Neutral Citation No: [2009] NIQB 15

Ref:	**McCL7426**
Delivered:	**19/02/09**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

2007 No. 14993

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

FEDERAL SECURITY SERVICES LIMITED

Plaintiff

-and-

THE NORTHERN IRELAND COURT SERVICE

Defendant

-and-

RESOURCE (NI) LIMITED

Intervening Party

McCLOSKEY J

I INTRODUCTION

[1] The issues to be resolved in these proceedings relate to the contractual provision of security and ancillary services in 23 courts throughout Northern Ireland. The context is shaped by a disappointed bidder (the Plaintiff), the existing contract holder and highest scoring bidder in the new contract award competition (the Intervening Party), the contract awarding authority (the Defendant) and a decision by the Defendant to abort the competition at a late stage.

[2] In brief compass, in 2006 the Northern Ireland Court Service ("*Court Service*"), the responsible public authority concerned, initiated a competition designed to lead to the award of a new contract for the provision of the aforementioned services. The Plaintiff was one of several undertakings which tendered for the contract. In the events which occurred, Court Service aborted the competition. Its decision was conveyed to the Plaintiff by letter dated 8th December 2006, in the following terms:

> " … *We have come to the conclusion that the instructions and statement of requirements issued to tenderers were insufficiently precise regarding the requirement to hold a licence to provide security services. This was included in the Statement of Requirements as a mandatory requirement. However, tenderers were also informed that criteria, including mandatory requirements, would be scored and weighted. On reconsideration, we should have provided that the statutory requirement to hold a licence under Schedule 13 to the Terrorism Act 2000 at the time of tendering was a pre-requisite without which tenders would not be further considered, rather than including it as one of a number of criteria which would be scored and weighted. The criteria were expressed in a way that could lead to an inconclusive answer on an issue which was in fact vital to the process.*
>
> *Having given the matter careful consideration, we have concluded that the proper course is to abandon the current procedure and initiate a new procedure for the award of this contract*".

This is the decision challenged by the Plaintiff and giving rise to its claim for various forms of relief.

[3] These proceedings are brought by originating summons with an attached schedule, which has mutated more than once as the litigation has progressed. Ultimately, the Plaintiff seeks the determination by the court of the following questions:

(i) Whether the impugned decision was unlawful and in breach of EU law.

(ii) If the answer to (i) is 'yes', whether the Defendant was thereby in breach of Regulation 47 of the Public Contracts Regulations 2006.

(iii) If the answer to (i) is 'yes', and the existing competition has to continue, whether Resource (NI) Limited (the intervening party, formerly Maybin Limited – hereinafter "*Maybin/Resource*") is disqualified from further participation by reason of its failure to have a valid security licence when it submitted its tender.

The remedies sought by the Plaintiff include an order annulling the impugned decision and an order requiring the Defendant to complete the aborted competition and award the contract on the basis that Maybin/Resource is ineligible or, alternatively, damages.

[4] As is evident from the foregoing, the non-possession by Maybin/Resource of a valid, current security licence at the time of submitting its tender for the contract, which is undisputed, is one of the key facts in the matrix which has unfolded in these proceedings. It will fall to the court to evaluate the significance of this fact and the legal consequences which flow therefrom. Given the obvious interest which Maybin/Resource has in the outcome of these proceedings, the court acceded to its application under Order 15, Rule 6 of the Rules of the Supreme Court (NI) 1980 to be added as an intervening party. This enabled Maybin/Resource to be represented at the trial and to address submissions to the court at its conclusion.

II <u>FACTUAL MATRIX</u>

[5] At the outset, it is appropriate to record that this trial was conducted on the basis of a mixture of agreed facts and agreed documentary evidence. The legal representatives of the parties are to be commended for the sensible and highly professional approach which brought this about. The gradually increasing resort in this jurisdiction to trials which do not consist exclusively (or sometimes at all) of the sworn *viva voce* evidence of witnesses, in cases where this is appropriate, is a welcome and positive development in contemporary litigation. Its primary virtue is that it results in shorter, more streamlined and more focussed hearings, with an associated saving in costs. This is manifestly harmonious with the terms and philosophy of the over-riding objective enshrined in Order 1, Rule 1A of the Rules of the Supreme Court. As a general rule, this mode of trial will be appropriate where it causes no injustice to any party and ensures that the court is properly equipped to do justice between the parties and to provide a fully informed judgment. The factual outline which follows should be considered against this background.

