearly authorises the incorporation of so-called "selection criteria" and the outworkings of this umbrella provision are found in Article 47 (proof of a tenderer's economic and financial standing) and Article 48 (evidence of a tenderer's technical and/or professional abilities). In this context, the terms of Article 51 are noteworthy:

> "***Additional Documentation and Information***
>
> *The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 – 50*".

Within Section 3, entitled "Award of the Contract", Article 53 provides that the criteria on which contracting authorities shall base the award of public contracts shall be either the most economically advantageous tender or the lowest price.

V THE PROCUREMENT STRUCTURE

General

[20] The transport services contracts being procured by the Department and giving rise to this litigation have a combined value of £14.5 million. The advent of these proceedings has overtaken the envisaged contract commencement date of 25th May 2011. The procuring agency, the Department, was in receipt of the usual advice and support from the Central Procurement Directorate ("*CPD*") of the Department of Finance and Personnel ("*DFP*"). This included written guidance which, *inter alia*, cautioned Evaluation Panel members in the following terms:

> "*Evaluation ratings and awards must be made on the basis of the material requested and included in the tender. The panel must not bring any personal knowledge nor any speculation or suspicion to bear when evaluating tenders. To ensure consistency, the evaluation panel should evaluate tenders according to a strictly defined scale of scores …*"

In another passage, it is stated:

> "*The evaluation process is concluded with the preparation and signing off by the Chairperson and individual panel members of the evaluation documentation including recommendations on the award of contract*".

In a further passage, Panel members were advised of the distinction between selection criteria (evaluating the bidders) and contract award criteria (evaluating the tender).

The "Terms of Reference"

[21] It is appropriate to make clear, at this juncture, that throughout this judgment and as reflected in the substantial documentary evidence the terms "*selection criteria*", "*bidder selection criteria*", "*minimum standards*" and "*minimum standards of professional and technical ability*" are employed interchangeably. I begin with the "Terms of Reference" ("*TOR*"), one of the documents contained in the so-called "electronic envelope". In short, this was one of the components of the "tender package". The other two main components were the "Instructions to Tenderers" and the draft "Conditions of Contract". I shall examine each of these in turn. I commence with the the TOR which explain that the contract being procured is concerned with the provision of "*specialised transport services for disabled people who cannot access the mainstream transport networks*". This document also provides information about the *existing* "Door to Door" transport services in Northern Ireland. These services are provided in towns and cities in Northern Ireland with a population exceeding 10,000. Statistically, this involves approximately 13,000 trips per month in 29 towns and cities. Thus, in the whole of Northern Ireland, there are approximately 156,000 trips per annum. Services are provided seven days a week between the hours of 7.30 and 23.30. Following the last procurement competition, contracts were awarded to three operators. For the purposes of this procurement exercise, the Department divided Northern Ireland into four separate regional areas and was procuring a contract in respect of each. Interested parties could bid for one or more of these, as paragraph 4.3 makes clear:

> "*Should an Operator wish to bid for more than one Contract Area, such an Operator should address all the evaluation criteria for each area he is bidding for. Additionally, that Operator may wish to indicate whether he is prepared to abate the price if he is awarded more than one Area*".

The TOR further advised:

> "*The facility to book, schedule and dispatch vehicles is one of the key elements …*
>
> *Operators should specify how they are going to organise this booking facility (for example, how many staff they will require) …*
>
> *At a minimum, each operator should provide a booking centre to deal with members requesting trips … At least one dedicated call handler with knowledge of the geography and transport infrastructure of the contract area should be established to deal with trips requested in each contract area, within the booking centre staff.*"

In the "TOR", the subject of vehicles is addressed in some detail. Vehicles were required to confirm to a stipulated specification and the use of a mixed fleet of vehicles by the successful bidder was envisaged.

"Instructions to Tenderers"

[22] The "Instructions to Tenderers" ("*ITT*") is one of the key documents. It prescribes three separate classes of requirements:

(a) Mandatory requirements: there were sixteen of these in total. The ITT clearly stated that "*failure to comply with any of the mandatory requirements will result in exclusion from the competition*". Consideration of one of the mandatory requirements arises in the context of the third of the Plaintiff's grounds of challenge.

(b) Minimum standards of professional and technical ability, or "selection criteria": there were four of these, each focussing on the operational competence and experience of bidders during the previous three years. Consideration of these arises in the context of the first, second, fourth and fifth of the Plaintiff's grounds of challenge.

(c) Award criteria: there were seven of these, with the criterion of contract price attracting the largest weighting, 30% and the remaining six attracting, in various proportions, the balance of 70%. The award criteria do not arise in relation to any of the Plaintiff's grounds of challenge.

The relevant mandatory requirement. The third of the Plaintiff's grounds of challenge focuses on the eighth of the sixteen mandatory requirements. The ITT formulated this requirement in the following terms:

> "***Vehicles/Drivers***
>
> *The tenderer has provided details to confirm that: …*
>
> *For vehicles capable of carrying nine plus passengers, Operator either has Road Service (Bus Operators) Licence, including Demand Responsive Bus Service component; or, has provided applications for Demand Responsive Bus Service on a Road Service (Bus Operators) Licence.*"

This discrete mandatory requirement is also addressed in the TOR, paragraph 6.2 whereof states *inter alia*:

> "*Successful operators must be licensed appropriately..*".

The Plaintiff's case is that Quinns' tender failed to satisfy this mandatory requirement. I would add, for completeness, that a discrete issue regarding the so-called "*Demand Response Bus Service Component"* which featured as part of the Plaintiff's initial challenge evaporated in due course, upon the Plaintiff concurring with the Department's contention that, in evaluating the tenders, it had waived the need for bidders to comply with this requirement.

[23] The Minimum Standards/Selection Criteria. In this particular procurement exercise, the Department opted to incorporate minimum standards of professional and technical ability (or so-called "selection criteria". In common with the mandatory requirements and the contract award criteria, these were contained in the ITT. As noted above, there were four "selection criteria", each embodying a different set of minimum professional and technical standards. In common with the mandatory requirements, the selection criteria were also evaluated on a pass/fail basis. In contrast with both, the contract award criteria were evaluated on the basis of specified percentage scores, accounting for a total of 70% of the marks [in differing proportions], with the balance of 30% allocated to the contract award criterion of cost. The four minimum standards specified in the

selection criteria were providing transport services; operating a transport company; providing transport services to people with disabilities; and managing a booking centre, including scheduling customer journeys. With reference to each of these minimum standards, bidders were instructed in essentially, though not precisely, the same terms. It will suffice to reproduce the instruction in relation to the first minimum standard ("**Providing Transport Services**"):

> "*Tenderers must provide details of a relevant project within the last three years which demonstrates their ability to successfully provide transport services. This project should be similar in nature and scale to the services required by DRD and should describe:*
>
> *(a) The customer organisation;*
>
> *(b) Project value;*
>
> *(c) Duration of project;*
>
> *(d) Roles of the key personnel responsible for delivering the project;*
>
> *(e) Evidence confirming delivery of project objectives on time and to budget;*
>
> *(f) Lessons and experiences which may be of benefit to DRD.*"

The instructions to bidders in respect of the remaining three minimum standards were couched in broadly similar terms, with minor adjustments to the template. One important feature common to all four selection criteria was the stipulation that the bidder should demonstrate a project belonging to the last three years "*similar in nature and scale to the services required by DRD*". This requirement dominated all four selection criteria. Also common to all four selection criteria were the specific requirements that the bidder provide information of the roles of key personnel responsible for delivering the comparator project and "*lessons and experiences which may be of benefit to DRD*". In the ITT, bidders were cautioned in the following terms:

> "*It is not sufficient to simply list projects. Tenderers must provide the information detailed in each of the criteria…*
>
> *Tenderers are required to upload a single file attachment **giving full supporting evidence** of the minimum standards as set out below …*

> *Failure to demonstrate clear relevant experience in sufficient detail may result in elimination of your tender submission.*"

[My emphasis]

The minimum standards "*set out below*" were the four selection criteria.

The Conditions of Contract

[24] The "Conditions of Contract" were another of the components of the tender documents. These stipulated, *inter alia*, a five year contract period. Having regard to one particular limb of the fourth of the Plaintiff's grounds of challenge, I draw attention to certain of the provisions of these Conditions bearing on the question of the subcontracting of services by a successful bidder. Under the rubric "Manner of Carrying out the Services", clause B3.1 provides:

> "*The Contractor shall at all times comply with the Quality Standards and where applicable shall maintain accreditation with the relevant Quality Standards authorisation body …*
>
> ***B3.2*** *The Contractor shall ensure that all staff supplying the services shall do so with all due skill, care and diligence and shall possess such qualifications, skills and experience as are necessary for the proper supply of the services*".

In this context, it is appropriate to note the contractual definition of "staff", in clause A1.50:

> "'*Staff*' *means all persons employed by the contractor to perform its obligations under the contract together with the contractor's servants, agents, suppliers and subcontractors used in the performance of its obligations under the contract*". **[P. 253]**

Clause B5.7 contains a related requirement:

> "*The contractor shall maintain sufficient staff to perform the contract in accordance with the specification*".

Clauses F1.2 and F1.3 provide:

> "*The contractor shall be responsible for the acts and omissions of its subcontractors as though they are its own …*
>
> *Where the client has consented to the placing of sub-contracts, copies of each sub-contract shall, at the request of the client, be sent by the contractor to the client as soon as reasonably practicable*".

I observe that this assortment of contractual provisions seems to me essentially harmonious with Regulation 25(3) (discussed in paragraph [13] above).

VI THE EVIDENCE

General

[25] Ultimately, the evidence assembled before the court was an assortment of affidavits, witness statements, voluminous bundles of documents and sworn testimony. Furthermore, as the trial progressed, agreement of certain facts proved possible. Throughout the trial there was a persisting and intense focus on the terms in which the tenders of the two successful bidders, in particular Quinns, were formulated.

The Mandatory Licensing Requirement

[26] This is the subject matter of the third of the Plaintiff's six grounds of challenge: see paragraph [10] above. The essence of this discrete challenge is that Quinns, on the face of its tender, failed to satisfy this mandatory requirement and should, accordingly, have been disqualified at the initial stage of evaluation, with the result that the Department fell into manifest error. I have already rehearsed in paragraph [22] above, the terms in which this specific requirement was formulated in the tender documents. The electronic methodology required bidders to address the mandatory requirements in a pro-forma. In its response, Quinns simply stated "Yes" and provided no supporting or confirmatory evidence. It is clear from the documentary evidence that DRD sought clarification of this response. This elicited the following supplementary reply:

> "*Quinn's Coach Hire is an established business with a large portfolio of customers. To service them an operators licence is required …* [reference is then made to the "Vehicles" upload, Section 2.0] …
>
> *Details to confirm the existence of the Licence* [semble, the operators Licence] *is contained within Appendix 1 …*".

Thus, *ex facie*, Quinns were representing that *they* were the holder of the requisite Road Service (Bus Operators) Licence. Neither this assertion nor the Department's evident acceptance thereof is challenged by the Plaintiff. Rather, the cornerstone of this discrete ground of challenge is based in a passage in Quinns' tender in which they confirmed that they were bidding as "*prime contractor*" intending to "*use third parties/consortium members to provide some services*". This was followed by a particularised response, in which the tender stated that they were intending to engage six named "*partners/sub-contractors*" who would, in total, provide a substantial proportion of the transport services for which Quinns were tendering. Although the exact percentage is somewhat unclear, due to the degree of interpretation required and the lack of certain detail, on its face it is of the order of 50% and, even if smaller, is on any showing a large proportion. Against this factual matrix, the Plaintiff contended that Quinns' tender had failed to comply with the eighth of the sixteen mandatory requirements as it contained no evidence that any of these six "*partners/subcontractors*" held the necessary statutory licence. At this juncture, it is convenient to record that arising out of the evidence given to the court by the Department's witnesses, it emerged that the evaluation panel members were ignorant of the aforementioned passage in the Quinns' tender at the stage of applying the mandatory requirements and selection criteria.

Compliance with the Selection criteria

[27] The ensuing summary of the evidence bearing on this discrete issue should be considered in the context of the case made by the Plaintiff (regarding the fourth and fifth grounds of challenge). In the final amended Statement of Claim, it was averred that the two successful bidders did not comply with the selection criteria (or minimum standards) in certain specified respects, with the result that the Department's conclusion to the contrary evinced the commission of a manifest error. This limb of the Plaintiff's case was based on assertions of paucity and unreliability of and inaccuracies in the information/evidence supplied by the bidders, Quinns in particular. As regards "Out and About", the Plaintiff's case was advanced on a significantly narrower ground, being based on the contention that this bidder could not lawfully rely on the experience of other entities in the provision of the "Dial A Lift" scheme during previous years, giving rise to a failure to satisfy all four selection criteria and a consequential manifest error on the part of the Department.

The "Providing Transport Services" Selection Criterion: Quinns

[28] In the relevant section of its tender, Quinns made the following assertions and representations:

(a) "*Quinns Coach Hire provides transport to the Tyrone County Board …*[or] *Tyrone GAA* [which] *… is one of the thirty-two County Boards of the GAA in Ireland and is responsible for Gaelic Games in County Tyrone. The County Board is also responsible for the Tyrone Inter-County Teams. In total they cater for football and hurling at senior, under 21, minor and under 16 development squads. In addition to this there are 52 clubs within the county and transport must be provided to their respective teams*".

(b) "*The value of* ***the project*** *is £265,000 per annum*".

[My emphasis].

(c) "***The contract*** *is issued on an annual basis and Quinns Coach Hire is currently in the second year of* ***the project*** *having successively secured the initial contract in January 2010 and renewed it January 2011*".

[Emphasis added].

(d) "*Tyrone County Board and associated units arranged 884 trips during the 2010 season*".

Most were both booked and provided outside normal office hours. All were punctual and provided within budget. Furthermore:

> "*Tyrone County Board reduced their carbon footprint by 7% during the year (2% more than target)*".

This part of the tender continued:

> "*Please refer to Appendix 1 – Reference from Tyrone County Board confirming delivery of project objective on times and to budget*".

The letter appended was in the headed notepaper of the organisation "Club Tyrone". It is dated 23rd January 2011 and states:

> "*Tyrone County Board for the second year running has contracted Quinn's Coach Hire with the transportation of* ***all*** *our teams and development squads …*
>
> *In support of the … Green Initiative, Quinn's Coach Hire are able to provide us with environmentally friendly vehicles in order to reduce our carbon output. They supply detailed reports on the*

> *environmental impact due to transport every month.*"

[My emphasis – see the evidence of the Tyrone County Board Chairman, paragraph [36], *infra*].

This letter also contains various eulogies about the standard and quality of the services provided by Quinns. It concludes with a signature purporting to be that of the Chairman of Club Tyrone. Throughout this part of its tender, Quinns repeatedly made reference to "*the project*" and "*the contract*". The following statement was also included:

> "*In addition to this there are 52 clubs within the county and transport must be provided to their respective teams*".

Considered in context, this had the character of a stray statement, almost a throwaway line, having no clear relationship to its surrounds and was totally unparticularised.

[29] The presentation of the Plaintiff's case at the trial included a frontal assault on the accuracy and veracity of many of the claims and assertions in the Quinns' tender, rehearsed immediately above. The evidence adduced included certain documentary materials emanating from the Tyrone County Board, which were twofold. Firstly, a letter dated 29th April 2010 from Quinns (signed by Kevin Quinn) addressed to the Tyrone County Board Office and entitled "Quotation". This states:

> "*Thank you for this opportunity to quote for* ***the county's senior team trips*** *for the remainder of the 2010 season …*
>
> *We have also agreed with Club Tyrone to supply coaches and two open top double decker buses free of charge for their open night at Garvaghy on 20th May 2010 …*".

[My emphasis]

Secondly, there were eighteen Quinns' invoices addressed to the Tyrone County Board. The first of these is dated 12th February 2010 and the last is dated 11th July 2011. In some of these the words "*senior panel*" appear, whereas the others are silent in this respect. These invoices detail a total of 32 separate transport services, or "trips", provided by Quinns'. Each invoice specifies the amount claimed. The total sum is approximately £14,000. One pauses, at this juncture, to contrast this figure with the amount represented in Quinns' tender, £265,000. The other evidence adduced at the trial bearing on

these issues was the sworn testimony of two senior representatives of the Tyrone County GAA Board, Mr. McCaughey and Mr. McLaughlin: see paragraphs [35] – [36], *infra*.

[30] In the events which occurred following the initiation of these proceedings, Quinns supplemented their original tender by the provision of two separate further written submissions. The first of these was a response to a series of written representations compiled by the Plaintiff's solicitors. The second was a response to questions raised by the Department during what was termed the "due diligence" exercise which was conducted by a specially constituted "Allegations Panel" of the Department. In the first of these two further written submissions, Quinns, in the context of referring to the services allegedly provided by them to the Tyrone County Board, employed the terminology "*the* contract" and "*our* appointment": these terms can be readily related to their counterparts "*the project*" and "*the contract*" in Quinns' tender. The first of these supplementary written submissions contained the following further salient assertions and representations:

(a) The suggestion that they were providing transport services for the senior Tyrone County football team only is "*entirely misconceived*".

(b) "*In fact our appointment involves us providing travel services for a significantly broader base of teams (as was indicated in our tender)*".

(c) In the detailed breakdown which followed, Quinns suggested, in terms, that their turnover included income generated by transport services for the Club Tyrone members' nights.

(d) "*Virtually all Tyrone away trips involve an overnight stay and therefore earn … considerably more revenue*".

(e) (In terms) transport services must be provided to the Tyrone Ladies' County Board (comprising 36 clubs) and the Tyrone County Camogie Board (comprising 12 clubs).

(f) "*By far the greater part of Gaelic games activity in Tyrone takes place at club level. County team games (at all levels and across men's football, women's football, hurling and camogie) account for about 2% only of the total volume of games played in any one year*".

(g) Within the four sporting disciplines there were, at the various age levels, a total of almost 230 teams.

(h) This generated approximately 7,000 games per season.

(i) "*It only takes Quinn's Coach Hire to deliver 15% of these trips at £250 each … it would generate £268,575 per annum*".

(j) In addition, there were youth team matches and training sessions during the week and the Gaelic Games Calendar was of 12 months' duration annually.

[31] At this juncture, there are some features of this written submission which I would highlight. The first, as noted above, is the persistent use of the language "*the contract*" and "*our appointment*". The second is the heavy reliance on a named official of Club Tyrone as a source of supposed verification of claims and assertions made. The evidence of the Tyrone County GAA Board witnesses (*infra*) was that Club Tyrone is essentially a fund raising agency: it is far from clear how the named representative of this organisation could reliably and accurately provide extensive data bearing on the operations and income of Quinns in the sphere of Gaelic games in County Tyrone generally. The third is the striking failure to put forward *any evidence* of the actual services provided by Quinns to either Tyrone County Board or private clubs **or** the income thereby generated. It is correct that *some* evidence of this latter *genre* was, eventually, included in the third of the three Quinns' submissions: however, Quinns' failure to include it in either of the first two cannot be overlooked. Fourthly, it is striking that none of the claims and assertions summarised in subparagraphs (c) – (h) above was particularised: rather, they were all pitched at a purely general level.

[32] The above-mentioned submission was made by Quinns in response to the written representations of the Plaintiff's solicitors. Subsequently, during the short period when proceedings were stayed by the court, the Department's "Allegations Panel" was formally constituted. This resulted in the transmission of a letter to Quinns with an appendix containing 36 questions. In response, Quinns forwarded a further written submission to which various materials were appended. These included several pages of "Vehicle Run Reports" (seemingly computer generated), apparently constituting the "Tyrone Work Report" mentioned in the covering submission and, on their face, spanning the period January to November 2010 and documenting a total of 884 trips. The customers' identities have been deleted from the documents. As a result, it is not possible to attribute *any* of these claimed transport services to any of the Tyrone County GAA teams or any County Tyrone private GAA club.

[33] Appended to this further submission there were also additional materials relating to the school transport services provided by Quinns in the NEELB and SELB areas. It was asserted that Quinns Coach Hire is "*a trading name of Loughshore Autos Limited … used for branding of coach hire business … any payments made to Quinns Coach Hire are deposited into an account belonging to Loughshore … all overheads belonging to Quinns Coach Hire are paid by Loughshore*

…". Kevin Quinn was described as operating both Loughshore and a second company, PVS Manufacturing Limited, with a total number of 21 employees, 15 of whom performed full time duties in the Quinns' business. It was asserted, with reference to the Loughshore Trading, Profit and Loss Accounts, that the Quinns transport operations accounted for an estimated 60% of the cost of sales and administrative expenses. Quinns also asserted that in respect of the nine month period December 2010 to September 2011 (notably different from the period cited – January to November 2010 – in relation to the "Vehicle Run Reports", *supra*) Quinns also asserted they had generated total coach hire income of £549,500, of which "*Tyrone*" (nowhere defined) accounted for £265,000; "*school transport*" £128,000; "*Easy Travel*" some £51,000; and "*other income*" of some £106,000. In support of these claims and figures, they appended an accountant's letter dated 8th November 2011. This letter was, notably, characterised by certain express qualifications and reservations. In particular, it highlighted – and repeated – "*a misanalysis in the company's accounts with regard to coach hire work*"; a change of accountants; limited available information; and unsatisfactory accounting practices. This letter also emphasized that there were no audited accounts and that such accounts as existed had been merely prepared and signed by the directors of Loughshore. The accountants did not enclose with their letter any accounts or other materials.

[34] It is appropriate to observe, at this juncture, that one of the features of the post-Writ information gathering exercises was the opportunity taken by Quinns to provide information which, on its face, was generated *post-tender*, belonged to the post-tender phase and, accordingly, could not be characterised as clarifying or properly supplementing information previously submitted. The Department was apparently willing to accept information of this kind, without question, whether by inadvertence or design. One of the consequences thereof, in my view, was an inequality of treatment of bidders. Globally, Quinns, in their quest to secure as many as possible of the contracts being procured, made a series of claims, assertions and representations at three separate stages:

(a) In their original tender.

(b) Post-Writ, in response to the written representations of the Plaintiff's solicitors.

(c) During the stay of the proceedings, in response to questions raised by the Department's "Allegations Panel" during the "due diligence" phase.

In the second and third of the submissions, there was a notable emphasis on the first of the four selection criteria.