[6] The Court Service is a statutory entity, established by Section 69 of the Judicature (Northern Ireland) Act 1978, which describes this entity as "*a unified and distinct civil service of the Crown*". It is charged with the responsibility of facilitating the conduct of the business of the Supreme Court, County Courts, Magistrates' Courts and Coroners' Courts throughout Northern Ireland. Its officers and other staff are appointed by the Lord Chancellor and it is accountable to the Westminster Parliament through the Ministry of Justice Parliamentary Secretary and the Lord Chancellor.

[7] Prior to 2001, security and ancillary services in the 23 courts throughout Northern Ireland were provided by an in-house team, supported by police personnel. The responsibility for providing these services was assumed fully by the Court Service in 2001, following a recommendation of the Criminal Justice Review. This gave rise to the award of the first contract for the provision of such services.

The court was informed that Maybin/Resource secured this contract around November 2001. It would appear that, making due allowance for the maximum permitted contractual extensions, the contract was scheduled to expire in November 2006. This stimulated the competition designed to culminate in the award of a new contract and which gave rise to the impugned decision. In the events which have occurred, the court was also informed that the contract has been further extended and the latest extension is evidently scheduled to expire at the end of March 2009.

[8] The agency which had the function of designing and orchestrating the contract award competition and procuring the new contract was the Northern Ireland Office, Procurement Unit ("*the Procurement Unit*"). This responsibility derived from a service level agreement between the Court Service and the Procurement Unit. It is the court's understanding that the Procurement Unit, given its particular expertise and resources, provides similar services to Government Departments and certain other public authorities in Northern Ireland. The competition for the award of this contract, as designed, was divided into two basic stages, as explained below.

First Stage: Pre-Tender Questionnaire

[9] All interested parties had to submit a completed questionnaire by 20th April 2006. In the relevant documentary materials, potentially interested tenderers were given certain instructions, which stated, *inter alia*:

> "*Late questionnaires will not be considered …*
>
> *Failure to complete the questionnaire will result in your tender being excluded …*
>
> *Any tenderer who directly or indirectly canvasses any official of Procurement Unit or Department concerning the award of contract or who directly or indirectly obtains or attempts to obtain information from such official concerning the proposed or any other tender will be disqualified …*
>
> *Questionnaires must be submitted in accordance with these and any additional instructions. Failure to comply may result in a tender being rejected by Procurement Unit.*"

The accompanying documentation provided potential bidders with certain information. Under the heading "Security Services", it was stated:

> "*A more detailed description of the required services will be contained in the Statement of Requirement. In summary the following security services are required …*"

There followed a brief description of the requirements associated with four specific services – general security, safety, court order and keyholding. An outline of the "Ancillary Services" to be delivered under the contract was also provided. In the questionnaire, the potential bidder had to provide detailed information about his firm – including particulars of its background, experience, subsidiaries, directors, number of employees and insurance. The questionnaire also posed the specific question of whether the firm was registered to the standard identified as BS 5750, together with certain other relevant standards.

Second Stage: Submission and Evaluation of Tenders

[10] The Plaintiff and Maybin/Resource (together with eleven other companies) submitted completed questionnaires. They both passed through this phase of the competition successfully and, in common with five other companies, were invited, by letters dated 13th June 2006, to submit tenders for the award of the contract. It is evident from the correspondence that there was a period of just over one month within which to complete and submit the tender documents, the deadline for submission being 1st August 2006. Completed tenders were duly compiled and submitted to the Procurement Unit by the Plaintiff, Maybin/Resource and four of the other five companies concerned.

[11] The "documentation pack" furnished to each of the seven companies invited to submit tenders included "Instructions to Tenderers". Paragraph 1(vii) of these instructions stated:

> "*Tenders must be fully compliant with the requirements detailed in the tender documentation*".

By paragraph 7:

> "*Any tenderer who directly or indirectly canvasses any official of Procurement Unit or Department concerning the award of contract or who directly or indirectly obtains or attempts to obtain information from such official concerning the proposed or any other tender will be disqualified*".

Paragraph 8 continued:

> "*Tenders must be submitted in accordance with these and any additional instructions. Failure to comply may result in a tender being rejected by Procurement Unit.*"

Paragraph 11 of the instructions bears the title "Format of Response". This recites, in material part:

"For ease of evaluation and uniformity purposes tenderers should devote a section of their tender to clearly indicate the following:

(i) Mandatory requirements – detailed response required separately for security and ancillary services, on ***how and to what extent*** *the mandatory requirements will be met.*

(ii) Methodology –

Demonstrate your understanding of requirements.

Full details of your proposed approach on how you intend to deliver all the services required.

Details and evidence (where stated) must be provided in relation to how paragraphs ***3.2*** [and others] *in the Statement of Requirements will be met*".

[Emphasis added].

This is followed by paragraph 12, entitled "Mandatory Requirements", which states:

"*The mandatory requirements are detailed in Section 4 Statement of Requirements. It is insufficient to state that they will be met, tenderers must provide full details on* ***how and to what extent*** *they will be met*".

[Emphasis added].

[12] Next, paragraph 13 of the instructions addresses the topic of "Evaluation Criteria and Weightings", in the following terms:

"*Tenders will be evaluated to ascertain the most economically advantageous using the following criteria. Each criteria* [six] *will be scored 0-10 and multiplied by the weighting, giving maximum marks available 1000.*

Criteria	***Weightings***
Mandatory Requirements	
Security	***5***
Ancillary Services	***5***

Only tenders receiving a score of 20 or higher will proceed to have the remainder of their bid evaluated".

This latter statement is repeated in paragraph 14, "Evaluation Process", as follows:

> "*Tenders will be assessed against each of the above criteria. Only tenders receiving a score of 20 or higher in the mandatory requirements will proceed to have the remainder of their bid evaluated.*"

Paragraph 18 of the Instructions explains that the contract was scheduled to commence on 1st January 2007, with a duration of three years, subject to consensual maximum extensions of two years. This timetable has obviously been frustrated by the present litigation.

[13] Section 2 of the tender documentation bears the title "Tender Forms". Within these documents is located the contract which the Defendant was proposing to award. Clause 30.1 of the contract provides:

> "*The contractor shall be deemed to have acquainted himself with any and all Acts of Parliament, Statutory Regulations, or such other laws, recommendations, guidance or practices as may affect the provision of the service(s) specified under the Contract*".

Section 4 of the tender documents is the "Statement of Requirements". Its purpose is expressed, in paragraph 1.2.1, thus:

> "*This Statement of Requirement aims to inform tenderers, in detail, about the security and ancillary services that constitute the main contractual requirements and to describe the way in which Court Service intend to work with the contractor in order to deliver a high quality service*".

There follows an outline of the separate provision to be made under the contract viz. security services and ancillary services, together with details of matters such as security vetting, training, performance standards and quality management.

[14] The next section of the "Statement of Requirements" contains a series of provisions arranged under the title "Security Statement of Requirement". Paragraph 3.1.1 explains the purpose:

> "*The purpose of this section is to describe where and what security services the Department require, to what standards and specifications. In their submission, the contractor is to describe how they propose to deliver and manage this requirement. The actual delivery and management approach will be agreed, prior to commencement of the contract, with the contractor and Department.*"

This is followed by a key passage, entitled "Security Standards and Specifications" in which the capital letter "I" denotes "information", while "M" denotes "mandatory". Paragraph 3.2.1 states:

> "**I** *Tenderers are to provide information concerning their current application of the standards listed below.* ***(Where a contractor is working towards a standard this is to be stated)***."

[My emphasis].

This is followed by paragraph 3.2.2 (which was the subject of much attention and debate during the hearing):

> "*The services are to be delivered to meet the following security standards and specifications (or those that supersede them):*
>
> **M** *Secretary of State Certificate/Licence to provide security services. A copy should be submitted with your tender submission or an explanation as to why it has not been included*".

There follows a list of specified British Standards (in matters such as CCTV systems and mobile patrol services), none of which is classified as either "I" or "M". The second "M" requirement is contained in paragraph 3.3.1.

> "**M** *The contractor will be responsible for provision of general security at each location. This will be provided by … (etc.)*".

In the extensive requirements detailed in the ensuing paragraphs, ninety-one were categorised as mandatory. Others were given the "information" designation. The remainder had neither classification.