[35] At the trial, the evidence of two representatives of the Tyrone County GAA Board also focussed particularly on this criterion. The first of these two witnesses was Mr. McCaughey, County Secretary of the Tyrone County GAA Board. The salient features of his evidence were:

(a) Until January 2010, transport for the Tyrone Senior County Team was provided by Chambers Coaches.

(b) From January 2010, this service was provided by Quinns.

(c) The service was confined to the **County Senior** team only.

(d) Based on the invoices, Quinns' gross income for this service was approximately £7,000 per annum.

(e) Quinns did not provide transport services to *any* of the other Tyrone County teams described in its "Providing Transport Services" tender submission.

(f) To Mr. McCaughey's knowledge, there were at no time any discussions – much less agreement – with Quinns relating to the provision of "*integrated and sustainable transport strategy with special emphasis on them becoming a carbon neutral organisation*".

With specific reference to the "Club Tyrone" testimonial letter dated 23rd January 2011, appended to Quinns' tender, Mr. McCaughey testified:

(g) The Tyrone County Board at no time agreed with Quinns that the latter would provide transportation for all of the Board teams and youth development squads.

(h) The arrangement with Quinns was confined solely to the County Senior Team.

(i) Quinns has never supplied any environmental impact reports to the Board.

(j) The purported signatory of the letter is *not* the chairman of Club Tyrone: rather, he is the chairman of the County Board.

(k) The witness is familiar with the Chairman's signature and questioned its authenticity.

(l) A quite different person has held the post of chairman of Club Tyrone since around 2007.

Mr. McCaughey further testified that no project objectives were at any time agreed between the County Board and Quinns. Most of the bookings were made through a named person (whose identity is irrelevant for present purposes), who acted as something of an intermediary between the two entities. Only a small percentage of bookings was made through the County Board office. The County Board had no carbon footprint reduction targets. The detailed data contained in the third of the Quinns' submissions could have been accessed from two sources only. The first is the national GAA central database, access whereto is restricted. The second is the annual report of the Tyrone County Board, published at the beginning of December each year. The third of the Quinns' submissions appears to draw on the business case prepared for the County Board's Garvaghy project (a GAA games sports development venture). Mr. McCaughey testified that this business case dates from around 2006. The evidence of Mr. McCaughey was plausible throughout and I accept it in full.

[36] The court also heard evidence from Mr. McLaughlin, who is the chairman of the Board of Tyrone County GAA. He testified that he agreed to provide Quinns with a reference in support of its tender. What materialised ultimately was the "Club Tyrone" testimonial letter appended to Quinns' tender (paragraph [28], *supra*). The sequence of events thereafter was that Quinns drafted the reference and sent it to Mr. McLaughlin in the body of an e-mail. He confirmed that what he received in this way contained the text of the letter subsequently appended to Quinns' tender, set out in paragraph [34](d) above. Mr. McLaughlin returned the e-mail to Mr. Devlin of Quinns. Before doing so, he deleted the word "*all*" from the first sentence. He readily agreed that the word "*all*" was, in this context, a very important one, concurring with the suggestion that there is "a world of difference" between Quinns being contracted to transport the County Senior Team only (circa 16 trips per annum) and being contracted to transport "all" Tyrone County teams and development squads. When returning the e-mail to its sender, Mr. McLaughlin specifically highlighted the deletion of the word "all". He confirmed that the signature appearing on the "Club Tyrone" letter in Quinns' tender is not his and, further, that he did not authorise the use of his signature. He also confirmed that he was not in a position to certify (as the testimonial letter purported to do) that Quinns provided all their services "*within the budgetary requirements*" or that they employed environmentally friendly vehicles or that they supplied monthly (or any) environmental impact reports to the County Board. With regard to these particular passages in the letter, Mr. McLaughlin acknowledged, candidly, a lack of care on his behalf in responding to the Quinns' e-mail. Mr. McLaughlin testified, finally, that Quinns also provide some *ad hoc* transport services for "*other*" Tyrone County teams and, to his knowledge, for various Tyrone Club teams. He was unable, however, to attempt any particularisation or quantification of either of these two forms of transport service. Mr. McLaughlin was also a demonstrably credible witness and I accept his evidence in full.

[37] At this juncture, I would observe that the text of the testimonial letter which Quinns appended to their tender was a manifestly inaccurate and misleading document. It was replete with false and dishonest claims and assertions and, to cap it all, the signature was plainly forged and had no relevant person's authority. Taking into account all the evidence before the court, it seems clear that this elaborate exercise in falsification was conducted deliberately and knowingly, having as its main purpose the securing of a commercial advantage to the detriment of other bidders. The description of this conduct as fundamentally inimical to the overarching aims and objectives of the Directive follows inexorably. One of the goals explicitly expressed in the Directive, "*to guarantee the opening up of public procurement to competition*", was manifestly frustrated in consequence.

"Providing Transport Services" Selection Criterion: the "Out and About" Tender

[38] In the exercise of construing and understanding the "Out and About" tender, I record, at the outset, the agreement between the parties that:

(a) "Out and About" (one of the two successful bidders) is an entirely separate legal entity, a company registered in its own right.

(b) "Mid Ulster Community Transport" and "Out and About Community Transport" are indistinguishable entities, being in substance one and the same entity.

(c) Each of the aforementioned entities is entirely separate from "Out and About".

(d) While "Out and About" was/is a provider of some transport services, these are of very small scale and do not include, to any extent, the kind of services being procured by the Department.

(e) The "Out and About" tender included the following material statements:

> "*Out and About Enterprises Limited operates as a social enterprise with a National and International Operator's Licence and is a trading arm of Out and About Community Transport …* [which] *… has been delivering transport services in the Mid-Ulster area for over eleven years …* [and] *… are delivering the new Dial A Lift service for* [DRD] *…*

> *We have delivered Dial A Lift services for the past thirteen months but previously the voluntary board of directors took the decision to prioritise individual Door to Door transport from 2002 using a mix of our social car scheme and local taxi operators.*"

Ultimately, with regard to construing this tender, the parties were agreed that, "Out and About" were not claiming to have provided *any* of the "Dial A Lift" services on their own account. Rather, they were relying exclusively on the delivery of these services by the entities Out and About Community Transport/Mid Ulster Community Transport: the word "*we*" in the "Out and About" tender (*supra*) is to be construed accordingly (and I record here my agreement with the parties' joint proposed construction). Stated succinctly, the "Dial A Lift" scheme, though not provided or delivered by "Out and About" in any shape or form, was the mainstay of its tender.

The "Operating a Transport Company" Selection Criterion

[39] In response to this criterion, Quinns detailed a contract with the North Eastern Education and Library Board ("*NEELB*") whereby they were required to provide transport for pupils in "*the local government districts of Antrim, Ballymena, Ballymoney, Carrickfergus, Coleraine, Larne, Magherafelt, Moyle and Newtownabbey*". The tender continued:

> "*Quinn's Coach Hire is a primary provider of transport to the Board and schools in the area. The work involves the collection and delivery to and from various schools on a daily basis and also provides private hire to the schools …*
>
> *Quinn's Coach Hire operates eight contracts to the NEELB transporting almost 320 pupils for 190 school days ev*ery year*……Please refer to Appendix 1 – reference from Rainey Endowed Voluntary Grammar School, Magherafelt confirming delivery of project objectives on time and to budget*".

The appended letter, on the headed notepaper of Rainey Endowed School, dated 18th January 2011, described Quinns as the provider of transport for all of the school's sports teams and groups and for pupils to and from the school daily and expressed satisfaction with the services provided. This testimonial letter, in stark contrast with the "Club Tyrone" testimonial letter, was not the subject of controversy at the trial.

The "Managing a Booking Centre" Selection Criterion

[40] In the electronic form of tender, bidders, in addressing the four specified suitability criteria, were given the option of uploading a file attachment "*in response to* [each] *question*". In the Quinns' tender, this option was duly invoked: as a result, its tender submission in relation to each of the four selection criteria consisted of four separate PDF files. These formed part of the documentary evidence considered by the court. The relevant PDF file in Quinns' tender contained the following passages:

> "*(a)* ***The customer base ...***
>
> *Easy Travel … is Northern Ireland's largest tourist operator and between their various tours they carry in excess of 350,000 passengers annually …*
>
> *Their numbers are increasing 8% annually and as a company we have to be prepared to expand with their needs …*
>
> *Quinn's Coach Hire manages their booking and scheduling via their offices … and carry out private hire for non-service bookings. The ten booking centre staff provide a twenty-four hour service seven days a week with direct links …*
>
> ***Evidence confirming relevant experience ...***
>
> *During 2010 … 352,644 passengers were booked on the* [Quinn's Coach Hire] *tours …*
>
> *Please refer to Appendix 1 – Reference from Easy Travel confirming that we have the relevant experience*".

This "Reference" was duly included as Appendix 1. It is contained in the headed notepaper of the entity "Easy Travel NI" and is dated 20th January 2011. The text is as follows:

> "*To whom it may concern …*
>
> ***Re reference for Quinns' Coach Hire ...***
>
> *Quinns' Coach Hire provide an excellent customer service for our company. The call centre they operate is extremely efficient and professional. They have the most up to date technology and software to provide the service from their centrally located offices on High Street, Belfast…*

> *The friendly office staff portray great knowledge of Belfast and all tourist attractions across the country which is extremely helpful due to the nature of our business. Their behaviour and telephone manners are exemplary …*
>
> *They keep a constant line of communication with my staff on the ground and everyone has the utmost respect for them. They deliver our centre service in a very proficient style …*
>
> *Quinn's Coach Hire provides us with a very professional high standard service which we cannot fault in any way.*"

On its face, this letter is signed by Philip Harkness, described as managing director of Easy Travel Limited. The evidence adduced at the trial, particularly that summarised in the immediately following paragraph, called seriously into question both the accuracy of this testimonial letter and the authenticity of the signature which it bore.

[41] At the trial, the Plaintiff adduced evidence from two witnesses whose testimony bore particularly on the question of whether Quinns' tender had complied with the second and third of the selection criteria. Mr. Harkness gave evidence as a witness for the Plaintiff. In summary, he testified that, operationally and functionally, there are three linked companies providing a range of public transport services – Easy Travel Limited, Belfast Tours Limited and Belfast City Sightseeing Limited. There are six directors who are common to the second and third of these companies. Belfast Tours Limited operates under the aegis of the Easy Travel Limited Road Transport Operator's ["RTO"] Licence. Belfast City Sightseeing Limited has a separate RTO Licence. All of these entities are based at and operate from the same commercial centre at High Street, Belfast. Mr. Harkness further testified that Quinns' is a trading limb of Loughshore Autos Limited ("Loughshore"); Quinns does not operate the High Street booking centre; Quinns has no business or contractual relationship with Easy Travel; Belfast Tours and City Sightseeing provide the same basic type of service; Belfast City Sightseeing pays the rent of the premises; Belfast Tours employs and pays the staff and the cost of running the office; Kevin Quinn is a director of each of these companies; and the latter have a variable workforce, dictated by seasonal forces, ranging from 18 to 40 employees. Mr. Harkness and Mr. Kevin Quinn discussed the formulation of the Quinns tender. It was agreed between them that the Belfast based companies would provide the whole of the service being procured for the Belfast area. Mr. Harkness added that the Belfast companies rented vehicles from Quinn/Loughshore. He confirmed that he

had discussed no vehicle rental details with Kevin Quinn. None of the Belfast companies possesses "*a demand/response*" transport licence.

[42] Mr. Harkness testified that he had no awareness of the testimonial letter appended to the Quinns tender and that the signature which it bears is not his. With reference to the *contents* of the letter, he testified:

(a) Quinns provided no service of any kind for Easy Travel.

(b) Kevin Quinn did provide some setting up services for the two Belfast companies, on a decreasing basis, during the first year of their existence, from around March 2010.

(c) Quinns provided no "technology and software": the latter belonged to Belfast Tours Limited.

(d) Most of the office staff for most of the time were direct employees of Belfast Tours Limited, varying from four to six during the differing seasons of the year.

(e) Occasionally, Kevin Quinn introduced an extra member of staff, presumed to emanate from the Loughshore business operation.

(f) Mr. Harkness further testified that since March 2011, Kevin Quinn's connection with the two Belfast companies has been confined to attendances at weekly board meetings. Aidan McCormick is one of the aforementioned six directors and receives his wages from Belfast Tours. Ciaran Quinn is a son of Kevin Quinn: he works for Loughshore and, for about one year from March 2010 he provided some IT/website services to the two Belfast companies, with a frequency of around once a fortnight. The two Belfast companies have no booking centre manager and no human resources manager. They have never made any payment to Quinns' and the latter entity has never been discussed at board meetings. The Belfast companies have various agents, including Quinns', who make bookings on their behalf from time to time. Kevin Quinn is one of the key management personnel in Belfast City Tours. Loughshore previously did all the servicing of the vehicles of Chambers Coach Hire, of which Mr. Harkness was a director. In this way he and Kevin Quinn have been known to each other for some ten years.

Generally, Mr. Harkness could not stand over **any** of the assertions in the letter relating to Quinns. I found Mr. Harkness a plausible witness and I accept his evidence in full.

[43] I pause to observe that this further testimonial letter, appended to Quinns' tender, is clearly another example of a document replete with false and inaccurate claims and assertions, designed to promote Quinns' tender to the disadvantage of their competitors. In this context, I repeat the entirety of my assessment and comments in paragraph [37] above.

[44] Desmond Chambers was the second witness called on behalf of the Plaintiff. He testified that prior to January 2007 he was the proprietor of and main shareholder in Chambers Coach Hire Limited. In October 2006, Chambers secured from the Department the "Door to Door" contract presently being re-procured. In January 2007, Mr. Chambers sold all the shares in the company. From October 2006 to May 2007, the aforementioned contract was gradually rolled out. From January to around July 2007, Mr. Chambers was employed by the company as a consultant/chief executive officer. During the next couple of years, when he was the subject of a restrictive covenant, he provided consultancy services to some of the players in the private transport industry. Chambers has been in administration since October 2010. Since then, he has been employed by Moneymore Coaches in a management capacity and the Administrator has paid his wages. The sole activity of Moneymore Coaches has been the delivery of the "Door to Door" contract and this continues. Mr. Chambers has been managing this since October 2010. Moneymore Coaches is the holder of one extant "demand/ response" licence, which is not transferable**.**

[45] Mr. Chambers further testified that the Plaintiff company was, following its original inauguration some years ago, a mere "shelf" company. It has two directors, Mr. Chambers and his son Paul Chambers. The Plaintiff company was revived around December 2010. This coincided with two events. The first was the procurement of a RTO Licence. The second was a purchase by the Plaintiff of a single transport vehicle. This vehicle, it was suggested, has been deployed subsequently to supplement the other Moneymore Coaches vehicles devoted to servicing the extant "Door to Door" contract. Prior to these events, the Plaintiff had not been an active trading company. Mr. Chambers' evidence about whether the Plaintiff company has traded at all was somewhat equivocal. He gave conflicting answers in this respect. He also gave equivocal evidence about the Plaintiff's purchase of vehicles. He testified, initially, that the Plaintiff had purchased all of the Moneymore Coaches "Door to Door" vehicles. Later he suggested, inconsistently, that this was some kind of conditional purchase arrangement with a finance company. He then provided two differing reasons to explain why this purchase did not actually materialise. The first was that the new proprietor of Chambers Coach Hire (post-January 2007) had been neglecting

these vehicles, running them down. The second, quite different, reason proffered was that around May 2010 the Moneymore Coaches "Door to Door" contract was extended.

[46] In cross-examination, Mr. Chambers was questioned about the assertion in his witness statement that from 31st January 2007 neither he nor his son had any "*further day to day responsibility … at all*" in the Chambers Coach Hire business. His evidence-in-chief (*supra*) contradicted this and he was unable to provide any satisfactory explanation. In his evidence-in-chief, Mr. Chambers was adamant that *he* had managed and administered the "Door to Door" contract since October 2010. However, in his witness statement, he asserted (in terms) that this has been a joint enterprise involving his son also. He claimed that this involved the handling of 300 to 400 bookings daily, seven days a week. Mr. Chambers was asked further about the following unequivocal representation in the Plaintiff's tender:

> "*Existing "Door to Door" vehicles are owned by Easycoach Limited, therefore any delay in vehicle availability will not occur*".

The tender is dated February 2011. Mr. Chambers was unable to provide any satisfactory explanation for this representation. Mr. Chambers was also asked about the following representation in the Plaintiff's tender:

> "*In recent months Easycoach have had the advantageous opportunity to run the current "Door to Door" transport service once again*".

In reply, he sought to equate Easycoach with himself. In summary, the unchallenged evidence established that Mr. Chambers, who is one of two Easycoach directors, has been managing and administering the extant "Door to Door" contract since October 2010, but has *not* been doing so under the aegis of Easycoach viz. the Plaintiff. I have highlighted in this paragraph two aspects of Mr. Chambers' evidence which were unsatisfactory. In all other respects, I found his evidence credible.

The "Providing Transport Services to People with Disabilities" Selection Criterion

[47] Quinns' Tender. In response to this criterion, Quinns' tender stated:

> "*Quinns Coach Hire are the sole provider of transport to the Cookstown Health Centre and have several contracts for the transport of patients to and from the Centre on a daily basis and excursions and medical appointments during the day. All these patients have disabilities of various natures from learning difficulties to wheelchair users*".

Quinns asserted that this service had been provided under a five-year contract with the relevant Trust which had entered its second year, having commenced in September 2009. It was further represented that this service entailed four "runs" daily to and from the Centre on weekdays (only) excepting public holidays and that, during the first contractual year, this generated a total of 663 trips. To this part of the Quinns' tender was appended a favourable testimonial from an adult day centre. These sundry aspects of Quinns' tender, in contrast with those highlighted and analysed in paragraphs [28] – [43] above, were not the subject of controversy at the trial. In particular, there was no issue of false content or forged signature.

[48] The "Out and About" Tender. With regard to the issues bearing on this discrete selection criterion, I refer firstly to the agreed facts rehearsed in paragraph [38] above. The relevant passages in the "Out and About" tender included the following in particular:

> *"Out and About Limited operates as a social enterprise with a National and International Operator's Licence and is a trading arm of Out and About Community Transport …* [which] *… has been delivering transport services in the Mid-Ulster area for over eleven years …* [and] *… are delivering the new Dial A Lift service for* [DRD] *…*
>
> *We have delivered Dial A Lift services for the past thirteen months but previously the voluntary board of directors took the decision to prioritise individual "Door to Door" transport from 2002 using a mix of our social car scheme and local taxi operators.*"

Ultimately, with regard to construing this tender, the parties were agreed that, "Out and About" were not claiming to have provided *any* of the "Dial A Lift" services on their own account. Rather, they were relying exclusively on the delivery of these services by the separate, unrelated entities Out and About Community Transport and Mid Ulster Community Transport. It follows that their tender fell squarely within the permissive provisions of Regulation 25(3).

The Defendant's Witnesses

[49] There was evidence from Mr. Anderson, who is attached to the Central Procurement Directorate ("*CPD*") of the Department of Finance and Personnel. The role of CPD in public procurement exercises of this kind is to provide advice, instruction and some oversight. The Department aims and the CPD advice had the joint objective of generating sufficient competition so that value for money transport services would be delivered to the relevant

beneficiaries in the twenty-eight urban centres concerned, all having a population exceeding 10,000. There were four separate geographical areas and bidders were at liberty to tender for the contract pertaining to one or more of these areas. According to Mr. Anderson, both the Department and CPD were conscious that it was neither feasible nor fair to require bidders to demonstrate experience in the provision of contracts identical in nature and scale to those being procured. To have done so would stifle competition. One of the mechanisms devised for addressing this was to permit tenders from consortia or other collaborative arrangements. Similarly, the open procedure was selected as the procurement mechanism most likely to encourage maximum response. Mr. Anderson's evidence focused particularly on the five selection criteria, responding to the first of the Plaintiff's grounds of challenge (paragraph [10] *supra*). The factor common to each of the four selection criteria was a requirement that the bidder "*… provide details of a relevant project within the last three years which demonstrates your ability to successfully …* ", followed by a recitation of the headline of each of the criteria duly augmented by particularisation; the latter sought particulars of matters such as the customer organisation, project value, duration of project, roles of key personnel, delivery of project objectives and "*lessons and experiences which may be of benefit to DRD*".

[50] With specific reference to the terms of the selection criteria, Mr. Anderson, in his witness statement, said the following:

> "*While the questions do not stipulate a minimum threshold to determine nature or scale …* [the Department] *provided a significant amount of detail within its ITT describing the range of transportation services required and instructing bidders on the particular evidence they should present. The Terms of Reference provided significant detail on the nature of the services which would be delivered by the contract …* [and] *… also presented specific information scaling the population of each urban centre and showing the current usage statistics for the current " Door to Door" Scheme*".

When questioned about the testimonials appended to the Quinns' tender, Mr. Anderson acknowledged that it had not been intended or envisaged that tenders would include such materials. However, it was not suggested that these were prohibited. All but two of the eight bidders were assessed as fulfilling the selection criteria. One of the main aims of these criteria was to identify experienced, capable and value for money providers. He explained that there were significant time restrictions on the electronic access to tenders enjoyed by selection panel members. Furthermore, access was structured in a manner which ensured that panel members, at the initial stage, had access only to those parts of the tenders bearing on mandatory requirements and the

selection criteria. He suggested that Quinns tendered in the capacity of "*prime contractor*". He challenged the suggestion that Quinns intends to subcontract the services, highlighting that in its bid several "partners" were identified. Mr. Anderson described these as "*organisations which they proposed to employ to provide the services across all contract areas*". He added that the extent to which Quinns may have proposed to subcontract the services and the related provision of percentages was recorded in the "*vendor management module*" of the electronic tendering system, to which panel members had no access. In particular, the contract being procured permitted the subcontracting of vehicle provision. Mr. Anderson agreed that the stipulated licensing requirements were central to the contracts being procured.