[15] The Plaintiff, Maybin/Resource and four other companies duly submitted completed tenders, within the stipulated deadline. In its tender, in the relevant part of paragraph 3.2 ("Security Standards and Specifications"), Maybin/Resource stated:

> "3.2.1 *We currently hold the following specifications and we will comply with the standards as stated in paragraph 3.2.2 below.*
>
> 3.2.2 *We will comply with all relevant security standards and specifications.*
>
> (**M**) *Secretary of State Certificate to provide security services.* ***(Section 4, enclosure 1).***"

The document thus enclosed was a licence issued by the Secretary of State for Northern Ireland to Maybin Support Services (NI) Limited (the predecessor of Maybin/Resource) under Section 106 of the Terrorism Act 2000, which contained the following statement:

> "*This licence is valid from 1st October 2004 and expires on 30th September 2005.*"

Accordingly, Maybin/Resource attached to their tender a statutory security services licence which had expired almost one year previously. The presentation of this expired licence and the associated failure to submit a valid current licence lie at the heart of the issues to be resolved in these proceedings.

[16] The agreed documentary evidence discloses that one of the other tendering parties made the following response to the requirement contained in paragraph 3.2.2:

> " *… Applied for this certificate and we understand that there is a lead in period of up to 8-10 weeks before this certificate can be issued. We envisage that we will be fully compliant with this requirement at the time of award*".

Thus, of the six tendering parties, one (Maybin/Resource) responded to the requirement enshrined in paragraph 3.2.2 by furnishing an expired statutory security services licence, while another responded by stating that it had applied for the requisite certificate and was expecting to receive it within a couple of months.

[17] The six tenders submitted were then evaluated by the panel established for this purpose. Before this exercise began, the Court Service discovered that Maybin/Resource did not have a valid current security licence. This gave rise to some consternation and related media interest. It would appear that Maybin/Resource then submitted an application for a fresh licence which was processed with the utmost speed. This culminated in a letter dated 4th August 2006 from Maybin/Resource to the Procurement Unit, stating:

> "*Please find attached copy of our current Security Licence. I would be grateful if you could pass this on to the Northern Ireland Court Service*".

Swift on the heels of this letter followed a further letter from the Managing Director of Maybin/Resource to the Court Service Director, apologising profusely for the company's default and proffering the following explanation:

> "*As you are aware, the current management team purchased the Maybin business through a locally funded management buy in on 1st March this year. At that time, as part of the detailed due*

diligence that was undertaken, we received legally binding warranties regarding all licences required in order to conduct our business. The warranties given not only related to the fact that such licences existed, but also that they were current. Therefore, we proceeded with our purchase of the Maybin business on that basis.

It has now come to light that, at the time of the management buy in by the current management team, the NIO licence that had been issued was out of date …

A renewal reminder had been issued by NIO prior to the renewal date. This reminder had been sent to an address at Dargan Crescent in Belfast that had been vacated some time previously. As a consequence of the address being vacant the reminder was returned to NIO as 'not known at this address' and no further reminder was issued to Maybin."

The new security licence was forwarded to Maybin/Resource under cover of a letter dated 3rd August 2006 from the NIO Security Policy and Operations Division (the relevant public authority concerned). The licence purported to operate from 1st August 2006, with a scheduled expiry date of 31st July 2007.

The Contract Award

[18] During the ensuing phase, the six tenders submitted were assessed by the evaluation panel, whose members received some written advice and instructions to which were appended copies of paragraphs 11-19 of the "Instructions to Tenderers". Panel members were advised *inter alia*:

"*Panel members should consider to what extent, having read the documentation enclosed, each tender meets the criteria outlined …*

Evaluation: *The objective of the evaluation panel is to ascertain the most economically advantageous tender in terms of qualitative and quantitative data when assessed against the criteria. The panel will be required to assess, based on the evidence provided, to what extent each tender meets the qualitative criteria and award scores accordingly …*".

In this evaluation exercise, Maybin/Resource was assessed as having complied with all of the 92 mandatory requirements, with the exception of the licence requirement contained at the beginning of the list found in paragraph 3.2.2 of the "Statement of Requirements" (cf. paragraph [14], *supra*). Applying the scoring and weighting methodology contained in paragraph 13 of the "Instructions to Tenderers" (paragraph [12], *supra*), which contemplated a possible maximum score of 1000, the evaluation panel gave Maybin/Resource a score of 920. Federal achieved an overall

score of 812. In the scoring records compiled by the evaluation panel, the issue of Maybin/Resource's security licence was addressed as follows:

> "*Maybin addressed 100% of the mandatory requirements for security, although the Secretary of State licence had expired and no explanation was given as to whether a renewal had been applied for. Therefore Maybin achieved 99% compliance*".

With regard to mandatory requirements for ancillary services, Maybin/Resource was assessed as having achieved 100% compliance.

[19] Following the evaluation of all tenders, the Plaintiff and Maybin/Resource emerged as the leading contenders for the award of the contract. They were the only tenderers invited to a "clarification" meeting. The other four tenderers were informed that they were not receiving such an invitation and that they would qualify for the provision of "feedback" following completion of the process. The "clarification" meetings were conducted on 29th September 2006. These did not result in any alteration of the parties' scores, which remained at 920 (Maybin/Resource) and 812 (the Plaintiff) respectively. This was followed by the tender evaluation report, containing the following conclusion:

> "*After the clarification meeting, the panel were content with the scores allocated to Maybin and Federal … therefore the scores remained unchanged.*
>
> *It is recommended and approved that this contract be awarded to Maybin Property Services*".

The next significant development was a letter dated 7th November 2006 from the Procurement Unit to Maybin/Resource, informing as follows:

> "*Thank you for your tender offer of 01 August 2006 for the above contract. The evaluation of tenders has been concluded and your offer has been assessed as the most economically advantageous …*
>
> *Our evaluation resulted in your bid receiving a score of 920 out of 1000.*
>
> *The Procurement Unit on behalf of its client, Northern Ireland Court Service, intend to issue a formal letter of acceptance on 22nd November 2006 …*".

At the same time, the Plaintiff received a letter advising it of the outcome.

The Decision to Abort the Competition

[20] The contemporaneous documents demonstrate that during the month of November 2006, there were extensive internal deliberations at a high level, involving senior civil servants and Ministers, concerning the proposed award of the contract to Maybin/Resource. This seems to have been stimulated particularly by information that the Police Service of Northern Ireland had investigated the non-possession by Maybin/Resource of a security licence and had transmitted a file to the Public Prosecution Service. A series of internal communications and submissions was generated during this period. At the same time, the Plaintiff wrote to the NIO Procurement Unit, by letter dated 10th November 2006. This letter raised a series of questions relating to the successful tenderer's non-possession of a valid, current licence at the time of submitting its tender.

[21] In the course of these internal reflections and deliberations, the Minister concerned sought answers to the following questions:

(i) Did Maybin/Resource require a security licence to apply for the contract?

(ii) If so, did they have one when they applied?

(iii) If not, why not?

These questions were addressed in an internal paper, which supplied the following answers:

> "1. *The tender documents for this competition required suppliers to provide information in relation to how they would meet the statement of requirements …*
>
> 2. *Specifically, a statement was included in the tender documents that services are to be delivered to meet a range of security standards. Included in this list was a mandatory requirement to provide a Secretary of State Certificate/Licence to provide security services. Suppliers were also instructed to submit a copy of the licence with their tender submission or an explanation as to why it was not included.*
>
> 3. *Outline details of the evaluation criteria were also included in the instructions issued to suppliers. This included the weighting applied to mandatory requirements and informed suppliers that companies receiving less than 20 marks in this area would not have the remainder of their bid evaluated.*

4. ***Within the evaluation criteria suppliers were not excluded from the tender for non-compliance against a single mandatory requirement.*** *The criteria effectively considered the level of compliance with mandatory requirements and awarded a proportionate score based on supplier compliance. In effect an average compliance score of less than 80% in both the security and ancillary mandatory requirements would prevent a company proceeding to the next stage of the competition.*

5. ***Based on these criteria non-provision of a licence was regarded as an incidence*** [sic] ***of non-compliance and the overall score adjusted in line with the agreed percentages****.*

   With regard to the security licence, Maybin submitted an expired licence. For this they were deducted one mark, however overall they met 99% of the mandatory requirements, therefore passing the threshold to have the remainder of their bid assessed".

[Emphasis added].