[51] Giving evidence on behalf of the Department, Mr. Robinson, illuminating the background to the procurement exercise concerned, explained that following an earlier exercise in 2006 the "Door to Door" contract, entailing the provision of services in twenty-seven towns and cities throughout Northern Ireland, had been awarded to Chambers Coach Hire Limited. Several operational and administrative difficulties followed in practice and, some four months later, the contractor company was sold to Enterprise Equity Fund Management Limited. Further substantial difficulties ensued. This led to the appointment of an administrator who, in October 2010, engaged Desmond and Paul Chambers to manage the provision of the services. Then the service provider was Moneymore Coaches Limited (In Administration). This arrangement continues to the present day. Around October 2010, the Department decided to procure new contracts. Mr. Robinson's witness statement contains the following material passage:

> "*In the development of the tender specification the Department was mindful of the fact that the private bus sector in Northern Ireland is relatively unsophisticated and is made up largely of small, owner operators carrying out private hire or local contract work … very few local transport companies have the skills and expertise needed to manage and deliver specialised transport services …*
>
> *Additionally … the Department was keen to encourage participation by small and medium sized enterprises while at the same time it did not want to exclude a start up company that had the necessary skills required to successfully operate the type and level of services required …*
>
> *Therefore, the Department sought to develop a process that would attract as wide a range of qualifying bidders as possible and as there had only been one previous exercise to procure "Door to Door"*

> *services on a province wide basis, the Department was aware that if it asked for experience identical to the current services it would effectively exclude everyone but the incumbent …*
>
> [Thus] *…we decided to seek examples of projects that had core elements that were similar (but not identical) to the core elements of the services required in a particular geographical area*".

Mr. Robinson explained that these "*core elements*" were reflected in the four selection criteria, duly supplemented by the "*sub-headings*" of customer organisation; roles of key personnel; evidence confirming delivery of project objectives; and lessons and experiences which could be of benefit to the Department.

[52] Mr. Robinson chaired the evaluation panel. He testified that the other four panel members had all been actively involved in managing the extant "Door to Door" contract. This contract has a smaller value than that being procured (£3 million versus £14.5 million) and, in volume of trips per annum, is substantially smaller in scale. Mr. Robinson readily agreed that the four geographical areas differ greatly in scale, with the projected average trips per month ranging from 1,132 (Northern Area) to 6,286 (Eastern Area). He claimed that the approach of the evaluation panel was to "*apply the lowest common denominator*", consistent with the objective of encouraging as wide a field of bidders as possible. For the reasons given in the passages quoted above, a "*relevant project*" could not be properly comparable to the extant "Door to Door" service. The formulation of the selection criteria was designed to address this reality. Their terms, he suggested, would have the merit of identifying both hopeless bidders and serious contenders. The selection criteria, he suggested, were designed to ascertain whether bidders had experience of delivering transport services similar in nature and scale to those being procured. Given their previous experience, all panel members were familiar with the "industry", to the extent that they had some expectation of who the tenderers would be and what they would be bidding for. Thus, for example, it was common knowledge that Quinns would be tendering for all four regional contract areas. Mr. Robinson agreed that the TOR, selection criteria and contract award criteria were each framed in contrasting terms.

[53] Mr. Robinson testified unequivocally that, at the stage of applying the selection criteria, panel members were unaware of the regions for which individual bidders had tendered. This appears inconsistent with paragraph 21 of the Defence, which avers:

> "*The project put forward by Quinn's Coach Hire was therefore evaluated against the selection criteria in*

respect of each of the geographical contract areas individually and not the four areas as a whole."

This pleading is made in respect of each of the four selection criteria. Both Mr. Robinson's evidence about this discrete matter and the corresponding pleading must be considered in conjunction with paragraph 4.3 of the TOR, which specifically instructed bidders to address all of the "*Evaluation Criteria*" for each of the regional contract areas for which they were tendering. In the ITT, the generic term "*Evaluation Criteria*" is framed so as to encompass mandatory requirements, selection criteria and award criteria. Mr. Robinson further explained that, in its evaluation of whether the various tenders satisfied the selection criteria, the panel did not apply **any** of the regional contract areas. Thus, to take the example of the first of the four selection criteria ("**Providing Transport Services**"), the panel did not ask itself in any of the cases whether the bidder concerned had established satisfactorily a relevant project within the last three years determining its ability to successfully provide transport services *in the regional contract area or areas for which it was tendering*. The panel's approach to the other three selection criteria was, with appropriate contextual adjustments, the same. Thus, in its application of the selection criteria to all tenders, the evaluation panel made no connection between the individual tender and the regional contract area or areas being pursued by the bidder. Mr. Robinson attempted to describe to the court some kind of notional, or hypothetical, approach applied by the selection panel in determining whether all of the tenders complied with the selection criteria. In this context, he spoke of, *inter alia*, a "*lowest common denominator*". Although carefully probed, I found this aspect of the Department's evidence, ultimately, quite unclear. I shall revisit the significance of this at a later stage of this judgment.

[54] Mr. Robinson agreed that the "*relevant project*" put forward by Quinns in purported compliance with the first selection criterion ("**Providing Transport Services**") viz. the Tyrone County Board service is "*totally different*" from the contracts being procured. While acknowledging that this criterion specified no minimum, or threshold, value he suggested that the panel applied an "*in the round*" approach to the sub-criteria of project value and duration of project. He further suggested that the only "*key personnel*" in any transport organisation are the transport manager and contract manager. He commented that in this small industry the main players viz. the owners and transport managers were known to the selection panel. Thus the identities of key personnel would convey something meaningful to the panel and contribute to building up an overall picture. He suggested that the sub-criterion "*lessons and experiences which may be of benefit to DRD*" was designed to promote possible innovation in the delivery of the services being procured and claimed that this would inform the contents of tenders. According to Mr. Robinson, the questions considered by the panel were whether the examples provided by bidders were large enough in scale to be comparable to the

services being procured. The panel considered whether the examples were sufficiently robust to demonstrate the bidder's capacity to deliver these services. Small individual providers could, by measures such as the formation of consortia, acquire a capacity necessary to provide the services being procured. Mr. Robinson further suggested that if a bidder were capable of delivering the service in one contract area, he should, in principle, be thus capable in respect of other contract areas. He agreed that each bidder's **experience** was the key factor. The fundamental question for the panel at the selection stage was whether the bidder concerned had demonstrated sufficient experience and skills to deliver the contracts being procured.

[55] Mr. Robinson was questioned specifically about the example provided by Quinns in purported compliance with the second selection criterion (Operating a Transport Company), which was the provision of transport to schoolchildren in the NEELB area, involving 320 pupils daily for 190 school days annually. He suggested that the emphasis in this criterion was on the previous successful operation of a transport company with regard to appropriate licences, compliance with all legal requirements and the scheduling and servicing of vehicles. The purpose of the four sub-criteria was to expand the "picture" available to the panel. Mr. Robinson testified that the third of the selection criteria ("Providing Transport Services to People with Disabilities") was designed to establish whether the bidder had satisfactory experience of providing this particular type of service. He agreed that the distinction between "Club Tyrone" and the "Tyrone County Board" was not appreciated by the panel. He further agreed that "Out and About" in its tender relied almost exclusively on the "Dial A Lift" scheme. He suggested that a "linked company" was one which had the basic ingredients of common personnel and trading arm. Mr. Robinson was a member of the "due diligence" panel. He testified that he had not seen the letter dated 29th September 2011 from the Plaintiff's solicitors. During this particular exercise, no contact was made with either "Club Tyrone" or "ETNI". In response to the Plaintiff's complaint regarding Quinn's subcontracting intentions, Mr. Robinson said in his witness statement:

> "*It has been incorrectly claimed that Quinns intend to use subcontractors to deliver 65% of the contract …*
>
> *Quinns clearly demonstrated that they would be practising sufficient vehicles to deliver all services and would be establishing and operational centres in various locations …* [and] *… would be using partners on a subcontracted basis to provide contingency services …*
>
> *Quinns also confirmed that they would be seeking to transfer as many of the existing staff as possible*

> *under TUPE arrangements to deliver the services. The company also explained that it would be using partners on a subcontracted basis to provide local booking services and depot facilities. There is nothing in the Quinns' submission to suggest that services would be subcontracted …"*

[56] Evidence was also given about the "due diligence" exercise conducted by the Department in mid-proceedings. Mr. Robinson was a member of the panel established for this purpose. It was chaired by Mr. Doran, the Director with responsibility for the extant "Door to Door" services. The evidence established that this was a pure paper exercise. In its essence, it consisted of the Plaintiff's written representations being brought to the attention of Quinns, the provision of a response by Quinns and the ensuing consideration of the totality of this information by the specially appointed panel. The rationale of this exercise was expounded by Mr. Doran in his witness statement in these terms:

> "*Counsel advised that as a public authority in possession of what appeared to be credible and substantial information which cast doubt on the successful tenders* [the Department] *should investigate these allegations …*
>
> *The Department accepted counsel's view that this was not a reopening of the tender exercise but a separate exercise which was available to any person entering into a contract to ensure that it had not been misled in the process.*"

Mr. Doran also adverted to the court's observations at the stage of ordering a time limited stay (paragraph [6], *supra*). The witness statement of Mr. Doran confirmed that, during the most recent phase of events, the provision of the "Door to Door" services with the assistance of Messrs. Desmond and Paul Chambers has been satisfactory. The administrator continues to perform his duties. Mr. Doran further explained that the "due diligence" or ("allegations") panel was convened in response to the two letters from the Plaintiff's solicitors dated 29th September and 10th October 2011 respectively. These letters contained a series of allegations to the effect that the two successful bidders had made significant false representations in their tenders and were not able to satisfy the selection criteria. These letters were duly brought to the attention of the two successful bidders who, in turn, responded. Mr. Doran's evidence highlighted the following assessments made by this panel:

(a) The number of vehicles held by "Out and About" when tendering was irrelevant as the issue was its capacity to deliver

the service if successful. It had clearly represented that vehicles would be purchased.

(b) The "Out and About" bid did not appear unusually low, taking into account available grant funding.

(c) There was no reason for disagreeing with the original panel's assessment that the experience obtained by Mid Ulster (Out and About) Community Services in operating the "Dial A Lift" scheme could properly be considered in satisfying the selection criteria and, further, that "Out and About" was a linked company.

(d) The panel accepted the "Out and About" representation that its original tender was fully accurate, duly supplemented by "*evidence to support qualifying responses to the original tender*".

(e) There was no evidence substantiating the claims that the "Rural Transport Fund" had been misused in any way by the linked company.

[57] Mr. Doran explained that the review panel sought further information from Quinns, which was not a separate entity, rather formed part of Loughshore Autos Limited. Ultimately, the panel concluded that Quinns had addressed satisfactorily the issues raised by the Plaintiff, to the extent that execution of the contracts with Quinns, as a successful bidder, would be appropriate. The panel made the following specific assessments:

(a) The number of vehicle presently owned by Quinns is of no relevance to its ability to deliver a contract in the future. This number was, in any event, substantially greater than alleged by the Plaintiff.

(b) "*The Tyrone GAA example has been substantiated and the figures quoted verified by an accountant's report. Essentially* [Quinns] *provide service for all Tyrone Clubs not just the senior team*".

(c) Quinns had provided satisfactory further information about their contract with the NEELB.

(d) Quinns provide transport services to disabled people on a subcontracted basis.

(e) Quinns provided information substantiating that they managed a booking centre for Easy Travel and further substantiating that this entailed journeys of the scale asserted in the original tender

(350,000 passengers) by reference to ticket stubs and telephone bills. The panel found no evidence of any misrepresentation in the Quinns' tender.

(f) The Quinns' response to allegations about staffing levels was considered satisfactory. This clarified the interaction between Loughshore Autos Limited (incorporating Quinns) and PVS Manufacturing Limited. Mr. Doran was asked specifically about the "ETNI" testimonial submitted by Quinns in their response to the Plaintiff's allegations. While this document is neither signed nor dated, he suggested that there is nothing untoward about this. He agreed, generally, that in conducting this in-trial exercise the Department sought no third party verification of any of the information and representations emanating from the two successful bidders.

VII GOVERNING PRINCIPLES

[58] In Chapter IV above and in Appendix I hereto I have outlined the relevant provisions of the 2006 Regulations and the Public Procurement Directive. When addressing below the Plaintiff's six grounds of challenge *seriatim*, I shall determine any contentious issues relating to the construction, scope or application of the governing statutory framework. Within this framework, the relevant principles and duties are most conveniently viewed through the lens of Regulation 47A. This subjects the contracting authority to two species of duty. The first is a duty to comply with specified provisions of the Regulations in the procurement process. The second is a duty to comply with "*any enforceable Community obligation in respect of a public contract*". Any alleged breach of any of these duties is actionable at the suit of an economic operator who claims, in consequence of the asserted breach of duty, to have suffered or to risk suffering loss or damage.

[59] The overarching principles are readily identified in the recitals to Directive 2004/18/EC. In the second recital, there is express reference to three well established "open market" principles, namely freedom of movement of goods, freedom of establishment and freedom to provide services. Continuing, the second recital explains that certain further principles derive therefrom – in particular the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Per Recital No. 46, all tenderers must be reasonably informed of the criteria and arrangements which will be applied in the exercise of identifying the most economically advantageous tender. Thus the contract award criteria and the relative weighting of each must be published. These requirements are designed to further the principle of equal treatment. So too is the requirement that "*… the criteria for the award of the contract should enable tenders to be compared and assessed objectively*". Within these various recitals the EU

values of fair, free and effective competition are readily ascertainable. The underlying rationale of the EU procurement rules is linked to the aims of eliminating barriers to trade in goods and the movement of business, labour and capital between, and within, Member States. The basic premise is that the elimination of such obstacles and barriers will enhance the economic welfare and growth of member states. The principal mischief which the EU procurement rules are designed to counter is that of unfair and/or discriminatory public contract procurement practices and laws. Thus the ECJ stated in ***Stadt Halle*** [2005] 1 ECR I-1, 46, paragraph 44:

> "*The principal objective of the Community rules in the field of public procurement …* [is] *the free movement of services and the opening up to undistorted competition in all the member states. That involves an obligation on all contracting authorities to apply the relevant Community rules where the conditions for such application are satisfied*".

In passing, the obligations imposed on Member States in this sphere must also be viewed through the prism of Article 10 EC.

[60] The decision of the European Court of Justice in ***Siac Construction –v- Mayo County Council*** [2001] ECR I-7725 contains an extensive treatise of the governing principles in this field. As the quotation is so lengthy and must be considered in its totality, I have reproduced it in Appendix III hereto. In answering the question referred under Article 234 EC by the Supreme Court of Ireland, the ECJ, notably, laid emphasis on the requirements of transparency and objectivity in the contract procurement procedure:

> *[45] In the light of all the foregoing, the answer to the question submitted is that Article 29(1) and (2) of Directive 71/305, as amended, must be interpreted as permitting an adjudicating authority which has chosen to award a contract to the most economically advantageous tender to award that contract to the tenderer who has submitted the tender the ultimate cost of which, in the professional opinion of an expert, is likely to be the lowest, provided that the equal treatment of tenderers has been ensured, which presupposes that the transparency and objectivity of the procedure have been guaranteed and in particular that:*
>
> *- this award criterion was clearly stated in the contract notice or contract documents; and*

> *- the professional opinion is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made.*"

This passage makes clear, firstly, that in EU the law values of transparency and objectivity of the procedure and equal treatment of all bidders are inextricably linked. Secondly, in furtherance of these values, there is a freestanding rule that contract award criteria must be clearly formulated in advance. The final noteworthy feature of the decision in ***Siac Construction*** is the holding that where the contract awarding authority relies on expert opinion, the latter must be based on objective factors which (objectively) are considered relevant and appropriate to the assessment made.

The Equality of Treatment Principle

[61] In ***Fabricon SA –v- Belgian State*** [2005]2 CMLR 25, the ECJ expounded on the principle of equal treatment in the following way:

> "[26] … *It must be borne in mind that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition.*
>
> [27] *Furthermore, it is settled case law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified*".

Applying these principles, the ECJ disapproved the blanket prohibition in Belgian law which purported to exclude from competitive tendering for public contracts any person who had been engaged in research, experiments, studies or development in connection with the subject matter in question. While such persons were recognised to be different from other tenderers, the necessary objective justification for the absolute exclusion was absent, since their participation in a tendering process would not automatically and necessarily distort competition.

The Principle of Transparency

[62] The interplay between the principles of equality of treatment of bidders and transparency is expounded in that portion of recital (46) of the Directive, which states:

> "*To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation – established by case law – to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender.*"

In the succeeding passages of this recital, a direct nexus is made between the principle of transparency and the publication of contract award criteria and the relative weighting thereof. The principal manifestation of the principle of transparency was explained by the ECJ in the following passage:

> "*… Potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer and their relative importance when they prepare their tenders …*
>
> *Potential tenderers must be in a position to ascertain the existence and scope of those elements when preparing their tenders …*
>
> *Therefore, a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderer's attention …*".

[See ***Lianakis –v- Municipality of Alexandroupolis*** [2008] ECR I-251, paragraphs 36-38].

The philosophy clearly identifiable in the above passage can be readily related to the pronouncements of the court in ***Siac Construction*** [*supra*].

The Principle of Objectivity

[63] The essence of the principle of objectivity is somewhat elusive. Some guidance to its essential meaning and scope can be gleaned from the Directive's recitals, which I have outlined in paragraph [19] above. I consider one of the main purposes of the requirement of objectivity to be the avoidance of unrestricted freedom of choice by the contracting authority as this, in turn, will promote the overarching aims and standards of the procurement law regime, including in particular the promotion of the open market principle

and the related principles of non-discrimination (vis-à-vis non nationals) and equality of treatment. Thus the court will be alert to any selection or award criteria which are formulated so as to confer excessive discretion and subjective assessment on the contracting authority. (See ***Lightways (Contractors) Limited –v- North Ayrshire County Council*** [2008] Sco2CS.CSOH 91, paragraph [48]). The evident rationale is that excessive freedom of choice on the part of the contracting authority is inimical to the overarching principles of free and fair access to the market concerned, non-discrimination and equal treatment.

Selection and Award Criteria: the Dichotomy

[64] The scheme of the Directive clearly contemplates that in any procurement process within its ambit there may permissibly be a dichotomy of selection criteria and award criteria. There is little controversy that the former must be directed to the credentials, experience, expertise and track record of the bidder, with a view to ascertaining whether the bidder satisfied specified standards of economic and financial standing and/or any specified professional or technical standards or requirements. In contrast, the focus of contract award criteria is the tender itself, the question being whether its collection of proposals gives rise to the most economically advantageous tender (in the majority of cases), as defined. While I recognise that there is scope for debate about whether some merger of these two species of criteria may sometimes be difficult to avoid in practice , this issue does not arise for determination in the current proceedings. In ***Lianakis***, the ECJ addressed the selection/award criteria dichotomy at some length [see Appendix IV hereto]. The confusion, or conflation, of selection criteria and award criteria similarly featured in ***Commission –v- Greece*** [2010] 2 CMLR 3, where the infirmity identified by the ECJ was the incorporation within the contract award criteria of standards touching on the ability of tenderers to perform the contract being procured. The combined effect of these two decisions suggests that a bidder's experience in relevant projects, its manpower and equipment and its ability to complete the project by a specified deadline are permissible criteria only if confined to selection of bidders, rather than award of the contract.

Manifest Error as a Vitiating Factor

[65] Where (as here) the Plaintiff's challenge is founded on, *inter alia*, a complaint of manifest error on the part of the awarding authority, it is important to identify the role of the court. In ***Lion Apparel Systems –v- Firebuy*** [2007] EWHC 2179 (Ch), Morgan J formulated the following principles:

> *"[35] The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the*

Authority are correct and that there is no manifest error of assessment or misuse of power.

[36] If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a "margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.

[37] In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a "manifest error".

[38] When referring to "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made."

In ***Evropaiki Dynamiki –v- Commission*** [2007] ECR I-85, a case in which the European Commission was the contracting authority, the ECJ provided the following guidance:

"[89] As a preliminary point, it should be recalled that the Commission has broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (Case 56/77 Agence européenne d'intérims v Commission [1978] ECR 2215, paragraph 20; Case T-145/98 ADT Projekt v Commission [2000] ECR II-387, paragraph 147, and Case T-148/04 TQ3Travel Solutions Belgium v Commission [2005] ECR II-2627, paragraph 47). "

A manifest error in this context is illustrated particularly, though not exclusively, by a demonstrated mistake in an evaluation panel's marking exercises. Furthermore, what ranks as a manifest error can, in appropriate cases, be identified by contrasting this species of vitiating factor with matters of evaluative judgment: a consistent theme of the reported cases is that, where the latter is concerned, the court accords an appropriate margin of appreciation to the contracting authority. In passing, this particular doctrine is readily related to both the common law principles of judicial review and

the regime of the European Convention on Human Rights and Fundamental Freedoms and its domestic incarnation, the Human Rights Act 1998.

VIII ASSESSMENT AND CONCLUSIONS

Grounds of Challenge: General

[66] At the outset, I observe that each of the grounds of challenge which the Plaintiff was ultimately permitted to pursue is quite distinct. There is no overlap and each must be considered on its particular merits. While the Department contends that the first of the six grounds of challenge is time barred, this contention is not raised in respect of any of the remaining five.

First Ground of Challenge: Analysis and Conclusions

[67] The essence of the argument advanced by Mr. Dunlop (of counsel) on behalf of the Plaintiff was that the selection criteria were *unlawful per se* on the ground that they were subjective, rather than objective, in nature; they lacked clear and specific thresholds, they were couched so as to confer excessive discretion on the part of the evaluation panel and, further, their terms encouraged the provision of unreliable and unverified information by bidders; the selection criteria invited a surplus of evaluative judgment on the part of panel members, rather than the application of a simple pass/fail approach. Stated succinctly, it was argued that panel members had too much freedom of choice. Mr Dunlop submitted, in the alternative, that the nebulous nature of the selection criteria gave rise to a breach of the Department's duty of transparency. As highlighted in ***Public Interest Lawyers –v- Legal Services Commission*** [2010] EWHC 3277, paragraph [60], the contracting authority must formulate its criteria in a manner which enables it to "*verify effectively*" whether they are satisfied by the tenders submitted.

[68] The primary riposte of Mr. Williams QC and Mr. McMillan QC on behalf of the Department was that this aspect of the Plaintiff's challenge is time barred under Regulation 47D of the 2006 Regulations. While Regulation 47D has been amended subsequently, in its previous form it governs the procurement exercise with which these proceedings are concerned, providing:

> "*Subject to paragraphs (3) and (4), proceedings must be started within three months beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen*".

By virtue of the Public Procurement (Miscellaneous Amendments) Regulations 2011, in operation since 1st October 2011, Regulation 47D(2) now provides:

> "*Subject to paragraphs (3) to (5), such proceedings must be started within thirty days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen*".