[22] The contemporaneous documents also make clear that, at this time, a decision was made to obtain legal advice. This is clear from the e-mails generated on 15th November 2006. Furthermore, at this stage, one of the senior officials concerned (Mr. Priestly) expressed his inability to understand why Maybin/Resource had not been automatically disqualified by virtue of its non-possession of a valid, current security licence. Next, Mr. McCracken of the Procurement Unit submitted a briefing paper to Minister Goggins, containing the following passages:

> "*In the evaluation process, suppliers were not excluded from the tender for non-compliance with a single mandatory requirement. Non provision of a valid security certificate was regarded as an incidence* [sic] *of non-compliance and the overall score adjusted to take account of this. As such, Maybin's bid was assessed as compliant. With hindsight, this was a mistake and lessons have been learned for the future.*
>
> *Maybin submitted a copy of their new security certificate on 4th August. It has an effective date of 1st August. However, this was not taken into account at the tender evaluation stage as it was submitted late.*"

This submission presented the following recommendation to the Minister:

"In the light of legal advice, we recommend that this tender process is aborted and started afresh".

It ends with the following paragraph:

"***Lessons learned.***

11. In future tender documents for security services will explicitly state the legal requirements under the Terrorism Act 2000. They will also specify that the licence needs to be valid at date of tendering, date of award and duration of the contract. *This will in future be a stand alone mandatory requirement and non-compliance will result in elimination of a company from the competition.*"

[Emphasis added].

[23] Subsequently, on 6th December 2006, a briefing paper from the Court Service Head of Policy and Legislation to Minister Prentice summarised the background and alluded to legal advice in the following way:

"*12. In consequence of this we sought counsel's advice on how best to proceed.*

<u>Advice</u>

13. There are essentially three options:

(i) Proceed to award the contract to Maybin/Resource.

(ii) Disqualify Maybin/Resource from the competition and award the contract to the second placed tenderer (Federal).

(iii) Abort the process and commence a fresh tender exercise."

There are two further documents to which reference should be made. The first is a further submission to Minister Goggins from the NIO Procurement Unit, dated 7th December 2006, advising on, *inter alia,* "Lines to Take". One of the latter was formulated thus:

"*The competition has been aborted because the tender process was flawed. The tender criteria were misleading because they did not adequately reflect the importance of the statutory requirement to possess a valid security licence*".

As was acknowledged on behalf of the Plaintiff, these two sentences encapsulate the rationale of the impugned decision. Next, there is a significant internal Court Service document, dated 11th December 2006, containing the following passage:

> "*Following publication of the notice of intent to award the contract a number of issues were raised in relation to the need to hold a valid licence under Schedule 13 to the Terrorism Act 2000 to provide the service. As a result further advice was sought on this issue and it has been concluded that the instructions and Statement of Requirement issued to tenderers were insufficiently precise regarding the requirement to hold a licence to provide security services …*
>
> *This requirement was included in the tender document as a mandatory item. However, tenderers were also informed that criteria, including mandatory requirements, would be scored and weighted. On reconsideration, the evaluation criteria should have provided that the statutory requirement to hold a licence … at the time of tendering was a pre-requisite without which tenders would not be further considered, rather than including it as one of a number of criteria which would be scored and weighted. The criteria were expressed in a way that could lead to an inconclusive answer on an issue which was in fact vital to the process. …*
>
> *Having given the matter careful consideration, it has been decided that the proper course of action is to abandon the current procedure and initiate a new tender for the award of this contract.*"

This document also affords some insight into the legal advice provided. The culmination of these protracted internal deliberations and communications was the letter dated 8th December 2006, framed in identical terms, transmitted to both the Plaintiff and Maybin/Resource, signalling the Defendant's decision to abort the competition and initiate a new contract award process. This is the twofold decision which the Plaintiff challenges in these proceedings.

[24] To complete the chronology, the Plaintiff swiftly initiated legal proceedings, by Originating Summons dated 5th February 2007. An application for judicial review, relating to the same subject matter, materialised subsequently and seems to have stalled the progress of these proceedings. In a judgment delivered on 8th June 2007, Morgan J refused leave to apply for judicial review.

III <u>DIRECTIVE 2004/18/EC</u>

[25] This 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].

[26] Against the background of governing principle set out immediately above, and taking into account the nature and thrust of the Plaintiff's case, certain of the Directive's recitals may be highlighted. Firstly, per recital (2):

> "*Whereas … the award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of*

establishment and the principle of freedom to provide service and to the principles deriving therefrom, ***such as the principle of equal treatment, the principle of non-discrimination,*** *the principle of mutual recognition,* ***the principle of proportionality and the principle of transparency***".

[Emphasis added].

Recital (46) states:

> "*Whereas … 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'. …*
>
> *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. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders*".

As the remainder of this recital makes clear, where the award criterion of most economically advantageous is adopted in any given competition, the contracting authority is concerned with the question of which tender "*offers the best value for money*" and, in assessing this, it shall "*determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority*". The recital continues:

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

[27] The principles readily discernible in the recitals quoted above are reflected, to a certain extent, in Article 2 of the Directive which, under the rubric "Principles of Awarding Contracts", provides:

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

Article 41, under the title "Informing Candidates and Tenderers", provides:

> "*Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system,* ***including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure*** *...*".

[Emphasis added].

Thus the Directive expressly contemplates that a competition for the award of a contract to which the Directive applies may be discontinued and/or may be recommenced. This is of obvious significance in the context of the present litigation. Finally, by Article 80/1, a deadline of 31st January 2006 for the implementation of the Directive by Member States was prescribed.

[28] The attention of the court was drawn to guidance emanating from the European Commission, published in the Official Journal on 1st August 2006. This bears the title "Commission Interpretative Communication on the Community Law Applicable to Contract Awards Not or Not Fully Subject to the Provisions of the Public Procurement Directives". This contains, in paragraph 2.2.1, the following passage:

> "**Transparent and Objective Approach**
>
> *All participants must be able to know the applicable rules in advance and must have the certainty that these rules apply to everybody in the same way*".

This can be readily linked to Recital (46) in the Directive and Article 2.

IV THE PUBLIC CONTRACTS REGULATIONS 2006

[29] The Public Contracts Regulations 2006 ("*the 2006 Regulations*") are the measure of domestic law transposing the Directive. They came into operation on 31st January 2006. Schedule 3 is concerned with the categories of services to be provided under contracts awarded in accordance with the Regulations. In Part B of Schedule 3, paragraph 23, one finds the category "Investigation and Security Services, Other than Armoured Car Services". This is the relevant category in the context of these proceedings and, applying the nomenclature of Regulation 2(2), this is known as "*a Part B Services Contract*". By virtue of Regulation 5(2), specified provisions of the Regulations apply to the award of this type of contract. This does not preclude the voluntary adoption by the relevant national authority of other provisions and, in this instance, the Defendant voluntarily applied Regulation 16 (which is concerned with the so-called "*restricted procedure*"). Regulation 16(7) provides:

> "*The contracting authority shall make its evaluation in accordance with Regulations 23, 24, 25 and 26 …*".

This is followed by Regulation 16(8):

> "*The contracting authority shall make the selection of the economic operators to be invited to tender in accordance with Regulations 23, 24, 25 and 26 and shall award the contract in accordance with Regulation 30*".

Regulation 23 enshrines various criteria for the rejection of economic operators. Some of these are couched in *prima facie* mandatory language, to be contrasted with Regulation 23(4) which provides:

> "*A contracting authority* ***may*** *treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator - …*
>
> *(i) in relation to procedures for the award of a public services contract, is not licensed in the relevant State in which he is established …*".

[Emphasis added].

[30] The subject matter of Regulation 30 of the 2006 Regulations is the criteria for the award of a public contract. The national authority must choose between the criterion of the most economically advantageous offer and that of the lowest price offer. Regulation 30(2) provides:

> "*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*".

Regulation 30 continues:

> "*(3) Where a contracting authority intends to award a 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*".

Regulation 32 provides for two distinct possibilities. The first is a decision by the contracting authority to award the contract. This triggers an obligation to inform any tendering party of the decision, in specified terms. The second possibility is spelt out in Regulation 32(11):

> "*Subject to paragraph (13) a contracting authority shall as soon as possible after the decision has been made inform any economic operator which submitted an offer … 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 …***".

[Emphasis added].

Thus the contracting authority is specifically empowered to abort the competition. By virtue of Regulation 32(12), the reasons for a decision of this kind must be provided.

[31] The essential thrust of Regulation 47 of the 2006 Regulations is that the obligation imposed on a contracting authority to comply