The court is invested with a discretion to extend time, by virtue of Regulation 47(4), the pre-amendment terms whereof are operative for present purposes:

> "*The court may extend the time limits imposed by this Regulation … where the court considers that there is good reason for doing so.*"

Post-amendment, Regulation 47(4) is unchanged, with the important alteration that it is expressed to be "*subject to paragraph (5)*", which provides:

> "*The court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than three months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen*".

This new "backstop" time limit of three months, measured from the Plaintiff's date of knowledge, is reinforced in Regulation 47(7) (which has a moderately complicated statutory lineage). By virtue of the commencement date of these new provisions, considered in tandem with the chronology underlying these proceedings, the pre-amendment time limit is the operative one in the present action.

[69] Responding to the merits of this ground of challenge, Mr. Williams QC and Mr. McMillen QC submitted that the selection criteria were capable of being understood by a reasonably experienced and informed bidder. It was highlighted that no bidder sought clarification of any of the criteria and, further, that interested parties (including the Plaintiff) were in attendance at certain pre-tender events conducted by the Department. The Department's submission also prayed in aid the draft conditions of contract and the evident ability of bidders to comprehend what the selection criteria were seeking. It was further submitted that the information sought under each of the selection criteria was clearly harmonious with Regulation 25(2). The rules governing selection criteria, it was argued, do not preclude the conferral of discretion on the contracting authority and are less exacting than those relating to award criteria, where the scope for discretion has been recognised but freedom of choice is more limited.

[70] It is clear from Regulations 15 and 25 that the adoption of selection criteria in a given competition is a matter of choice for the contracting

authority concerned. It is well established that where selection criteria are adopted, they must focus particularly on the technical knowledge and ability of bidders, while conferring some discretion on procuring authorities as to how these qualities are to be demonstrated. In ***Embroiders –v- The Netherlands*** [1990] 1 CMLR 287, the ECJ held that the purpose of Articles 25 – 28 is "*… to determine the references or evidence which may be furnished in order to establish the contractor's financial and economic standing and technical knowledge and ability …*", thereby conferring some discretion on national procuring authorities, provided that they act within the bounds of all relevant EU legal requirements: see paragraphs [17] and [20]. While an appropriate measure of discretion is permissible, selection criteria will be deemed unlawful where they are formulated so as to confer excessive choice on the part of the contracting authority. The specific legal rules in play here are properly viewed as a reflection of the overarching principles of equality of treatment of all bidders and transparency.

[71] In determining whether this aspect of the Plaintiff's challenge is time barred, I take into account the decisions in ***SITA –v- Greater Manchester Waste Disposal Authority*** [2011] EWCA. Civ 156 (per Elias LJ at paragraphs [22] – [26] especially) and ***Jobs UK –v- Department of Health*** [2001] EWCA. Civ 1241 (per Dyson LJ, paragraphs [33] – [38] especially). In deciding whether there is "*good reason*" for extending time, I consider that the court can permissibly take into account two factors in particular. The first is that this is a broadly based challenge, involving six grounds of challenge altogether, five of which involve no limitation issue. There is, in my view, a readily identifiable contrast with a case where a limitation plea applies to the entirety of a Plaintiff's challenge under the 2006 Regulations: that is not this case. In this respect, I note that a similar approach has been adopted in certain other decisions in this jurisdiction: see ***Traffic Signs and Equipment –v- Department for Regional Development*** [2010] NIQB 138, paragraphs [30] – [31]. Secondly, I consider that the court can take into account the apparent strengths and merits of the ground of challenge in question. While concurring with Weatherup J that the public interest in scrutinising infringements is unlikely in the generality of cases to constitute good reason to extend time *per se*, I consider that this factor may lend weight to an application to extend time in tandem with some other factor or factors and, in this context, I bear in mind also the obligations imposed on Member States and their institutions by Article 10 EC.

[72] Next, I propose to examine the selection criteria under scrutiny in these proceedings. I accept the evidence of the Department's witnesses concerning the attempts to devise selection criteria which would encourage broad interest and a suitable level of competition. These aims were unquestionably appropriate. However, having regard to the rules and principles to be applied, I am unable to give undue weight to such difficulties as may have been experienced in the exercise of formulation. All four selection criteria

invited bidders to provide details of "*a relevant project*" belonging to the previous three years "*similar in nature and scale to the services required by DRD*". This was allied to a requirement to provide several pieces of specific information. In the terms of the selection criteria, the comparator project was given no definition or particularity. Furthermore, the criteria made no clear link between the comparator project/s contained in tenders and the contract region/s for which each tender was bidding. In addition, no benchmarks or minimum thresholds were prescribed. In particular, there was no prescription of project volume, characteristics, duration or value. There is evident strength in the argument that, as a result, panel members were left to form opinions of an intuitive and instinctive nature, applying such experience and expertise as they possessed. This criticism gains momentum when one considers the evidence of the Department's witnesses about how the selection panel actually went about its business. As this evidence unfolded, I formed the clear impression that the selection panel struggled mightily, but far from successfully, in their efforts to correctly apply these criteria. I consider this to be readily attributable, in material part, to the amorphous terms in which the criteria were formulated and the exaltation of subjectivity and intuition to the detriment of objectivity and, consequentially, transparency. In these various respects, each of the selection criteria is materially indistinguishable from the others. I conclude that these selection criteria were not apt to establish fairly, transparently and objectively that bidders possessed specified minimum standards of technical and professional ability for the purpose of delivering the regional project/s for which they were tendering.

[73] Giving effect to the above analysis and conclusion, the first ground of challenge succeeds, unless it is time barred by Regulation 47D or otherwise unsustainable. Addressing firstly the limitation issue, I find that the date when the Plaintiff first knew or ought to have known that there were grounds for pursuing this structural challenge was the date when the competition commenced, November 2010. Accordingly, this discrete challenge can be pursued only if the court considers that there is "*good reason*" to extend time. In addressing this discrete issue, the main thrust of the Plaintiff's submissions focussed on the application of the selection criteria, rather than their formulation. For obvious reasons I find this argument unpersuasive. Properly analysed, the Plaintiff failed to put forward in its evidence any clear justification for extending time. However, I consider that an *evidential* justification is not a pre-requisite to the exercise of the court's discretion to extend time. I conclude that the exercise of the court's discretion to do so is warranted by the two factors which I have identified in paragraph [71] above, namely the breadth of the Plaintiff's overall challenge and the conclusion which I have reached about the strength of this discrete ground of challenge. Added to this is the absence of any substantial prejudice to the Department in permitting the inclusion of this further ground. I take into account, finally, that the imposition of a time limit for bringing legal proceedings in a regime of this kind is designed to promote legal certainty and, more specifically, to

enable contracts to be let without undue delay and disruption. In short, following the expiry of a specified period, a disappointed bidder's private interest in seeking to vindicate some complaint/s about the procurement competition and its outcome and the associated public interest, linked to the rule of law, in permitting this to occur yield to the quite different public interests of legal certainty and promoting the interests of those citizens who will benefit from the contract/s. In the present case, I consider that the balance of these competing factors tips in favour of the Plaintiff, given that, with or without the incorporation of this first ground of challenge, execution of the contracts being procured has been the subject of statutory suspension, duly perpetuated by the initial order of this court, and will remain so until judgment has been given and the final order drawn up. I conclude that these factors combine to constitute "*good reason*" and I extend time accordingly.

[74] As foreshadowed above, this ground of challenge must be subjected to one final tool of analysis. This is contained in Regulation 47C of the 2006 Regulations, which provides that a breach of duty is actionable *only where* the disappointed bidder "*… in consequence suffers, or risks suffering, loss or damage*". The effect of this provision is that an asserted breach of duty under the procurement regime cannot be advanced in the abstract: rather, it must be supported by loss or damage in this sense. This aspect of Regulation 47C must be considered in the context of two undisputed facts in these proceedings. The first is that all three of the bidders concerned – the Plaintiff and the two successful bidders – were adjudged by the Department to have satisfied all of the selection criteria. The second is that, in this respect, all three bidders were treated with absolute equality. It is simply impossible for the court, on the basis of the available evidence, to conclude that the shortcomings which I have found in the selection criteria somehow operated to the Plaintiff's disadvantage in the sense that they were causative of an inappropriate assessment that either or both of the two successful bidders similarly satisfied these criteria. To so hold would be a matter of pure speculation. Furthermore, it is at least equally possible that *the Plaintiff* was a beneficiary. As a result, the Plaintiff fails to establish that in consequence of the breach of duty in play it has suffered, or risks suffering, loss or damage. Thus this breach of duty is not actionable. Giving effect to this analysis, I conclude that the first ground of challenge must fail.

Second Ground of Challenge: Analysis and Conclusions

[75] This aspect of the Plaintiff's challenge involves a contention that the Department committed a manifest error through the failure of its selection panel to apply the relevant provisions of the TOR at selection stage. The argument advanced entailed an exercise in comparing and contrasting the following:

(a) Paragraph 4.3 of the TOR, which stated "*Should an operator wish to apply for more than one contract area, such an operator should address all evaluation criteria for each area he is bidding for. Additionally, that operator may wish to indicate whether he is prepared to abate the price if he is awarded more than one area*".

(b) The (effective) definition of "*Evaluation Criterion*" in the ITT as encompassing mandatory requirements, minimum standards and award criteria.

(c) The terms in which the four minimum standards were formulated.

(d) The pleading in the amended Defence that the Quinns' tender was "*… evaluated against the selection criteria in respect of each of the geographical contract areas individually and not the four areas as a whole*".

(e) The reiteration of this pleading in the Department's skeleton argument.

(f) The supporting averment to like effect in Mr. Robinson's witness statement [paragraph 15e).

(g) (Mr. Robinson's contradictory evidence to the court paragraphs [51] – [55] above), which was that at the stage of applying the selection criteria panel members were unaware of the regional contract areas for which bidders had tendered and, in consequence, did not apply the selection criteria in accordance with the pleading in the Defence or paragraph 4.3 of the TOR. The explanation proffered for this was that panel members were precluded from having access to the relevant section of the so-called "electronic envelope". The second relevant aspect of Mr. Robinson's evidence, in this respect, was his claim that in applying the selection criteria the panel did not focus its attentions on *any* of the regional contract areas. Rather they proceeded on some kind of notional or hypothetical basis.

It was in this latter context that Mr. Robinson, in his evidence, spoke of the panel "*applying the lowest common denominator*" (see paragraph [53], *supra*). It is appropriate to observe, at this juncture, that I found these aspects of the Department's evidence to be nebulous in the extreme. This was the stimulus for a related argument on behalf of the Plaintiff that the Department's failure to evaluate each bidder's compliance with the selection criteria in accordance with paragraph 4.3 of the TOR and its adoption of the alternative

methodology described in Mr. Robinson's evidence gave rise to a breach of the principle of transparency.

[76] By virtue of the principle of transparency, the Department was obliged to assess all tenders received in accordance with the published rules of the competition. One of these rules was that promulgated in paragraph 4.3 of the TOR. When viewed in conjunction with the ITT, I consider it clear that the generic term "*the evaluation criteria*" encompassed the specified mandatory requirements, the selection criteria and the contract award criteria. The rule in question required each bidder to address **all** of these criteria for each of the regional contract areas for which he was tendering. Objectively, this rule is unsurprising, having regard to the marked differences in the services to be procured for the four regions concerned, coupled with the realistically foreseeable possibility that the resources and capacities of some tenderers would differ significantly from those of others. Self-evidently, there is a world of difference between the Eastern region (some 6,200 trips per annum) and the Northern region (around 1,100 trips per annum). I consider that paragraph 4.3 of the TOR, analysed in its full context, broadcast a competition rule to the effect that the Department would apply the selection criteria in respect of each of each of the regional contract areas for which a bidder was tendering. This assessment is reinforced by the terms in which the selection criteria were formulated. In my opinion, the requirement that each bidder demonstrate in his tender a comparator project "*similar in nature and scale to the services required by DRD*" could not be sensibly applied in ignorance of what the bidder was tendering for, since, depending on the bid, the "*services*" had a range of possible meanings – one, two, three or all four of the regional contract areas. The evidence establishes unambiguously that, in applying the selection criteria, panel members were ignorant of the regional contract areas for which the bidders were tendering. This appears to have occurred by accident rather than design and was, frankly, a glaring aberration.

[77] As a result, the Department failed to evaluate any of the tenders in accordance with the competition rule which it had devised and promulgated. While this was inexcusable, I consider that this failure is not a vitiating factor *per se*. Rather, the question is whether it gives rise to a breach of any of the legal rules or principles in play. I conclude that there has been a clear breach of the principle of transparency: the Department broadcast that it would evaluate tenders by a certain methodology, but failed to do so. Furthermore, the breach of the principle of transparency had one further dimension, constituted by the "in the round", "lowest common denominator" and "notional regional contract area" approach adopted and applied by the selection panel, as described in Mr. Robinson's evidence. These evaluation tools were unpublished, inaccessible and, hence, manifestly lacking in transparency. Moreover, having listened carefully to Mr. Robinson's evidence, I am bound to describe them as nebulous and incomprehensible, an assessment which is unsurprising having regard to the series of

inconsistencies and contradictions identified in paragraph [75] above. These evaluation tools appear to have been devised *ad hoc.* They also suffered from the additional vice of encouraging the formation and application of subjective, intuitive judgment at the expense of clearly formulated objective standards. In summary, for this combination of reasons, I conclude that the approach of the assessment panel at the selection stage clearly infringed the principle of transparency. Bearing in mind the alternative bases upon which the Plaintiff put forward this discrete challenge, I consider that this particular failure is to be viewed through the prism of the transparency principle, rather than the doctrine of manifest error. The alternative analysis of misuse of power is also a possibility: see ***Europaiki*** (paragraph [65], *supra*). This ground of challenge succeeds accordingly.

Third Ground of Challenge: Analysis and Conclusions

[78] The focus of this ground of challenge is the eighth of the sixteen mandatory requirements, which relates to possession of a Roads Service (Bus Operator's) licence (which I shall describe for convenience as a "*RSO licence*": see paragraphs [22] and [26], *supra*). The Plaintiff contends that the Department lapsed into the prohibited realm of manifest error in determining that Quinns did not intend to engage partners/subcontractors in its proposed provision of the transport services being procured, with a resulting breach of this mandatory requirement. As recorded in paragraph [26] above, in their tender Quinns clearly evinced, with full supporting particularity, an intention to engage "*third parties/consortium members*" to provide a range of services, including a substantial percentage of the transport services being procured. I reject the Department's submission to the contrary, finding the relevant sections of Quinns' tender to be unequivocal in this respect. The unambiguous statements made by Quinns in their tender were that they intended that "*third parties/consortia members*" would provide, to varying degrees, 50% of *transport services* in five defined areas. Notably, one of the nominated "subcontractors" was Philip Harkness of Easy Travel (Belfast) who, according to the tender, was to provide approximately 10% of the transport services in the "*immediate area*". Significantly, this squares with the evidence to the court of Mr. Harkness (paragraphs [41] – [42], *supra*), which confirmed an agreement with Mr. Quinn, when the tender was being prepared, that the three Belfast coach entities with whom Mr. Harkness is connected would, if Quinns secured the Eastern region contract, provide the entire service required for the Belfast area. I accept this evidence. Furthermore, at the trial, it was an agreed fact that the selection panel, in assessing the compliance of tenders with the mandatory requirements and selection criteria, did not have access to that part of the Quinns' tender containing this information and disclosing these intentions. The failure of Quinns to include within their tender the RSO Licence of any of their envisaged "subcontractors" was also an agreed fact.

[79] On behalf of the Department, the court's attention was drawn particularly to Regulation 25(3) which, it was submitted, clearly contemplates the phenomenon of a bidder relying on subcontractors. It was further submitted that the ITT were not designed so as to require the application of either mandatory requirements or selection criteria to subcontractors. The conditions of contract clearly envisaged the engagement of subcontractors by a successful bidder. Furthermore, it was argued that in their tender Quinns did not have recourse to the technical capacity or professional experience of any of their proposed partners or subcontractors. Mr. Williams QC and Mr. McMillen QC submitted that the term "*operator*" is to be construed as synonymous with *successful bidder*. Ultimately, this was presented as the Department's central riposte to this discrete ground of challenge. It was further submitted that, on the face of the Quinns' tender, the bidder would be purchasing sufficient new vehicles and establishing booking and operational centres in appropriate locations in order to deliver the transport services being procured. I have already recorded above my rejection of the Department's submission that Quinns' tender did not disclose an intention to subcontract any of the transport services which it was seeking to secure: the tender does not, on any showing, yield this construction.

[80] In determining this particular ground of challenge, I record, at the outset, the Department's evidence (which I accept) that at the initial stage of assessing compliance of the tenders with the specified mandatory requirements panel members did not have access to that portion of the Quinns' tender which disclosed its intention to have recourse to a series of "*partners/subcontractors*" in the event of being awarded the contract/s for which it was bidding. The conclusion that the panel was, in consequence, bereft of material information seems to me unassailable. I consider that, in consequence, the panel could not have sensibly or knowledgably evaluated the question of whether Quinns' tender satisfied this mandatory requirement. In retrospect, it is extraordinary that the panel was bereft of this obviously significant information. I find that in their tender Quinns enunciated an unequivocal intention to subcontract transport services to a substantial extent. The fundamental question to be determined by the court is whether the competition rules, properly construed, obliged Quinns to demonstrate that all of their proposed transport services "*partners/subcontractors*" were in possession of the necessary RSO Licence. This requirement was expressed with particular clarity in the ITT and with less particularisation in the TOR. It must be construed both in its narrow and wider contexts. It is also appropriate to bear in mind the aetiology of the legal term "*economic operator*", which I have sketched in paragraph [19] above. Whereas the terminology repeatedly employed in the TOR was "*operator*", this was consistently supplanted by the word "*tenderer*" throughout the ITT. Having construed these documents as a whole, I find that in the relevant passage of the ITT, "*operator*" is not synonymous with "*tenderer*" or "*successful tenderer*". Rather,

in my estimation, the word "*operator*", in this particular context, clearly denotes all of the entities identified in the tender as proposed transport service providers. This construction is supported by the terms in which the next succeeding mandatory requirement, that of taxi licences, is framed and by the clearly ascertainable underlying intention that, in these particular contexts, the words "*tenderer*" and "*operator*" were to have contrasting meanings where a tenderer was relying on subcontractors to provide any of the transport services being procured. This construction has the added attraction of according with manifest good sense. It is further supported by the other provisions of the procurement structure which I have highlighted in Chapter V above and the associated provisions of Regulations 25 and 28 of the 2006 Regulations. This mandatory requirement was to be assessed by the Department on a pass/fail basis, involving no element of evaluative judgment or discretion. I conclude that a manifest error on the part of the Department has been established. Given that the selection panel members were, for reasons unexplained, deprived of access to the relevant segment of the tenders, the clearly demonstrated commission of a manifest error in this respect is unsurprising. Accordingly, this ground of challenge succeeds.

Fourth Ground of Challenge: Analysis and Conclusions

[81] The essence of this ground of challenge is that the Department lapsed into manifest error in failing to exclude both successful bidders on the ground that, in certain differing respects, their tenders failed to satisfy the minimum standards viz. the selection criteria. While this is the banner complaint, I shall endeavour to disentangle its outworkings in the following paragraphs. I would also observe that, as the trial progressed, the focus of this discrete complaint became progressively narrower.

[82] This discrete challenge is mounted on three separate bases. The first is that, on its face, the Quinns' tender was replete with false and inaccurate representations, supplemented by equally inaccurate documents and forged signatures, and that the Department's failure to identify these amounted to manifest error. As regards "Out and About", the Plaintiff's case is rather differently formulated (*infra*). Secondly, it is complained that the gravity and extent of the alleged false representations became even clearer from the further information provided by the Plaintiff post-award decision letter, at which stage the Department's earlier errors were compounded and perpetuated. Thirdly, and in any event, the Plaintiff makes the case that none of the comparator projects put forward by Quinns in its tender was of sufficient similarity or scale to satisfy any of the selection criteria. The main riposte on behalf of the Department entails emphasizing that none of the comparator projects submitted by bidders had to be precisely equivalent to any of the projects being procured. Experience was the main attribute which the selection panel was seeking to identify in bidders. It was further argued that the Department was seeking from bidders examples of projects that had

core elements similar to those of the services being procured. In devising these criteria, the Department was anxious to identify serious contenders and to exclude no hopers. The Department's submissions also sought to confine this ground of challenge to events preceding the impugned contract award decisions. While the Department's arguments, understandably, seek to place the Quinns' comparator projects in the best possible light, I consider that they do not really engage with the issue of false and misleading information in the tender. Furthermore, the court would normally expect to find extensive arithmetical calculations, where germane and if reliable, in the evidence of a party's witnesses rather than the written submissions of its counsel. During the final phase of the trial, Mr. Williams QC conducted an exercise of interpretation and calculation of figures which was undoubtedly bona fide but to which the court can attribute no real weight, as this did not feature in the evidence of any of the Department's witnesses. Strikingly, at the end of a lengthy trial, the information supplied by Quinns following a total of three opportunities was still in need of significant interpretation, illumination and calculatory analysis. This discrete ground of challenge undoubtedly gained some momentum accordingly.

[83] Quinns' Tender. In his final submissions, the central focus of Mr. Dunlop's argument was the Tyrone GAA comparator "project" put forward by Quinns in purported compliance with the first selection criterion ("Providing Transport Services"). It was contended that this was a particularly small scale contract which was not a "demand responsive" service and did not entail transporting any elderly or disabled people. Even if all of Quinns' assertions were correct, the example proffered entailed only 884 trips per annum – in contrast with the 14,000 being procured for the Northern contract area and the 80,000 being procured for the Eastern contract area. In advancing these submissions, reliance was placed on Mr. Robinson's witness statement (paragraph 15i):

> "*… The Department was aware that very few companies had direct experience of delivering the particular type of services required and that only one company had previous experience of delivering the services on a province wide basis …*
>
> *The Department was clearly not seeking examples of service delivery based on all operational areas as to have done so would have excluded all but one bidder*".

The Plaintiff contends that the selection panel plainly did not engage in even the most elementary of comparative arithmetical exercises. It is further contended, as a discrete aspect of this ground of challenge, that Quinns manifestly failed to provide "*full supporting evidence*" of their purported compliance with the minimum standards. The "Club Tyrone" letter, appended to the Quinns' tender, fell far short of such evidence, while, in the

tender, there was no supporting evidence whatsoever of Quinns' transport services and income claims. It was argued, further, that Quinns' "Operating a Transport Company" comparator project was manifestly incomparable as it had a total contract value of merely £128,000 per annum, was not a demand responsive service and required the use of a very small number of vehicles only. A comparable critique, with appropriate adjustments, was advanced in respect of the "Providing Transport Services to People with Disabilities" comparator project. Finally, as regards the "Managing a Booking Centre" selection criterion, it was submitted, based on the evidence of Mr. Harkness, that the claim in Quinns' tender that, as a comparator project, they had managed a booking centre for Easy Travel Limited had been exposed as false.

[84] The riposte of Mr. Williams QC and Mr. McMillen QC to the various ingredients of this ground of challenge pointed out, firstly, that the "Club Tyrone" letter was but one part of Quinns' tender and assert the Department's entitlement to rely on Quinns' assertion that its "Tyrone" transport services entailed 884 trips per annum and was [later] verified by an accountant. In short, the court was invited to accept as correct the data put forward by Quinns – 884 "Tyrone" trips per annum having a value of £265,000 per annum. It was further emphasized by counsel that the evaluation panel was obliged to confine itself to the contents of the tender. Counsel's submissions further highlighted that the competition rules, as designed, did not require bidders to put forward in their tenders comparator projects precisely equivalent to those being procured by the Department. It was further submitted that the central requirement enshrined in the selection criteria was that of demonstrating that the bidder possessed the experience necessary to deliver the services being procured under one or more of the four contracts at stake. Emphasis was also placed on the intrinsic inability of bidders other than the incumbent "Door to Door" service provider to furnish evidence of having delivered identical projects. It was further submitted that "Out and About" should properly be viewed as the trading arm of the operator contracted and financed to deliver the service in question. Emphasis was placed on the unequivocal statements in the "Out and About" tender that it has been providing the "Dial A Lift" services since December 2009. The evidence further established, it was argued, that individuals belonging to the "Out and About" entity were experienced in delivering the "Dial A Lift" project.

[85] This ground of challenge is focussed mainly (though not exclusively) on the Quinns' tender. The thrust of the Plaintiff's case is that the comparator projects put forward in Quinns' tender in purported compliance with all four selection criteria were not truly comparable, as they were not "*similar in nature and scale to the services required by DRD*". This ground of challenge must be determined by reference to the meaning of the words actually used in the criteria. The evidence of the Department's witnesses regarding what the Department was apparently seeking bidders to demonstrate cannot, in

my view, be reconciled with the actual wording of the selection criteria. I consider that there is a demonstrable disconnect between this evidence and the selection criteria as formulated. The aims and objectives which the Department evidently wished to reflect in the selection criteria were, unmistakably, not expressed in the event. The construction of the selection criteria is a question of law for the court. I accept the argument that the selection criteria did not require bidders to demonstrate experience of previous projects identical to those being procured by the Department. Precise equivalence was neither requested nor required. However, the comparator projects had to be "*similar in nature and scale to the services required by DRD*". "Similarity", in this context, must be properly and sensibly viewed as having both qualitative and quantitative ingredients and conveying, in its essence, the notion of *a reasonably comparable project*. In short, the comparator project put forward in tenders had to approximate to some reasonable degree and extent to the transport services being procured by the Department. I consider that the construction of the relevant provisions for which the Department contended entails a manifest distortion of the true meaning of the words in question, having regard to their ordinary and natural connotation and taking into account the context in which they were used.

[86] Thus it becomes necessary to consider whether the comparator projects submitted by the two successful bidders were reasonably comparable projects. Did the comparator projects approximate to a reasonable degree and extent to the projects being procured? As regards the first of the four selection criteria, with specific reference to Quinns' original tender, I accept the Plaintiff's critique, duly fortified by the evidence of Mr. McLaughlin and Mr. McCaughey which I found credible and persuasive. I find that, taken at its zenith, Quinns' comparator project fell manifestly short of qualifying as *a reasonably comparable project* and, further, was demonstrably lacking in "*full supporting evidence*". In their tender, what Quinns provided was some supporting evidence which was extremely limited in nature and, at the trial, was exposed mercilessly as false and unreliable. The clearly discernible purpose of furnishing "*full supporting evidence*" was to ensure that selection panel members were properly equipped to carry out the exercise of deciding whether *a reasonably comparable project* had been demonstrated by the bidder. In my view, the requirement of "*full supporting evidence*" demanded the provision by bidders in their tenders of material capable of sustaining and confirming, to a reasonable extent, a bidder's subjective claims and assertions. I find that Quinns' tender was manifestly deficient in this respect. I conclude further that, insofar as the "due diligence" exercise was conducted under the aegis of the 2006 Regulations (*infra*), this manifest error was repeated and perpetuated.

[87] This manifest error, in my view, had a further ascertainable dimension. In advancing their comparator project, the centrepiece of Quinns' tender was, indisputably, the transport project in which they were engaged with the

Tyrone County GAA Board. This was reaffirmed by the terms of Quinns' second and third submissions to the Department, which I have highlighted in paragraphs [30] – [34] above. Quinns made no clear and sustainable distinction between the previous services allegedly provided by them to Tyrone County GAA and those which they allegedly provided to private clubs. The former, as portrayed, had a clearly identifiable contractual character and were put forward as a single comparator project. In contrast, the transport services allegedly provided by Quinns to individual clubs were clearly of a disparate and more *ad hoc* nature, appearing to involve a series of intermittent arrangements with individual clubs. This is readily inferred from the terms of Quinns' tender. Moreover, the tender contained no particularisation whatsoever and absolutely no supporting evidence of the transport services allegedly provided by Quinns to private clubs. This uncontroversial assessment impels inexorably to the conclusion that the Department's evident reliance on this aspect of Quinns' tender and its related failures to make the obvious distinction between these claims and the Tyrone County GAA "project" and to appreciate that the vague and unparticularised assertions relating to private clubs could not possibly constitute a "*project*", within the terms of the competition, constituted a freestanding manifest error. This aspect of the Plaintiff's challenge succeeds accordingly.

[88] Having regard to the unusual matrix and evolution of these proceedings, I record my view that the doctrine of manifest error in EU public procurement law, properly analysed by reference to the overarching principles, is not concerned with whether the relevant act or omission on the part of a contracting authority has some benign or innocent explanation. Thus the existence of a manifest error is not dependent on the authority's state of knowledge or any blameworthiness in its behaviour. Rather, I consider liability to be of the no fault variety. Accordingly, where an authority asserts – or demonstrates – that the relevant error has occurred without any fault on its part, I consider this legally irrelevant. The exercise conducted by the court is of a clinical, detached and objective nature. The only question for the court is whether a manifest error has been established. A manifest error can occur with or without fault on the part of the contracting authority. To hold otherwise would be inimical to the overarching principle of fair, equal and open access to the market concerned and the related principles of non-discrimination and equality of treatment. If a contract award decision clearly influenced, and contaminated, by false or misleading information contained in a bidder's tender were to escape censure by the court on the ground that the authority acted blamelessly, the aims and objectives of the Directive would plainly be thwarted.

[89] For convenience, I shall consider at this juncture the question of whether this manifest error was repeated and perpetuated by the Department at the conclusion of the "due diligence" exercise. In the third – and final – of Quinns' submissions to the Department, an accountant's letter was included.

In this letter, no distinction was made between the Tyrone County GAA services and those allegedly provided by Quinns to private clubs. Thus there was no accountancy information about the value of the Tyrone County GAA project **or** the services provided to private clubs. According to Mr. Doran's evidence, the "Allegations Panel" was satisfied that the Tyrone County GAA project had been "*… substantiated and the figures quoted verified by an accountant's report*". This evidence suggests that the panel did not attempt to explore the differences between the two types of service. Nor did they, by the simple medium of further enquiries, ask and pursue any of the questions which the accountant's letter was begging. The latter was replete with qualifications and reservations. To describe it as substantiating and verifying Quinns' several claims is, in my view, unmistakably erroneous. Furthermore, having regard to all the evidence, I find that the "Allegations Panel" was sufficiently influenced by the clarification provided by Quinns to conclude that Quinns provided transport services for all, or virtually all, the Tyrone County GAA teams (per Mr. Doran's evidence). This plainly erroneous conclusion can only be attributed to misunderstanding or carelessness on the part of panel members. Furthermore, this evidence suggests that the panel did not attempt to explore the differences between the transport services allegedly provided by Quinns to Tyrone County GAA teams and transport services allegedly provided by Quinns to private clubs. In the latter respect, Quinns' extravagant claim in its various submissions, variously phrased, was simply not substantiated, even at the third time of asking, but was clearly swallowed fully by the panel. All of this, in my view, gives rise to three distinct, though inter-related, species of manifest error. Firstly, in the absence of "*full supporting evidence*", the panel should have concluded that compliance with this selection criterion had not been established. Secondly, the panel failed to identify the clear falsity of Quinns' claims. Thirdly and finally, the transport services allegedly provided previously by Quinns to private clubs plainly did not form part of the comparator project on which they relied mainly in their tender. Properly analysed, they represented a quite different type of "*project*" – a material distinction which, in my opinion, the selection panel failed to appreciate.

[90] Next, the court must consider whether the selection panel was guilty of a manifest error in concluding that Quinns had satisfied the second, third and fourth of the selection criteria. This issue can be considered in the round. Once again, I find that the Plaintiff's critique, summarised above, is sustained. As already noted, all of these criteria required the bidder to demonstrate "*… a relevant project within the last three years … similar in nature and scale to the services required by DRD …*". I have already held that, properly construed, this required the demonstration of *a reasonably comparable project*. The finding that this was not demonstrated in respect of any of these further selection criteria follows inexorably from the evidence of the Department's witnesses to the court. The relevant evidence, in this respect, was to the effect that the selection panel was satisfied by the demonstration of something falling

considerably short of a reasonably comparable project. In short, the panel demonstrably failed to give effect to the clear wording of all four selection criteria. Furthermore, they failed to give effect to the umbrella requirement that bidders provide "*full supporting evidence*" of each of the four minimum standards. In my view, properly construed, this requirement was designed to extract from bidders materials attesting to and/or verifying the claims and assertions in their tenders – relating in particular to figures, amounts and periods. This, I find, was a further, freestanding manifest error in the panel's approach and conclusions. These findings and conclusions are not undermined by the evidence of the Department's witnesses about the nature of the existing market and the attributes which they were seeking to establish through the vehicle of these selection criteria. This evidence demonstrated, simply and clearly, a striking mismatch between the Department's pre-tender aims, aspirations and intentions (on the one hand) and the actual formulation of the selection criteria (on the other). This aspect of the Plaintiff's challenge succeeds accordingly.

[91] "Out and About". The Plaintiff's case is that the Department committed a manifest error in permitting one of the successful bidders ("Out and About") to rely on a project ("Dial A Lift") which had been delivered by other entities. The Plaintiff's submission emphasized that the "Dial A Lift scheme" was in fact a service provided under contract by the entity "Out and About Community Transport" (otherwise described as "Mid Ulster Community Transport"). The Plaintiff relies on the evidence that the "Dial A Lift" scheme was financially assisted by a grant provided by the Department, the beneficiary whereof was "Rural Community Transport Partnerships" and which contained a condition prohibiting the latter from competing for any "*publicly tendered transport partnerships*". Mr. Dunlop argued that "Out and About" could not permissibly rely on the scheme in question by reference to Regulations 25(3) and 28 of the 2006 Regulations (reproduced in Appendix I hereto). Invoking the language of Article 48(3) of Directive 2004/18/EC (substantially replicated in Regulation 25(3)(b) of the 2006 Regulations), it was further submitted that a bidder is permitted to rely on the "*capacities*" of "*other entities or members in the group*" only where it "… [proves] *to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract*". The presentation of this discrete ground of challenge also emphasized that the "Dial A Lift" operator cannot lawfully apply its "*resources*" to any of the contracts being procured, as this would be in express breach of the terms of the departmental grant, with the result that the "Out and About" tender did not comply with Regulation 25(3) of the 2006 Regulations.

[92] The "Out and About" Tender: Conclusion. Ultimately, the parties were in agreement that "Out and About" had not previously provided *any* transport services of the kind being procured by the Department. By virtue of Regulation 25(3)(a), "Out and About" was entitled to rely on the capacities of

other entities in its tender and it duly did so, heavily, to the extent that this reliance permeated its attempted compliance with all four selection criteria. Based on the information contained in its tender, "Out and About" is properly described as a provider of some limited transport services. None of these services is comparable to those which were being procured by the Department. Thus, for the purpose of securing *any* of the contracts being procured, "Out and About" was relying *exclusively* on the capacities of other entities. This was permissible by reason of Regulation 25(3). However, Regulation 25(3)(a) and (b) are linked by the conjunctive "and"; furthermore, Regulation 25(3)(b) is characterised by the use of the presumptively mandatory "*shall*". In this respect, its terms are virtually identical to the corresponding provision of the Directive, Article 48(3). The construction of Regulation 25(3) which I adopt is that where a bidder (or, as the case may be, a group of economic operators under Regulation 28) relies on the capacities of other entities, it **must** prove to the contracting authority that "*… the resources necessary to perform the contract will be available …*". In my view there is nothing in the language of either the Directive or the Regulations to support the view that this requirement is triggered only where the contracting authority proactively requests the financial information concerned. As a matter of undisputed fact, the "Out and About" tender did not contain this information. In passing, it seems highly unlikely that it could have done so, having regard to the restrictive public funding condition affecting the "Dial A Lift" service provider. It follows that "Out and About" demonstrably failed to satisfy any of the four selection criteria. Accordingly, the Department's assessment to the contrary is vitiated by clearly demonstrated manifest error.

Fifth Ground of Challenge: Analysis and Conclusions

[93] The focus of this discrete ground is the "due diligence" exercise conducted by the Department mid-litigation. The Plaintiff's case is that there is now "incontrovertible" evidence that neither of the successful bidders satisfied the selection criteria, with the result that if the Department executes contracts with them (pursuant to the contract award decisions) a clear breach of the duty of equality of treatment will ensue. The elements of this ground of challenge are the further information supplied by the Plaintiff to the Department following the initiation of these proceedings, certain aspects of the evidence adduced at the trial and, *pace* these developments, the Department's refusal to voluntarily rescind the impugned decisions. On behalf of the Department, emphasis is placed on the careful and thorough nature of the "due diligence" exercise conducted mid-trial. It is submitted that having regard to all the information and materials thereby generated – figures, copy licences, testimonials, accountant's letter, telephone bills, invoices and certificates – the "Allegations Panel" had no good reason to uphold any of the Plaintiff's allegations, with the result that the Department itself had no good reason to rescind the impugned decisions. During final

submissions, at which stage the dust had settled considerably, Mr. Dunlop was disposed to accept that the role and viability of this discrete ground of challenge were not entirely clear. Furthermore, I should record that the operation of Regulation 26 of the 2006 Regulations, considered *infra*, did not form part of the Plaintiff's submissions.

[94] The main submission advanced on behalf of the Department was that the "*due diligence*" phase was not governed by the 2006 Regulations, thereby confounding this discrete ground of challenge. As rehearsed in paragraphs [6] – [8] above, these proceedings were stayed to enable the Department, at its option, to conduct and complete this discrete exercise. While I have recorded in paragraph [8] that, in effect, its outcome was an *affirmation* of the impugned decisions, the precise terminology employed in the evidence was that the Department was "*satisfied that both their tenders were complete and accurate in all material respects*" (per the Department's solicitor). Specifically, the "Allegations Panel" concluded:

> "*Having considered all of the additional information supplied by* [Quinns] *and their accountants, the Panel concluded that the documentation supplied adequately addressed the issues raised by the Plaintiff's solicitors and that it could see no reason why the Department should decline to enter into a contract with the successful tenderers*".

The Plaintiff's claim is brought under the 2006 Regulations, as amended, specifically Regulation 47C. The scheme of this segment of the Regulations is to impose on the contracting authority obligations to comply with the specified provisions of the Regulations and any enforceable EU obligation, to couch same in the form of a duty owed to an economic operator and to confer on the latter a right to bring proceedings seeking appropriate relief founded on an asserted breach of duty and consequential loss or damage. If the Department's contention is correct, it has the consequence that the Plaintiff's claim is confined to the period measured by the beginning of the procurement competition and the promulgation of the contract award decisions. Thus, properly analysed, the Department contends that the significant events postdating the contract award decisions including the affirmation thereof lie beyond the purview of the court in these proceedings. In the course of submissions, Mr. Williams QC was disposed to accept that the legality of the Department's conduct in respect of the "due diligence" exercise must be gauged by *some* barometer and suggested that the relevant standards and constraints are to be found in the common law. Mr. Williams responded affirmatively to the court's formulation of the proposition that, if his contentions were correct, the territory thus occupied would be marked by the familiar public law obligations of taking into account all material factors, disregarding anything immaterial, observing the requirements of a fair

decision making process, avoidance of bias and avoidance of ***Wednesbury*** irrationality.

[95] Neither resort to the Directive nor the Regulations equips the court with a ready answer to the Department's contentions. Moreover, it appears that the issue has not previously been the subject of judicial decision. "Due diligence" appears to constitute an exercise conducted post-contract award decision by many public authorities in cases to which the EU procurement regime applies. Moreover, it is an issue of direct interest to the court since, as the present case illustrates, it has implications for case management and has the potential for the court to be seised simultaneously of a claim under the 2006 Regulations and a parallel claim for judicial review. The issue is, therefore, one of some little importance.

[96] Some guidance to the correct resolution of this issue may be found by analysing the contractual position. In my opinion, the Directive distinguishes between a contracting authority's decision to award a contract to a particular bidder and the necessarily subsequent act of entering into the contract. Both the structure and the language of the Directive, which I have examined above, support this analysis. This distinction, in my view, is duly replicated in the 2006 Regulations: I refer particularly to Regulation 32A and Regulation 47G. The contrasting language consistently employed in both measures is that of awarding the contract (on the one hand) and entering into the contract (on the other). I consider it abundantly clear from the terms of Regulations 32 and 47 in particular that a distinction is made between the contracting authority's decision to award the contract and the ensuing execution of the contract. If it were otherwise, the standstill period would be meaningless: its whole rationale is to suspend execution of the contract, on the premise that, in certain eventualities, execution will not occur, on account of some actionable misdemeanor by the contracting authority. Regulation 32 further envisages that execution of the contract may not occur at all, in certain eventualities. In summary, the act which occurs at the beginning of the standstill period is the promulgation of a "intention to execute" decision, whereas the act which materialises upon the expiry of this period **or**, in the event of litigation, upon the occurrence of one of the specified later events is either the actual execution of the contract *or* its non-execution and, effectively, rescission of the award decision. I am satisfied that in EU law terms no binding agreement comes into existence during the intervening period. Furthermore, applying a pure domestic law analysis, I consider that no binding agreement exists until the act of actual execution of the contract has occurred. I would highlight, finally, that where execution of the contract has occurred, this has significant implications for the remedies available, as Regulation 47J makes clear.

[97] Some reflection on the procedural regime established by the Directive is also instructive. Article 28 of the Directive in particular supports the view that the Directive is not designed to regulate exhaustively all procedural

aspects of national regimes governing the award of contracts to which the Directive applies. This is in harmony with the recitals to the Directive, which make clear, in my view, that this is a measure designed to establish "*co-ordinating provisions*" in the sphere of procurement of relevant public contracts, *rather than* absolute harmonisation. Taking into account also the principle of subsidiarity, it appears to me to contemplate that such regimes may legitimately vary from one Member State to another and that their legality, from an EU law perspective, will ultimately depend upon their compatibility with the standards and requirements established by the Directive. I consider that, properly analysed, the Directive prescribes the legal principles and standards to be observed in the procurement of contracts to which it applies, while simultaneously imposing certain procedural formalities, such as the OJEU advertising requirements and the obligation to provide a reasoned decision. Subject to any such prescribed procedural arrangements, Member States are at liberty to apply national contract award procedures, suitably tailored to the regime established by the Directive. In my view, properly analysed, the regime which the Directive establishes is not exhaustive in nature. This approach finds clear support in the decision of the ECJ in ***Gebroeders –v- The Netherlands*** [1990] 1 CMLR 287, paragraphs [17] and [20], given in the context of the Directive 71/305/EEC:

> "*The Directive does not lay down a uniform and exhaustive body of Community rules; within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the treaty in regard to the right of establishment and the freedom to provide services …*"

Accordingly, to the extent that the "territory" is not fully occupied by the EU regime, there is scope for Member States to devise and give effect to both substantive and procedural laws in this sphere.

[98] I consider that governing principles and standards (on the one hand) are to be distinguished from contract award methodology (on the other). A Member State's contract award procedure, whatever form it takes, will be lawful provided that it complies fully and faithfully with the principles and standards enshrined in the Directive and imposed by general EU law **and** is obedient to such procedural requirements as are prescribed by the Directive **and** is compliant with such further rules as may be contained in domestic law. What the Directive does not purport to do is to prescribe an exhaustive model of contract award methodology. It is, rather, concerned with [a] governing principles, [b] certain procedural requirements and [c] *the outcome* of the process. The conduct in which the Department engaged during the "due diligence" process must, in my view, be evaluated against this framework.

Both this conduct and the outcome which this yielded were of indisputable importance. While the Department opted to affirm its contract award decisions, it is abundantly clear that it was prepared, in principle, to rescind these decisions. In the abstract, it would be surprising if the Directive did not bite at all on these activities. Furthermore, what the Department did during this phase was in no way prohibited by the Directive. These reflections lend support to the view that the later events and decisions simply extended and merged with the relevant earlier events and decisions in the process. This conclusion is attractive not only because it is fully harmonious with the basic EU rules and principles enshrined in the Directive: it also possesses the added attraction of according full force and supremacy to the Directive.

[99] I consider it necessary to test this tentative conclusion through the lens of Regulation 26 of the 2006 Regulations. The reason for this is that, by virtue of Regulation 26, the Department was specifically empowered to require any bidder to provide information supplementing the information provided in accordance with Regulations 23, 24 or 25 or to clarify such information. The qualifying condition specified in Regulation 26 is that the further information sought must relate to the matters specified in Regulations 23, 24 or 25. In the present context, the operative provision is Regulation 25, which relates directly to the selection criteria formulated by the Department. When the Plaintiff made its written representations to the Department following the initiation of these proceedings, the focus thereof was, fundamentally, Quinns' ability to satisfy the selection criteria. The Department's assessment was that, on its face, this constituted "*credible and substantial information which cast doubt in the successful tenders …*". In these circumstances, I consider that, if lawfully empowered to do so, the Department had ample grounds for exercising its power under Regulation 26. When the Department brought the Plaintiff's allegations to the attention of Quinns, inviting the provision of further information and representations, it was not *expressly or consciously* operating under the aegis of Regulation 26. This I consider irrelevant. The critical question is whether, post-contract award decision, the Department was at liberty to lawfully exercise the discretionary power contained in Regulation 26 and, properly analysed, objectively did so. On behalf of the Department, it was submitted that, as a matter of law, it was not acting under Regulation 26 and was not empoweredto do so at this late stage. In developing this submission, Mr. Williams QC drew attention to the distinctive nature and purposes of selection criteria and contract award criteria and the importance of avoiding impermissible overlap in this respect.

[100] In the present case, as a matter of fact, the Department did not have resort to its powers under Regulation 26 during its evaluation of the selection criteria. It then proceeded to apply the contract award criteria to the successful tenders. This resulted in the formulation of contract award decisions. All of the information and representations which the Department subsequently received bore on the question of whether the successful bidders

had in fact satisfied mandatory requirements and selection criteria. Neither the Directive nor the 2006 Regulations prescribe a time limit for the exercise of the power enshrined in Regulation 26. The question which arises is whether there is anything in the express or implied terms of the Directive or Regulations precluding the exercise of the Regulation 26 power post-contract award but pre-contract execution. In my view, there is no such bar. To hold otherwise would risk undermining the overarching aims and principles of the Directive. In the present case, the late exercise conducted by the Department was stimulated by serious and credible allegations of falsification and misrepresentation in a winning bidder's tender. As I have already held, conduct of this kind is plainly inimical to the principles, values and standards which the Directive enshrines and seeks to promote. Its investigation and exposure at this stage is, in my view, harmonious with the Directive, as overlaid by relevant overarching principles of EU law such as proportionality, legitimate expectation, equality of treatment and the promotion of fair and open competition, specifically described in the Directive itself as "*the opening up of public procurement to competition*". It is beyond dispute that in embarking upon the exercise undertaken, the Department must have at least contemplated the possibility of revoking the contract award decision. In this they were undoubtedly correct and I consider the genesis of this power to be found in the Directive itself, rather than general common law principles. While cases of this nature are likely to be comparatively rare, they highlight the versatility of Regulation 26, coupled with the truism that the ultimate touchstone for all conduct in this sphere is its compatibility with the applicable EU regime, standards and principles.

[101] As foreshadowed in paragraph [98] above, a further, and somewhat different, analysis of the "due diligence" exercise falls to be considered. Bearing in mind that final contracts had not been executed, there is some scope for the analysis that the "due diligence" exercise merged with the earlier exercises in which the selection panel evaluated the various tenders against the mandatory requirements, selection criteria and contract award criteria. More specifically, the merger was with the panel's earlier discrete exercise which evaluated whether the tenders had satisfied the mandatory requirements and the selection criteria. Viewed in this way, the "due diligence" exercise entailed a reconsideration of earlier assessments and evaluations. The consideration that, factually, there were two identifiable separate processes, conducted at different times and involving different personnel, is not, in my view, material. There is no dispute that, under one legal guise or another, the Department was obliged to consider the information which came to its attention post award decision letter. The only dispute relates to the legal framework under which it was then operating. Significantly, the Department's conduct during this phase did not infringe any of the express provisions of the Directive or Regulations. Fundamentally, the question is whether the Department's conduct continued to belong to the realm of the EU procurement regime. This, in turn, throws up questions

relating to the revocability of contract award decisions within the ambit of this regime and the genesis of any power of revocation.

[102] Thus I consider that there are two possible analyses of the "due diligence" exercise and its outcome. My preferred conclusion is that this should be viewed through the prism of Regulation 26, since this provision governs expressly a contracting authority's power to require a bidder to provide further information and occupies this discrete piece of territory accordingly: *expressio unius exclusius alterius*. In other words, there is evident strength in the view that Regulation 26 occupies the territory, to the exclusion of other possible powers. Regulation 26 provides the answer to the conundrum, unless, *by implication*, the exercise of the power therein enshrined was forbidden following the promulgation of the award decision letters. I consider that no such prohibition existed. If I am wrong in this conclusion, the alternative view is that the Department's conduct during the "due diligence" phase merged with and extended its evaluation of the tenders from the perspectives of compliance with the mandatory requirements and selection criteria. I consider this alternative analysis less persuasive, having regard to the express terms of Regulation 26. I consider the better view to be that Regulation 26 governed the "due diligence" exercise. Whichever view is correct, the question which arises is whether this ground of challenge is sustainable. At heart, I construe this ground of challenge as entailing a segregation of the "due diligence" exercise from everything transacted by the Department during the phase occupied by the pre-contract award decision letters – in other words, during the entirety of the conventional evaluation process. In light of my analysis and conclusions, I am of the opinion that this discrete ground of challenge is unsustainable, as it adds nothing of novelty or substance to the fourth of the Plaintiff's ground of challenge. Irrespective of whether one views the Department's post-award decision conduct through the lens of Regulation 26 or as merging with its evaluation and assessments prior to its application of the contract award criteria, I find that there was a unitary whole, with the result that there can be no freestanding isolation of and challenge to the Department's conduct of and decisions consequent upon the "due diligence" exercise. Thus it does not avail the Plaintiff to make the case that the Department's initial errors were repeated and perpetuated during the "due diligence" exercise.

[103] This court is not, of course, seised of a parallel application for judicial review directed to the Department's conduct of the "due diligence" exercise and the outcome thereof. If it were, the analysis, findings and conclusions which I have rehearsed above would, in all probability, give rise to findings that the Department, during this discrete exercise, committed the well recognised public law misdemeanours of irrationality, taking into account immaterial considerations, failing to take into account all material factors and/or failing in its related duty of proper enquiry.

Sixth Ground of Challenge: Analysis and Conclusions

[104] Mr. Dunlop's formulation of this discrete ground of challenge contained an acknowledgement that if the court rejects the Department's contention that the 2006 Regulations have not governed events since the making of the impugned award decisions, this final ground of challenge will not arise. The essence of this ground is that if the Department's contention is correct, the Plaintiff is entitled to seek solace in common law principles. This approach, it is argued, gives rise to an implied contract between the parties whereby the Department was obliged to fairly assess the allegations levelled by the Plaintiff against the tenders of the two successful bidders. The breach of this implied contract asserted by the Plaintiff lies in the Defendant's alleged failure to properly probe and verify the totality of the information provided by Quinns. No discrete argument is advanced under this final heading in respect of "Out and About". The substance of the Department's riposte is that if the court finds that the Department correctly evaluated Quinns' tender at the selection stage, the Department's entitlement to execute a contract pursuant to the impugned award decision is beyond challenge. I interpose here the observation that this suggested entitlement is, presumably, qualified by the common law principles which, it was accepted, must have governed the Department's conduct during the "due diligence" exercise if the 2006 Regulations were then inapplicable. The Department's submissions acknowledged that insofar as any implied contract existed, the Department was (merely) obliged to treat bidders equally and fairly and had done so.

[105] In light of my conclusion in respect of the immediately preceding ground of challenge, to the effect that the Department was at all times operating within the ambit of the 2006 Regulations, this discrete ground does not arise. If my earlier conclusion had been otherwise, and if I had been satisfied about the assertion of an implied contract, I would have concluded without hesitation that the Department failed to properly and thoroughly probe and verify the information provided and allegations made by the Plaintiff and the totality of the information provided by Quinns. Having regard to all of the information in its possession, the Department should have been on red alert when it began to evaluate the further information supplied by Quinns. In my view, the Department was all too ready to accept at face value, without appropriate corroboration or verification, the information provided by Quinns in both its original tender and subsequent submissions. As regards the latter, a paradigm example is provided by Quinns' embellished and enlarged claim which, as I have found, persuaded the Department - that it is the provider of transport services to **all or virtually all** of the Tyrone County GAA teams (per Mr. Doran's evidence). This assessment was manifestly erroneous *per se*. Having regard to the unsatisfactory contents of Quinns' original tender, coupled with the Plaintiff's allegations, I consider that the Department should have rejected this discrete

assertion as manifestly unsubstantiated. As an absolute minimum, the Department should have demanded further supporting particulars and evidence. These failures were, in my view, symptomatic of its uncritical and quite inadequate probing of Quinns' claims and assertions, from beginning to end.

[106] Furthermore, the letter from Quinns' accountants was quite unsatisfactory, begging a series of questions. The accountants were, in my opinion, demonstrably at pains to express themselves in cautious and diffident terms. Throughout the process, the Department either appears to have been unaware of the competition rule that all bidders provide "*full supporting evidence"*or was disinclined (for whatever reason) to exercise its power under Regulation 26 or, as a further alternative, was simply not alert to the facility thereby provided. The Department's supine acceptance of virtually everything claimed and asserted by Quinns was, in my view, the very antithesis of what was required of them in the particular circumstances, namely a critical, probing and challenging mindset. Ultimately, the Department found itself in the highly unsatisfactory position of, effectively, seeking to adduce further evidence through the medium of counsels' closing submissions. This, in my view, was merely symptomatic of the serial shortcomings in the Department's evaluation of the successful bidders' tenders from start to finish. The somewhat limited guidance in the available jurisprudence clearly supports the proposition that where an implied contract of this *genre* is concerned, and as acknowledged in the Department's submissions, it entails a duty to treat bidders *fairly* : see ***Deane Public Works – v- Northern Ireland Water*** [2009] NICH 8, paragraph [18] (per Morgan LCJ). I remind myself that this ground of challenge is directed solely to the "due diligence" exercise. Having regard to the critique rehearsed immediately above, I conclude that the Department treated the Plaintiff unfairly throughout the process triggered by the information provided and allegations made by the Plaintiff post-contract award decision letter and post-Writ. This unfairness is constituted by inadequate enquiry and insufficient scrutiny, to the Plaintiff's detriment. The contrary proposition makes good this conclusion: to suggest that the Plaintiff was treated "*fairly*" during this phase is simply unsustainable. Accordingly, on the premise that my conclusion relating to the fifth of the Plaintiff's grounds of challenge is incorrect, I find that during the "due diligence" phase the relationship between the parties was governed by an implied contract behoving the Department to act with appropriate fairness to the Plaintiff and that this contractual term was duly breached and, further, inequality of treatment ensued, to the benefit of Quinns and the detriment of the Plaintiff. Furthermore, insofar as any implied contract between the Plaintiff and the Department imposed on the latter a duty of comprehensive and thorough enquiry, I find that a clear breach occurred.

IX OMNIBUS CONCLUSION AND DISPOSAL

[107] I summarise the court's conclusions in the following terms:

(a) While the selection criteria were unlawful on account of lack of objectivity and/or lack of transparency, this aspect of the Plaintiff's challenge fails as no ensuing loss or damage or risk thereof has been demonstrated.

(b) The Department's application of the selection criteria was unlawful as it infringed the principle of transparency.

(c) The Department was guilty of manifest error in concluding that Quinns satisfied the mandatory requirement relating to the RSO licence.

(d) The Department committed further manifest errors in various respects in concluding that the two successful bidders had satisfied the selection criteria.

(e) The "due diligence" exercise was governed by Regulation 26 of the 2006 Regulations – and its conduct entailed a repetition and perpetuation of the other actionable errors listed above.

(f) If conclusion (e) is incorrect, the Department's conduct of the "due diligence" exercise was in breach of the implied contract between the parties.

[108] I take this opportunity to restate what this court said in ***Clinton –v- Department for Employment and Learning*** [2012] NIQB 2, paragraph [48]:

> "*While I have found in the Plaintiff's favour, it is appropriate to record the court's view that the members of the Department's selection panel and the CPD representatives clearly acted diligently and conscientiously throughout the process. The court's findings that they erred in certain discrete respects do not reflect adversely on any individual, having regard particularly to the legal complexities with which public procurement law is veritably saturated*".

To this I would add two further observations. The first is that it may be timely for public authorities, in tandem with the CPD, to carefully review the question of whether public officials concerned in procurement exercises of this kind are receiving the necessary intensive and specialised instruction and training. The second is that where a claim is brought against a public authority under the 2006 Regulations, it is not obliged to defend it. Whatever

pressure may be exerted by a successful bidder or bidders, responsible public authorities must be prepared to accept, in appropriate cases, either before the initiation of proceedings or shortly thereafter, the legitimacy of the legal claim pursued. This is entirely harmonious with the EU procurement regime, the amended Remedies Directive, the contemporary culture and philosophy of litigation and the over-riding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature. In this context, I would highlight that Article 2C of the amended Remedies Directive, couched in permissive rather than mandatory language, contemplates, at the first stage of dispute, direct recourse by an aggrieved bidder to the contracting authority concerned: this is manifestly and indisputably desirable in every case. Furthermore, where time limits dictate that proceedings must be issued, there is no good reason in modern litigation why a stand off between the parties – which, almost invariably, becomes progressively polarised with the passage of time – should ensue. In cases where litigation materialises, there is never any shame in acknowledging the commission of an actionable error or errors: *au contraire*, the public authority sued will be duly commended by the court, will be acting manifestly in the public interest and, further, will thereby ensure that the expenditure of ever shrinking public funds is minimised to a fraction of the amount which materialises when full blown litigation, which in this sphere entails lengthy and expensive trials, eventuates.

Remedy and Costs

[109] Having heard argument, I order that the impugned contract award decisions be set aside and I award the Plaintiff seventy per cent of its costs. I also extend the contracts execution stay until 20 March 2012

APPENDIX I

THE PUBLIC CONTRACTS REGULATIONS 2006

Regulation 4(3)

A contracting authority shall (in accordance with Article 2 of the Public Sector Directive)—

(a) treat economic operators equally and in a non-discriminatory way; and

(b) act in a transparent way.

Regulation 15(11)

The contracting authority shall make its evaluation in accordance with regulations 23, 24, 25 and 26 and may exclude a tender from the evaluation of offers made in accordance with regulation 30 only if the economic operator—

(a) may be treated as ineligible to tender on a ground specified in regulation 23; or

(b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—

(i) economic and financial standing; or

(ii) technical or professional ability.

Regulation 25

Information as to technical or professional ability

(1) Subject to regulation 27, in assessing whether an economic operator meets any minimum standards of technical or professional ability required of economic operators by the contracting authority—

(a) for the purposes of regulation 15(11), 16(7), 17(9) or 18(10); and

(b) in selecting the economic operators to be invited to tender for or to negotiate the contract in accordance with regulation 16(8), 17(10) or 18(11);

a contracting authority may have regard to any means listed in paragraph (2) according to the purpose, nature, quantity or importance of the contract.

(2) The means referred to in paragraph (1) are—

(a) in the case of a public services contract, a public works contract or a public supply contract requiring the siting or installation of work, the economic operator's technical ability, taking into account in particular that economic operator's skills, efficiency, experience and reliability;

(b) a list of works carried out over the past 5 years together with (unless the contracting authority specifies that the following certificate should be submitted direct to the contracting authority by the person certifying) certificates of satisfactory completion for the most important of those works indicating in each case—

(i) the value of the consideration received;

(ii) when and where the work or works were carried out; and

(iii) specifying whether they were carried out according to the rules of the trade or profession and properly completed;

(c) a statement of the principal goods sold or services provided by the supplier or the services provider in the past 3 years and—

(i) the dates on which the goods were sold or the services provided;

(ii) the consideration received;

(iii) the identity of the person to whom the goods were sold or the services were provided;

(iv) any certificate issued or countersigned by that person confirming the details of the contract for those goods sold or services provided; and

(v) where—

(aa) that person was not a contracting authority; and

(bb) the certificate referred to in sub-paragraph (c)(iv) is not available;

any declaration by the economic operator attesting the details of the goods sold or services provided;

(d) a statement of the technicians or technical services available to the economic operator to—

(i) carry out the work under the contract; or

(ii) be involved in the production of goods or the provision of services under the contract;

particularly those responsible for quality control, whether or not they are independent of the economic operator;

(e) in relation to the goods to be purchased or hired or the services to be provided under the contract, a statement of the supplier's or services provider's—

(i) technical facilities;

(ii) measures for ensuring quality; and

(iii) study and research facilities;

(f) where the goods to be sold or hired or the services to be provided under the contract are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the relevant State in which the supplier or services provider is established—

(i) on the technical capacity of the supplier or services provider in relation to the goods to be purchased or hired or the services to be provided under the contract; and

(ii) if relevant, on the supplier's or services provider's study and research facilities and quality control measures;

(g) the services provider's or contractor's educational and professional qualifications where the services provider or contractor is an individual and—

(i) if any, those of the services provider's or contractor's managerial staff; and

(ii) those of the one or more persons who would be responsible for providing the services or carrying out the work or works under the contract;

(h) the environmental management measures, evidenced in accordance with paragraph (4), that the services provider or contractor is able to apply when performing the contract, but only where it is necessary for the performance of that contract;

(i) a statement of the services provider's or contractor's average annual number of staff and managerial staff over the previous 3 years;

(j) a statement of the tools, plant and technical equipment available to the services provider or contractor for performing the contract;

(k) a statement of any proportion of the contract which the services provider intends to sub-contract to another person;

(l) any samples, descriptions and photographs of the goods to be purchased or hired under the public supply contract and certification of the authenticity of such samples, descriptions or photographs;

(m) certification by official quality control institutes or agencies of recognised competence, attesting that the goods to be purchased or hired under the public supply contract conform to standards and technical specifications (within the meaning of regulation 9(1)) identified by the contracting authority;

(n) a certificate—

(i) attesting conformity to quality assurance standards based on the relevant European standard; and

(ii) from an independent body established in any relevant State conforming to the European standard concerning certification; or

(o) any other evidence of conformity to quality assurance measures which are equivalent to the standards referred to in sub-paragraph (n)(i).

(3) Where appropriate—

(a) an economic operator or a group of economic operators as referred to in regulation 28 may rely on the capacities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or group of economic operators and the other entities; and

(b) the economic operator or the group of economic operators shall prove to the contracting authority that the resources necessary to perform the contract will be available and the contracting authority may, in particular, require the economic operator to provide an undertaking from the other entities to that effect.

(4) The evidence referred to in paragraph (2)(h) is—

(a) a certificate—

(i) attesting conformity to environmental management standards based on—

(aa) the Community Eco-Management and Audit Scheme; or

(bb) the relevant European or international standards; and

(ii) from an independent body established in any relevant State conforming to [EU] law or the relevant European or international standards concerning certification; or

(b) any other evidence of environmental management measures which are equivalent to the standards referred to in sub-paragraph (a)(i).

(5) A contracting authority which requires information to be provided in accordance with paragraph (2) shall specify in the contract notice or in the invitation to tender the information which the economic operator must provide.

Regulation 26

Supplementary information

Subject to regulation 27, the contracting authority may require an economic operator to provide information supplementing the information provided in accordance with regulations 23, 24 or 25 or to clarify that information, provided that the information so required relates to the matters specified in regulations 23, 24 or 25.

Regulation 28

Consortia28.—(1) In this regulation a "consortium" means two or more persons, at least one of whom is an economic operator, acting jointly for the purpose of being awarded a public contract.

(2) Subject to paragraph (3), a contracting authority shall not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those economic operators from which it will make the selection of economic operators to be invited to tender for or to negotiate a public contract or to be admitted to a dynamic purchasing system on the grounds that the consortium has not formed a legal entity for the purposes of tendering for or negotiating the contract or being admitted to a dynamic purchasing system.

(3) Where a contracting authority awards a public contract to a consortium it may, if it is justified for the satisfactory performance of the contract, require the consortium to form a legal entity before entering into, or as a term of, the contract.

(4) In these Regulations references to an economic operator where the economic operator is a consortium includes a reference to each person who is a member of that consortium.

Regulation 30

30 Criteria for the award of a public contract

(1) Subject to regulation 18(27) and to paragraphs (6) and (9) of this regulation, a contracting authority shall award a public contract on the basis of the offer which—

(a) is the most economically advantageous from the point of view of the contracting authority; or

(b) offers the lowest price.

(2) A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion.

(3) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.

(4) When stating the weightings referred to in paragraph (3), a contracting authority may give the weightings a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.

(5) Where, in the opinion of the contracting authority, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the contracting authority shall indicate the criteria in descending order of importance in the contract notice or contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.

(6) If an offer for a public contract is abnormally low the contracting authority may reject that offer but only if it has—

(a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;

(b) taken account of the evidence provided in response to a request in writing; and

(c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator.

(7) Where a contracting authority requests an explanation in accordance with paragraph (6), the information requested may, in particular, include—

(a) the economics of the method of construction, the manufacturing process or the services provided;

(b) the technical solutions suggested by the economic operator or the exceptionally favourable conditions available to the economic operator for the execution of the work or works, for the supply of goods or for the provision of the services;

(c) the originality of the work, works, goods or services proposed by the economic operator;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the contract is to be performed; or

(e) the possibility of the economic operator obtaining State aid.

(8) Where a contracting authority establishes that a tender is abnormally low because the economic operator has obtained State aid, the offer may be rejected on that ground alone only after—

(a) consultation with the economic operator; and

(b) the economic operator is unable to prove, within a reasonable time limit fixed by the contracting authority, that the aid was granted in a way which is compatible with the [TFEU].

(9) Where a contracting authority rejects an abnormally low offer in accordance with paragraph (8), it shall send a report justifying the rejection to the [Cabinet Office] for onward transmission to the Commission.

(10) In this regulation "offer" includes a bid by one part of a contracting authority to provide services, to carry out work or works or to make goods available to another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons.

Regulation 32

Award decision notice

(1) Subject to paragraph (13), a contracting authority shall, as soon as possible after the decision has been made, inform the tenderers and candidates of its decision to—

(a) award the contract; or

(b) conclude the framework agreement,

and shall do so by notice in writing by the most rapid means of communication practicable.

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

(a) the criteria for the award of the contract;

(b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—

(i) the economic operator which is to receive the notice; and

(ii) the economic operator—

(aa) to be awarded the contract; or

(bb) to become a party to the framework agreement,

and anything required by paragraph (10);

(c) the name of the economic operator—

(i) to be awarded the contract; or

(ii) to become a party to the framework agreement; and

(d) a precise statement of either—

(i) when, in accordance with regulation 32A, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies; or

(ii) the date before which the contracting authority will not, in conformity with regulation 32A, enter into the contract or conclude the framework agreement.

(2A) Where it is to be sent to a candidate, the notice referred to in paragraph (1) shall include—

(a) the reasons why the candidate was unsuccessful; and

(b) the information mentioned in paragraph (2), but as if the words "and relative advantages" were omitted from sub-paragraph (b).

(6A) Where the contract or framework agreement is permitted by these Regulations to be awarded or concluded without prior publication of a contract notice, the contracting authority need not comply with paragraph (1).

(6B) Where the only tenderer is the one who is to be awarded the contract or who is to become a party to the framework agreement, and there are no candidates, the contracting authority need not comply with paragraph (1).

(7) Where a contracting authority awards a contract under a framework agreement or a dynamic purchasing system, that contracting authority need not comply with paragraphs (1) to (5).

Reasons to be given on request to unsuccessful economic operators

(9) Except to the extent that the contracting authority has already informed the economic operator (whether by notice under paragraph (1) or otherwise), and subject to paragraph (13), a contracting authority shall within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful (whether in accordance with regulation 15(11), 16(7), 16(8), 17(9), 17(10), 17(22), 17(23), 18(10), 18(11), 18(22), 18(23), 19(9), 20(8), 20(14) or 30)—

(a) inform that economic operator of the reasons why it was unsuccessful; and

(b) if the economic operator submitted an admissible tender, the contracting authority shall inform that economic operator of the characteristics and relative advantages of the successful tender and—

(i) the name of the economic operator to be awarded the contract;

(ii) the names of the parties to the framework agreement; or

(iii) the names of the economic operators admitted to the dynamic purchasing system.

(10) The reasons referred to in paragraphs (2)(b) and (9)(a) shall include any reason for the contracting authority's decision that the economic operator did not meet the technical specifications—

(a) as specified in regulation 9(6) by an equivalent means; or

(b) in terms of the performance or functional requirements in regulation 9(7) by an equivalent means.

Abandonment or recommencement of procedure

(11) Subject to paragraph (13), a contracting authority shall as soon as possible after the decision has been made, inform any [candidates and tenderers], of its decision to abandon or to recommence a contract award procedure in respect of which a contract notice has been published, in relation to—

(a) the award of a contract;

(b) the conclusion of a framework agreement; or

(c) admittance to a dynamic purchasing system.

(12) A contracting authority which informs an economic operator of its decision in accordance with paragraph (11) shall—

(a) include the reasons for the decision; and

(b) provide the decision and reasons in writing if requested by the economic operator.

Grounds for withholding information

(13) A contracting authority may withhold any information to be provided in accordance with paragraph (1), (9) or (11) where the disclosure of such information—

(a) would impede law enforcement;

(b) would otherwise be contrary to the public interest;

(c) would prejudice the legitimate commercial interests of any economic operator; or

(d) might prejudice fair competition between economic operators.

Records and reports

(14) A contracting authority shall prepare a record in relation to each public contract awarded by it, framework agreement concluded by it or dynamic purchasing system established by it, specifying—

(a) the name and address of the contracting authority;

(b) the value of the consideration to be given under the contract, framework agreement or dynamic purchasing system and—

(i) the type of goods purchased or hired;

(ii) the work or works to be carried out; or

(iii) the services to be provided;

(c) where offers were evaluated in accordance with regulation 30, the names of the economic operators which submitted those offers and where the contracting authority has used the restricted procedure or negotiated procedure, the reasons why those economic operators were selected;

(d) the name of any economic operator—

(i) to which the contract was awarded;

(ii) with which the framework agreement was concluded; or

(iii) which was admitted to the dynamic purchasing system;

and the reasons for having—

(aa) awarded the contract to, or concluded the framework agreement with, that economic operator; or

(bb) admitted that economic operator to the dynamic purchasing system;

(e) the names of the economic operators which were unsuccessful in the circumstances referred to in regulation 15(11), 16(7), 16(8), 17(9), 17(10), 18(10), 18(11), 20(8) or 30 and the reasons why they were unsuccessful;

(f) if known to the contracting authority, the parts of the contract or framework agreement that the economic operator to which the contract has been awarded, or with which the framework agreement has been concluded, intends to sub-contract to another economic operator;

(g) in the case of a contracting authority which used the negotiated procedure, which of the circumstances specified in regulation 13 or 14 constituted grounds for using that procedure;

(h) in the case of a contracting authority which used the competitive dialogue procedure, details of the circumstances which constituted grounds for using that procedure in accordance with regulation 18(2); and

(i) where a contracting authority has abandoned a contract award procedure, the conclusion of a framework agreement or the establishment of a dynamic purchasing system, the reasons why the contracting authority has decided not to award the contract, to conclude the framework agreement or to establish the dynamic purchasing system as the case may be.

(15) A contracting authority shall keep appropriate information to document the progress of contract award procedures conducted by electronic means.

(16) If the Commission requests a report containing the information specified in paragraph (14), the contracting authority shall send a written report containing that information, or the main features of it, to the [Cabinet Office] for onward transmission to the Commission.

Definitions

(17) For the purposes of this regulation—

(a) "candidate" means an economic operator (other than a tenderer) which applied—

(i) to be included amongst the economic operators to be selected to tender or to negotiate the contract; or

(ii) to be a party to the framework agreement,

but does not include any economic operator which has been informed of the rejection of its application, and the reasons for it; and

(b) "tenderer" means an economic operator which submitted an offer and has not been definitively excluded.

(18) For the purposes of paragraph (17)(b)—

(a) a tenderer has been excluded if its offer has been excluded from consideration; and

(b) an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—

(i) the exclusion has been held to be lawful in proceedings under Part 9; or

(ii) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 47D(4) and (5).

32A Standstill period

(1) Where regulation 32(1) applies, the contracting authority must not enter into the contract or conclude the framework agreement before the end of the standstill period.

(2) Subject to paragraph (6), where the contracting authority sends a regulation 32(1) notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

(3) Subject to paragraph (6), where the contracting authority sends a regulation 32(1) notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first—

(a) midnight at the end of the 15th day after the relevant sending date;

(b) midnight at the end of 10th day after the date on which the last of the economic operators to receive such a notice receives it.

(4) In paragraphs (2) and (3), "the relevant sending date" means the date on which the regulation 32(1) notices are sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Subject to paragraph (6), where the contracting authority sends a regulation 32(1) notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest—

(a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;

(b) the time when whichever of the following occurs first—

(i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;

(ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.

(6) Where the last day of the standstill period reckoned in accordance with paragraphs (2) to (5) is not a working day, the standstill period is extended to midnight at the end of the next working day.

(7) In this regulation—

"regulation 32(1) notice" means a notice given in accordance with regulation 32(1); and

"relevant economic operators" means economic operators to which regulation 32(1) requires information to be given.

Regulation 47

47 Interpretation of Part 9

(1) In this Part, except where the context otherwise requires—

"claim form" includes, in Northern Ireland, the originating process by which the proceedings are commenced;

"contract", except in regulation 47O, means a public contract or a framework agreement;

"contracting authority" has the extended meaning given to it by regulation 47A(3);

"declaration of ineffectiveness" means a declaration made under regulation 47J(2)(a) or 47O(3);

"economic operator" has the extended meaning given to it by regulations 47A(3) and 47B(4);

"grounds for ineffectiveness" has the meaning given to it by regulation 47K;

"proceedings" means court proceedings taken for the purposes of regulation 47C; and

"standstill period", and references to its end, have the same meaning as in regulation 32A.

(2) In this Part. . . any reference to a period of time, however expressed, is to be interpreted subject to the requirement that, if the period would otherwise have ended on a day which is not a working day, the period is to end at the end of the next working day.

47A Duty owed to economic operators

(1) This regulation applies to the obligation on—

(a) a contracting authority to comply with—

(i) the provisions of these Regulations, other than regulations 14(2), 30(9), 32(14), 40 and 41(1); and

(ii) any enforceable [EU] obligation in respect of a contract or design contest (other than one excluded from the application of these Regulations by regulation 6, 8 or 33); and

(b) a concessionaire to comply with the provisions of regulation 37(3).

(2) That obligation is a duty owed to an economic operator.

(3) Where the duty owed in accordance with this regulation is the obligation on a concessionaire to comply with the provisions of regulation 37(3)—

(a) references in this Part to a "contracting authority" include, despite regulation 3, the concessionaire; and

(b) references in this Part to an "economic operator" include, despite regulation 4, any person—

(i) who sought, who seeks or would have wished, to be the person to whom a contract to which regulation 37(3) applies is awarded; and

(ii) who is a national of a relevant State and established in a relevant State.

47B Duty owed to GPA economic operators

(1) Subject to paragraphs (2) and (3), the duty owed to an economic operator in accordance with regulation 47A is a duty owed also to a GPA economic operator.

(2) The duty is not owed in relation to—

(a) a Part B services contract;

(b) a contract for research and development services specified in category 8 of Part A of Schedule 3;

(c) regulation 34;

(d) regulation 36;

(e) regulation 37(1); or

(f) regulation 37(2).

(3) The duty owed to a GPA economic operator in accordance with this regulation is owed by the Secretary of State for Defence only in relation to public supply contracts for the purchase or hire of goods specified in Schedule 5.

(4) References to an "economic operator" in this Part, except in regulation 47A or in relation to the duty owed in accordance with that regulation, also include a GPA economic operator.

(5) In this regulation—

"GPA economic operator" means a person from a GPA State who sought, who seeks, or would have wished, to be the person to whom the contract is awarded;

"GPA State" means any country, other than a relevant State, which at the relevant time is a signatory to the GPA and has agreed with the European Union that the GPA shall apply to a contract of the type to be awarded; and

"relevant time" means the date on which the contracting authority sent a contract notice in respect of the contract to the Official Journal or would have done so if it had been required by these Regulations to do so.

47C Enforcement of duties through the Court

(1) A breach of the duty owed in accordance with regulation 47A or 47B is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 47D to 47P apply to such proceedings.

47D General time limits for starting proceedings

(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods—

(a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—

(i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;

(ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first—

(i) 15 days beginning with the day after the day on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;]

(ii) 10 days beginning with—

(aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or

(bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.

(4) Subject to paragraph (5), the Court may extend the time limit imposed by paragraph (2) (but not any of the limits imposed by regulation 47E) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

47E Special time limits for seeking a declaration of ineffectiveness

(1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.

(2) Such proceedings must be started—

(a) where paragraph (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that paragraph;

(b) in any event, within 6 months beginning with the day after the date on which the contract was entered into.

(3) This paragraph applies where a relevant contract award notice has been published in the Official Journal, in which case the relevant date is the day after the date on which the notice was published.

(4) For that purpose, a contract award notice is relevant if, and only if—

(a) the contract was awarded without prior publication of a contract notice; and

(b) the contract award notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice.

(5) This paragraph applies where the contracting authority has informed the economic operator of—

(a) the conclusion of the contract; and

(b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.

(6) In paragraph (5), "the relevant reasons" means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 32(9).

(7) In this regulation, "contract award notice" means a notice in accordance with regulation 31(1).

(8) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

47F Starting proceedings

(1) Where proceedings are started, the economic operator must serve the claim form on the contracting authority within 7 days after the date of issue.

(2) Paragraph (3) applies where proceedings are started—

(a) seeking a declaration of ineffectiveness; or

(b) alleging a breach of regulation 32A, 47G or 47H(1)(b) where the contract has not been fully performed.

(3) In those circumstances, the economic operator must, as soon as practicable, send a copy of the claim form to each person, other than the contracting authority, who is a party to the contract in question.

(4) The contracting authority must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with paragraph (3).

(5) In this regulation, "serve" means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.

47G Contract-making suspended by challenge to award decision

[(1) Where—

(a) a claim form is issued in respect of a contracting authority's decision to award the contract;

(b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision; and

(c) the contract has not been entered into,

the contracting authority is required to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs—

(a) the Court brings the requirement to an end by interim order under regulation 47H(1)(a);

(b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(4) This regulation does not affect the obligations imposed by regulation 32A.

47H Interim orders

(1) In proceedings, the Court may, where relevant, make an interim order—

(a) bringing to an end the requirement imposed by regulation 47G(1);

(b) restoring or modifying that requirement;

(c) suspending the procedure leading to—

(i) the award of the contract; or

(ii) the determination of the design contest,

in relation to which the breach of the duty owed in accordance with regulation 47A or 47B is alleged;

(d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.

(2) When deciding whether to make an order under paragraph (1)(a)—

(a) the Court must consider whether, if regulation 47G(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and

(b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 47G(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court.

47I Remedies where the contract has not been entered into

(1) Paragraph (2) applies where—

(a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 47A or 47B; and

(b) the contract has not yet been entered into.

(2) In those circumstances, the Court may do one or more of the following—

(a) order the setting aside of the decision or action concerned;

(b) order the contracting authority to amend any document;

(c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(3) This regulation does not prejudice any other powers of the Court.

47J Remedies where the contract has been entered into

(1) Paragraph (2) applies if—

(a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 47A or 47B; and

(b) the contract has already been entered into.

(2) In those circumstances, the Court—

(a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 47L requires the Court not to do so;

(b) must, where required by regulation 47N, impose penalties in accordance with that regulation;

(c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in sub-paragraphs (a) and (b);

(d) must not order any other remedies.

(3) Paragraph (2)(d) is subject to regulation 47O(3) and (9) (additional relief in respect of specific contracts where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 47M(3) or 47N(10) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

47K Grounds for ineffectiveness

(1) There are three grounds for ineffectiveness.

The first ground

(2) Subject to paragraph (3), the first ground applies where the contract has been awarded without prior publication of a contract notice in any case in which these Regulations required the prior publication of a contract notice.

(3) The first ground does not apply if all the following apply—

(a) the contracting authority considered the award of the contract without prior publication of a contract notice to be permitted by these Regulations;

(b) the contracting authority has had published in the Official Journal a voluntary transparency notice expressing its intention to enter into the contract; and

(c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.

(4) In paragraph (3), "voluntary transparency notice" means a notice—

(a) which contains the following information—

(i) the name and contact details of the contracting authority;

(ii) a description of the object of the contract;

(iii) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice;

(iv) the name and contact details of the economic operator to be awarded the contract; and

(v) where appropriate, any other information which the contracting authority considers it useful to include; and

(b) which, if Commission Regulation (EC) No 1564/2005 as amended from time to time sets out a form to be used for the purposes of paragraph (3), is in that form.

The second ground

(5) The second ground applies where all the following apply—

(a) the contract has been entered into in breach of any requirement imposed by—

(i) regulation 32A (the standstill period);

(ii) regulation 47G (contract-making suspended by challenge to award); or

(iii) regulation 47H(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 47G);

(b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 47A or 47B in respect of obligations other than those imposed by regulation 32A (the standstill period) and this Part;

(c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the contract was entered into; and

(d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the contract.

The third ground

(6) Subject to paragraph (7), the third ground applies where all the following apply—

(a) the contract is based on a framework agreement or was awarded under a dynamic purchasing system;

(b) the contract was awarded in breach of any requirement imposed by—

(i) regulation 19(7)(b), (8) and (9) (award of particular contracts under framework agreements through re-opening of competition); or

(ii) regulation 20(11) to (14) (award of contracts under dynamic purchasing systems); and

(c) the estimated value of the contract [is equal to or exceeds] the relevant threshold for the purposes of regulation 8.

(7) The third ground does not apply if all the following apply—

(a) the contracting authority considered the award of the contract to be in accordance with the provisions mentioned in paragraph (6)(b)(i) or (ii);

(b) the contracting authority has, despite regulation 32(7), voluntarily complied with the requirements set out in regulation 32(1) to (2A); and

(c) the contract has not been entered into before the end of the standstill period.

47L General interest grounds for not making a declaration of ineffectiveness

(1) Where the Court is satisfied that any of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—

(a) the contracting authority or another party to the proceedings raises an issue under this regulation; and

(b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(2) For that purpose, economic interests in the effectiveness of the contract may be considered as overriding reasons only if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

(3) However, economic interests directly linked to the contract cannot constitute overriding reasons relating to a general interest.

(4) For that purpose, economic interests directly linked to the contract include—

(a) the costs resulting from the delay in the execution of the contract;

(b) the costs resulting from the commencement of a new procurement procedure;

(c) the costs resulting from change of the economic operator performing the contract; and

(d) the costs of legal obligations resulting from the ineffectiveness.

(5) For the purposes of paragraph (1)(b), overriding reasons may be taken to require that the effects of the contract should be maintained even if they do not require the Court to refrain from shortening the duration of the contract by an order under regulation 47N(3)(a).

47M The consequences of ineffectiveness

(1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

(2) Paragraph (1) does not prevent the exercise of any power under which the orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing—

(a) the implications of paragraph (1) or (2) for the particular circumstances of the case;

(b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(5) Paragraph (6) applies where the parties to the contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made.

(6) In those circumstances, the Court must not exercise its power to make an order under paragraph (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in paragraph (1) or (2).

47N Penalties in addition to, or instead of, ineffectiveness

(1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority pay a civil financial penalty of the amount specified in the order.

(2) Paragraph (3) applies where—

(a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that any of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 47L requires it not to do so; or

(b) in any proceedings, the Court is satisfied that the contract has been entered into in breach of any requirement imposed by regulation 32A, 47G or 47H(1)(b), and does not make a declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that any of the grounds for ineffectiveness applies).

(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties—

(a) that the duration of the contract be shortened to the extent specified in the order;

(b) that the contracting authority pay a civil financial penalty of the amount specified in the order.

(4) When the Court is considering what order to make under paragraph (1) or (3), the overriding consideration is that the penalties must be effective, proportionate and dissuasive.

(5) In determining the appropriate order, the Court must take account of all the relevant factors, including—

(a) the seriousness of the relevant breach of the duty owed in accordance with regulation 47A or 47B;

(b) the behaviour of the contracting authority;

(c) where the order is to be made under paragraph (3), the extent to which the contract remains in force.

(6) Where more than one economic operator starts proceedings in relation to the same contract, paragraph (4) applies to the totality of penalties imposed in respect of the contract.

Civil financial penalties

(7) Subject to paragraph (7A), where a contracting authority is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—

(a) the Court's order must state that the penalty is payable to the Minister for the Cabinet Office;

(b) the Court must send a copy of the order to the Minister;

(c) the contracting authority must pay the penalty to the Minister; and

(d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.

(7A) Where the Minister for the Cabinet Office, or the Cabinet Office, is ordered to pay a civil financial penalty under this Part—

(a) paragraph (7) does not apply; and

(b) the Minister for the Cabinet Office must pay the penalty into the Consolidated Fund.

(8) Subject to paragraph (8A), where a contracting authority is ordered by the High Court of Northern Ireland to pay a civil financial penalty under this regulation—

(a) the Court's order must state that the penalty is payable to the Department of Finance and Personnel;

(b) the Court must send a copy of the order to the Department;

(c) the contracting authority must pay the penalty to the Department; and

(d) the Department must, when it receives the penalty, pay it into the Consolidated Fund of Northern Ireland.

(8A) Where the Department of Finance and Personnel is ordered to pay a civil financial penalty under this Part—

(a) Paragraph (8) does not apply; and

(b) the Department must pay the penalty into the Consolidated Fund of Northern Ireland.

(9) Where a contracting authority is a non-Crown body—

(a) any payment due under paragraph (7) may be enforced by the [Minister for the Cabinet Office] as a judgment debt due to [the Minister]; and

(b) any payment due under paragraph (8) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

Contract shortening

(10) When making an order under paragraph (3)(a), or at any time after doing so, the Court may make any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the contract.

(11) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(12) Paragraph (13) applies where the parties to the contract have, at any time before the order under paragraph 3(a) is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such an order being made.

(13) In those circumstances, the Court must not exercise its power to make an order under paragraph (10) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the primary order that is being made, or has been made, under paragraph (3)(a).

(14) In paragraph (3)(a), "duration of the contract" refers only to its prospective duration as from the time when the Court makes the order.

47O Ineffectiveness etc in relation to specific contracts based on a framework agreement

(1) In this regulation, "specific contract" means a contract which—

(a) is based on the terms of a framework agreement; and

(b) was entered into before a declaration of ineffectiveness (if any) was made in respect of the framework agreement.

(2) A specific contract is not to be considered to be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement.

(3) Where a declaration of ineffectiveness has been made in respect of the framework agreement, the Court must, subject to paragraph (5), make a separate declaration of ineffectiveness in respect of each relevant specific contract.

(4) For that purpose, a specific contract is relevant only if a claim for a declaration of ineffectiveness in respect of that specific contract has been made—

(a) within the time limits mentioned in regulation 47E as applicable to the circumstances of the specific contract;

(b) regardless of whether the claim was made at the same time as any claim for a declaration of ineffectiveness in respect of the framework agreement.

(5) Regulation 47L (general interest grounds for not making a declaration of ineffectiveness) applies for the purposes of paragraph (3), insofar as the overriding reasons relate specifically to the circumstances of the specific contract.

(6) This regulation does not prejudice the making of a declaration of ineffectiveness in relation to a specific contract in accordance with other provisions of these Regulations on the basis of—

(a) the third ground of ineffectiveness set out in regulation 47K(6) and (7); or

(b) the second ground of ineffectiveness set out in regulation 47K(5), where—

(i) the relevant breach of the kind mentioned in regulation 47K(5)(a) is entering into the specific contract in breach of regulation 47G or 47H(1)(b); and

(ii) the relevant breach of the kind mentioned in regulation 47K(5)(b) relates specifically to the award of the specific contract and the procedure relating to that award, rather than to the award of the framework agreement and the procedure relating to it.

(7) A declaration of ineffectiveness must not be made in respect of a specific contract otherwise than in accordance with paragraph (3) or on a basis mentioned in paragraph (6).

(8) Where a declaration of ineffectiveness is made in respect of a specific contract in accordance with paragraph (3)—

(a) regulation 47M (the consequences of ineffectiveness) applies;

(b) regulation 47N(1) (requirement to impose a civil financial penalty) does not apply.

(9) Where the Court refrains, by virtue of paragraph (5), from making a declaration of ineffectiveness which would otherwise have been required

by paragraph (3), the Court must, subject to paragraph (10), order that the duration of the contract be shortened to the extent specified in the order.

(10) The extent by which the duration of the contract is to be shortened under paragraph (9) is the maximum extent, if any, which the Court considers to be possible having regard to what is required by the overriding reasons mentioned in paragraph (5).

(11) In paragraphs (9) and (10), "duration of the contract" refers only to its prospective duration as from the time when the Court makes the order.

47P Injunctions against the Crown

In proceedings against the Crown, the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947.

APENDIX II

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEENS BENCH DIVISION

Between

EASYCOACH LIMITED

Plaintiff

-and-

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant

AMENDED AMENDED STATEMENT OF CLAIM

Served this day of 2012 by
Tughans Solicitors
Marlborough House
30 Victoria Street
Belfast
BT1 3GS

1) The Plaintiff is a limited liability company established for the provision of transport and related services.

2) The Defendant published a contract notice in the Official Journal of the European Union for a public contract for the award of a contract to provide a Door to Door Transport Services within Northern Ireland. The Defendant stated that the contract would be awarded pursuant to the open procedure and that objective criteria would be used for selecting a limited number of candidates.

3) The proposed contract was a Part A services contract. At all times material to this Action, the Defendant was subject to the provisions of the Public Contracts Regulations 2006 ("the Regulations") and Directive 2004/18/EC. The Defendant is a Contracting Authority within the meaning of the Regulations and was at all times subject to an obligation to:-

1) treat economic operators equally and in a non-discriminatory way; and
2) act in a transparent way;

4) At all material times, the Plaintiff was an economic operator within the meaning of the Regulations.

5) The Defendant published an Invitation to Tender on the 23rd December 2010. The Defendant provided the prospective tenderers with Terms of Reference and Instructions to Tenderers, which the Plaintiff relied upon in the preparation of its bid. The Plaintiff will produce and rely upon the said documents upon the trial of this Action.

6) At all times material to this Action, the Defendant was obliged to treat the tenderers equally and in a non-discriminatory fashion. The Defendant elected to apply a procedure by which the tenders would be evaluated and assessed over 3 stages which would be distinguished as follows:-

Stage 1	Compliance with Mandatory Requirements
Stage 2	Minimum Standards of Technical Ability
Stage 3	Award Criteria

7) The Defendant sought tenders to provide the Door to Door Transport Services ("D2D") across 4 contract areas. The instructions and guidance supplied by the Defendant identified a series of mandatory requirements. The Defendant stated that a failure to comply with the mandatory requirements would result in a tender being excluded from the competition.

8) In addition to the mandatory requirements, the Defendant also required the tenderers to meet various selection criteria. The minimum standards to meet the selection criteria were identified as follows:-

1) Providing Transport Services
2) Operating a Transport Company
3) Providing Transport Services to People with Disabilities
4) Managing a Booking Centre, including scheduling customer journeys

9) Subject to each of the tenderers complying with the Mandatory Requirements and further satisfying the minimum standards as identified in the Selection Criteria, the evaluation panel then were obliged to consider the Award Criteria in order to assess the winning tender.

10) Following publication of the formal tender documentation and issue thereof to the prospective tenderers, the Defendant received a series of questions and issued Clarifications, which were provided to all of the tenderers. The Plaintiff will produce and rely upon the said Clarifications upon the trial of this Action.

11) The evaluation panel considered the 3 stages of their assessment at one time. Thereafter, on the 11th April 2011, the Defendant wrote to the

Plaintiff and advised that the various services has been awarded as follows:-

- Northern Contract Area – Quinn's Coach Hire
- Eastern Contract Area – Quinn's Coach Hire
- Southern Contract Area – Quinn's Coach Hire
- Western Contract Area – Out and About Enterprises

12) In each of the four contract areas, the Plaintiff's bid was ranked in 3rd place.

13) Upon reviewing the award notification and having had regard to the feedback supplied by the Defendant, the Plaintiff was satisfied that the Defendant had not assessed the tenders correctly and in fact had acted in breach of its obligations as a contracting authority, had acted unfairly and in a discriminatory manner and in breach of its obligations both pursuant to the Regulations and EC law.

14) On the 22nd April 2011, the Plaintiff instructed its solicitors to send a letter to the Defendant setting out its objections and concerns relating to the procurement exercise. The Plaintiff will produce and rely upon the chain of correspondence between it and the Defendant upon the trial of this Action.

15) The Defendant has failed to comply with its obligations in the following respects:-

1) The Defendant was guilty of manifest error and/or inequality of treatment in:-

a) Determining that Quinn Coach Hire did not intend to use partners/subcontractors to discharge transport services **therefore failing to apply the mandatory requirement that Quinn give details of the Road Service Operators Licence for those partners who were to provide transport services;**

2) Failed to formulate objective and/or transparent criteria at the selection criteria stage;
3) **Further and in the alternative, if the Court finds that the selection criteria are permissible and were intended to be applied to each of the four contract areas separately, then the Defendant was guilty of a lack of transparency/ objectivity and/or manifest error in the application of the selection criteria**
4) The Defendant was guilty of manifest error by reason of its failure to exclude Quinn Coach Hire and Out and About Enterprises Limited from moving to the Award Criteria Assessment on the grounds that:-

    a) They did not meet the minimum standards required;
    b) They did not provide full supporting evidence of the minimum standards required;

5) The Defendant was guilty of manifest error and/or inequality of treatment and or/a lack of objectivity and transparency by reason of its failure to objectively verify the information supplied by Quinn and Out and About when challenged and in consequence repeated the errors set out in 15(4) above in conducting a due diligence exercise;

16) Particulars of Grounds upon which the Defendant was guilty of manifest error in the application of the mandatory requirements in respect of the mandatory requirement entitled Vehicles/Drivers

1) Quinn Coach Hire submitted their bid indicating an intention to discharge the Bid through the use of partners/sub-contractors who would discharge 50% of the total transport services;
2) Quinn Coach Hire did not provide any details confirming that the Operator of vehicles carrying 9+ passengers had a Road Service (Bus Operators Licence);
3) The Defendant was guilty of a manifest error in its decision that Quinn Coach Hire met the mandatory requirement given that Quinn Coach Hire did not provide any details whatsoever to confirm that the Operators of the vehicles capable of carrying 9+ passengers held a Road Service (Bus Operators) Licence

17) Particulars of manifest error and inequality of treatment in determining that Quinn Coach Hire did not intend to use partners/subcontractors to discharge transport services

1) The Bid submitted by Quinn Coach Hire showed that 65% of the Contract would be discharged by partners/subcontractors;
2) The Defendant determined that Quinn Coach Hire would only use partners either for facilitating booking centre management or for providing contingency services when in fact more than 50% of the provision of transport was to be discharged by partners/subcontractors;

18) Particulars of Grounds upon which the Defendant failed to formulate objective and/or transparent criteria at selection criteria stage

1) In Breach of Regulations 15(11) and 25 of the Regulations and its duty of objectivity and transparency, the Defendant permitted impermissible minimum standards to be applied at the selection criteria stage which were not capable of being objectively and transparently assessed and in particular failed to:-

    a) adequately define what was meant by a relevant project similar in nature and scale to the services required by the Defendant;
    b) make clear the nature and scale of the said project and whether it related to 1 or 4 contract areas;
    c) explain how the 'similarity' between any previous project and the proposed contract would be assessed;
    d) make clear the weighting or score required to meet the minimum standard in respect of each of the identified criteria and submissions;
    e) in seeking evidence of similar projects, the Defendant introduced nebulous concepts which could not be objectively and transparently assessed such as:-

        (i) the customer organisation;
        (ii) the roles of key personnel responsible for delivering the project;
        (iii) evidence confirming delivery of project objectives;
        (iv) lessons and experience which may be of benefit to the Defendant;

19) **Further and in the alternative, if the Court finds that the selection criteria are permissible and were intended to be applied to each of the four contract areas separately, then the Defendant was guilty of a lack of transparency/objectivity and/or manifest error in the application of the selection criteria**

1) **The evaluation panel was not given access to that portion of the tenderers bids at the time it carried out the evaluation of the selection criteria;**
2) **The evaluation panel was not aware of the specific contract area(s) (North, South, East or West) which each bidder had applied for at the time of consideration of the selection criteria;**
3) **The evaluation panel was unable to apply the selection criteria to each bid in accordance with the stated intention of the Defendant (that each of the selection criteria would be considered against each of the contract areas individually) as the panel did not know which area each bidder was bidding for;**
4) **The evaluation panel applied the selection criteria in a manner which was not disclosed to the bidders and which was lacking in transparency; namely**

    a) **The panel applied the selection criteria to a figurative and non-existent geographical area which does not exist in practise;**
    b) **The Defendant failed to disclose to any of the bidders that this mechanism of applying the selection criteria would be adopted;**

c) **The figurative and non-existent geographical area was not, and cannot be defined and is unclear and lacking in transparency;**

5) **The evaluation panel were guilty of manifest error in seeking to apply a figurative and non-existent geographical area which does not exist in practise to the assessment of the selection criteria;**
6) **The application of a figurative and non-existent geographical area which does not exist in practise to the assessment of the selection criteria was lacking in objectivity;**

20) Further and in the alternative, if the selection criteria are permissible (which is denied) then at all times material to this Action, Quinn Coach Hire and Out and About Enterprises Ltd did not meet the minimum standards specified in the Instructions to Tenderers.

21) Particulars of Grounds of which the Plaintiff is aware upon which Quinn Coach Hire did not meet the minimum standards **as a matter of fact**:-

Providing Transport Services;

1) Tyrone County Board is not a relevant project, which is similar in nature and scale to the D2D contract as:-

a) It involves transport of a Senior Sports team not people with disabilities;
b) It requires approximately 16 trips per annum not 123,960 trips per annum;

c) It requires transport for all passengers to and from a fixed address and is not a demand response service;
d) It has a project value of approximately £7,000 per annum and not approximately £3,000,000 per annum;

Operating a Transport Company;

2) The North Eastern Education and Library Board contract is not a relevant project, which is similar in nature and scale to the D2D contract as:-

a) It involves a contract with a total value of £128,000 per annum and not approximately £3,000,000 per annum;
b) It involves transport on a fixed route and not a demand response service;
c) It requires the use of a few vehicles and not approximately 39 vehicles as required for the D2D contract;

Providing Transport Services to People with Disabilities

3) The transport for Etherson Travel on behalf of the North Eastern Health and Social Care Trust is not a relevant project, which is similar in nature and scale to the D2D contract as:-

a) It involves a contract with a annual value of £39,000 per annum and not approximately £3,000,000 per annum;
b) It involves 4 trips per day and not 339 trips per day;
c) It involves the use of 1 vehicle and not 39 vehicles;

Managing a Booking Centre, including scheduling customer journeys

4) Easytravel Ltd is not an appropriate project at all given:-

a) Quinn Coach Hire does not operate a booking centre for Easytravel and has never done so;

22) Particulars of the Defendant's Manifest Error by reason of its failure to Exclude Quinn Coach Hire from moving to the Award Criteria Assessment **based upon the details provided within its bid**;

Providing Transport Services;

1) The contract with the Tyrone County Board of the GAA is not a relevant project, which is similar in nature and scale to the D2D contract as:-

a) It represented transport of a Senior Sports team not people with disabilities;
b) It represented approximately 884 trips per annum not 123,960 trips per annum;

c) It represented transport for all passengers to and from a fixed address and is not a demand response service;
d) It represented a project value of approximately £265,000 per annum and not approximately £3,000,000 per annum;

2) On the Grounds Quinn did not provide full supporting evidence of the minimum standards required:-

a) No documentary evidence was provided to support the claimed income of £265,000;
b) The reference supplied was not supplied by the Customer Organisation but by Club Tyrone;

Operating a Transport Company;

3) The North Eastern Education and Library Board contract is not a relevant project, which is similar in nature and scale to the D2D contract as:-

a) It involves a contract with a total value of £128,000 per annum and not approximately £3,000,000 per annum;
b) It involves transport on a fixed route and not a demand response service;

c) It requires the use of a few vehicles and not approximately 39 vehicles as required for the D2D contract;

4) On the Grounds Quinn did not provide full supporting evidence of the minimum standards required:-

a) Quinn's did not submit a reference from the customer organisation but provided a reference from Rainey Endowed School;
b) No contract was provided;
c) No proof of appointment was supplied;

Providing Transport Services to People with Disabilities

5) The transport for Etherson Travel on behalf of the North Eastern Health and Social Care Trust is not a relevant project, which is similar in nature and scale to the D2D contract as:-

a) It involves a contract with a annual value of £39,000 per annum and not approximately £3,000,000 per annum;
b) It involves 4 trips per day and not 339 trips per day;
c) It involves the use of 1 vehicle and not 39 vehicles;

6) On the Grounds Quinn did not provide full supporting evidence of the minimum standards required:-

a) The reference purportedly provided by Etherson Travel has not been dated or signed;
b) Alternative any reference supplied by "Carers and Friends" was not supplied by the customer organisation;
c) There was no evidence of a 5 year contract or indeed a contract at all;

Managing a Booking Centre, including scheduling customer journeys

7) Quinn did not provide full supporting evidence of the minimum standards required and in particular did not supply any evidence showing management or operation of the booking centre as alleged;

23) Particulars of Grounds of which the Plaintiff is aware upon which Out and About Enterprises Ltd did not meet the minimum standards **as a matter of fact:-**

Providing Transport Services;
Operating a Transport Company;
Providing Transport Services to People with Disabilities
Managing a Booking Centre, including scheduling customer journeys

1) DRD "Dial a Lift" Scheme is not a relevant project, which is similar in nature and scale to the D2D contract as:-

a) It is not operated by Out and About Enterprises Ltd but by Mid Ulster Community Transport Ltd;
b) Out and About Enterprises Ltd is not entitled to rely upon the experience/ project held by Mid Ulster Community Transport Ltd in accordance with Regulation 25(3) of the Regulations;
c) Out and About Enterprises Ltd did not prove to the Defendant that the resources necessary to perform the contract will be available so as to be entitled to rely upon the capacity of Mid Ulster Community Transport Ltd;
d) The "Dial a Lift" Scheme has a value of £325,000 per annum and not approximately £3,000,000 per annum;

24) Particulars of the Defendant's Manifest Error by reason of its failure to Exclude Out and About from moving to the Award Criteria Assessment **based upon the details provided within its bid**;

Providing Transport Services;

1) The Plaintiff repeats the matters set out in 23(1) above

2) Out and About did not provide full supporting evidence of the minimum standards required in respect of the sub criteria:-

a) Evidence confirming delivery of project objectives on time and to budget;

b) Any lessons or experience of benefit to the Defendant;

Operating a Transport Company;
Providing Transport Services to People with Disabilities
Managing a Booking Centre, including scheduling customer journeys

3) The Plaintiff repeats the matters set out in 23(1) above

25) Further and in the alternative, on or about the 29th September and on the 10th October 2011, the Plaintiff wrote to the Defendant disclosing information which the Plaintiff alleged demonstrated that Quinn Coach Hire and Out and About Enterprises Limited either did not meet the selection criteria or had not provided "details of a relevant project" which was not applicable or similar in nature and scale to the services required by the Defendant. The Plaintiff will produce and rely upon this letter upon the trial of this Action together with all further information supplied by the Plaintiff concerning the ability of Quinn Coach Hire and Out and About Enterprises Limited to meet the selection criteria.

26) The Department contends that it carried out an exercise to check the suitability of Quinn Coach Hire and Out and About Enterprises to meet the standards of professional and technical ability. The Defendant alleges that it sought information from Quinn Coach Hire and Out and About Enterprises.

27) Having chosen to conduct a due diligence exercise, or, alternatively, having chosen to exercise its powers under Regulation 26, the Defendant has fallen into manifest error in the following respects:-

1) The Defendant did not seek information clarifying the information previously supplied by Quinn Coach Hire and Out and About Enterprises concerning their ability to meet the selection criteria;
2) Alternatively, the Defendant failed to seek the correct information from Quinn Coach Hire and Out and About Enterprises to assess whether they met the selection criteria and/or minimum standards of professional and technical ability;
3) Insofar as the Defendant did seek any information from Quinn Coach Hire and Out and About Enterprises then the said information sought and/or provided was not verifiable or if verifiable was not verified by the Defendant;
4) The Defendant did not objectively verify the professional and technical ability of Quinn Coach Hire and Out and About Enterprises and did not obtain information or have regard to an objective or transparent means of assessing the minimum standards of professional or technical ability falling within Regulations 15(11) and 25(2)
5) The Defendant fell into manifest error in its assessment of any further information supplied by Quinn Coach Hire and Out and About Enterprises insofar as it found that the said information demonstrated that the original tenders were complete and accurate in all material respects;

28) In the alternative, the Plaintiff's decision to submit a bid to be considered by the Defendant gives rise to an implied contract between the Plaintiff and the Defendant that the Defendant will act fairly and, in particular, will not seek to award any contract to any party which has provided false and misleading and/or fraudulent information within its bid.

29) Despite being on notice of the false and misleading information and/or fraudulent information supplied by Quinn Coach Hire, the Defendant has failed to communicate any intention to set aside its proposed award to Quinn Coach Hire and in doing so has breached the contract between the Plaintiff and the Defendant.

30) <u>Particulars of false and misleading information and/or fraudulent information supplied by Quinn Coach Hire in its tender bid</u>

a) In respect of Providing Transport Services:-

1) Quinn hold a contract with the Tyrone County Board solely for the transport of the senior team and not for any other teams as was suggested in Quinn's bid;
2) The value of the contract with Tyrone County Board is not £265,000 per annum but approximately £7,000 per annum;
3) Any contract held with Tyrone County Board requires approximately 16 trips per annum and not 884;
4) Tyrone County Board did not reduce their carbon footprint by 7% during 2010;
5) Tyrone County Board does not have a carbon neutral policy;
6) Tyrone County Board does not requires engine management records;

7) The reference supplied by Quinn was false and further does not relate to the Tyrone County Board but to Club Tyrone which does not hold a contract with Quinn for transport services;
8) The reference supplied by Quinn had a forged signature and was inaccurate in describing the Chairman of Club Tyrone as Ciaran MacLochlainn when the Chairman at the date of the said reference was Hugh McAleer;
9) The information in the said reference was false;

b) In respect of Managing a Booking Centre

1) Quinn does not manage or operate a booking centre for Easy Travel Ltd;
2) Quinn does not operate or manage a booking centre on behalf of Easytravel which would deal with 350,000 passengers annually;
3) Easytravel does not have 10 booking centre staff;
4) The alleged reference supplied from Easytravel was false and the signature of Philip Harkness had been forged;

31) By reason of the matters as aforesaid, the decision of the Defendant to award the contract(s) and/or maintain the award to Quinn Coach Hire and Out and About Enterprises Limited is unlawful, is in breach of the Public Contracts Regulations 2006 (as amended) and/or EC law and should be set aside.

AND THE PLAINTIFF CLAIMS

1) An Order setting aside the decision of the Defendant made on or about the 11th April 2001 in relation to the award of a contract for the provision of Door to Door Transport Services in Northern Ireland ("the Contract"), whereby it was

decided that the Plaintiff's offer to provide those services was not successful and the and the successful tenderer was identified as being Quinn's Coach Hire (across 3 contract areas) with Out and About Enterprises succeeding in the Western area.

2) A declaration that the said decision, rejecting the Plaintiff's offer to provide those services was unlawful, and/or was reached in a manner which was in breach of the Public Contracts Regulations 2006 (as amended) ("the 2006 Regulations") and/or in breach of enforceable general principles of EC law and/or in breach of contract.

3) A declaration that the Defendant, if it had acted lawfully in evaluation the respective offers to provide those services, should have awarded the Contract to the Plaintiff;

4) A Declaration that Quinn Coach Hire Limited and Out and About Enterprises Limited did not meet any minimum standards of technical or professional ability required by the Defendant under Regulation 15(11) of the Public Contracts Regulations 2006;

5) A Declaration that the minimum standards of technical or professional ability required by the Defendant under Regulation 15(11) were not permissible as means listed in Regulation 25(2) of the Public Contracts Regulations 2006;

6) Further or alternatively, damages:

i. Pursuant to Regulations 47L(2)(c) of the 2006 Regulations for breach of duty under the said Regulations, as a consequence of which the Plaintiff has suffered loss and damage;
ii. For breach of directly effective EC law; and/or
iii. For breach of contract

7) Such further or other relief as this Honourable Court deems meet; and all necessary and consequential directions;

8) Interest on all sums adjudged to be due and owing to the Plaintiff;

9) Costs;

10) An Injunction restraining the Defendant from proceeding to execute a contract with Quinn Coach Hire;

David Dunlop

APPENDIX III

SIAC CONSTRUCTION –v- MAYO COUNTY COUNCIL

"[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 Macfarlan 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."

LIANAKIS –v- GREECE

APPENDIX IV

"[25] It must be borne in mind that Article 23(1) of Directive 92/50 provides that a contract is to be awarded on the basis of the criteria laid down in Articles 36 and 37 of the Directive, taking into account Article 24, after the suitability of the service providers not excluded under Article 29 has been checked by the contracting authorities in accordance with the criteria referred to in Articles 31 and 32.

[26] The case-law shows that, while Directive 92/50 does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules (see, to that effect, in relation to works contracts, Case 31/87 Beentjes [1988] ECR 4635, paragraphs 15 and 16).

[27] The suitability of tenderers is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical capability (the 'qualitative selection criteria') referred to in Articles 31 and 32 of Directive 92/50 (see, as regards works contracts, Beentjes, paragraph 17).

[28] By contrast, the award of contracts is based on the criteria set out in Article 36(1) of Directive 92/50, namely, the lowest price or the economically most advantageous tender (see, to that effect, in relation to works contracts, Beentjes, paragraph 18).

[29] However, although in the latter case Article 36(1) of Directive 92/50 does not set out an exhaustive list of the criteria which may be chosen by the contracting authorities, and therefore leaves it open to the authorities awarding contracts to select the criteria on which they propose to base their award of the contract, their choice is nevertheless limited to

criteria aimed at identifying the tender which is economically the most advantageous (see, to that effect, in relation to public works contracts, Beentjes, paragraph 19; Case C-19/00 SIAC Construction [2001] ECR I-7725*, paragraphs 35 and 36; and, in relation to public service contracts, Case C-513/99 Concordia Bus Finland* [2002] ECR I-7213*, paragraphs 54 and 59, and Case C-315/01 GAT* [2003] ECR I-6351*, paragraphs 63 and 64).*

[30] Therefore, 'award criteria' do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question.

[31] In the case in the main proceedings, however, the criteria selected as 'award criteria' by the contracting authority relate principally to the experience, qualifications and means of ensuring proper performance of the contract in question. Those are criteria which concern the tenderers' suitability to perform the contract and which therefore do not have the status of 'award criteria' pursuant to Article 36(1) of Directive 92/50.

[32] Consequently, it must be held that, in a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36(1) of Directive 92/50 from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline.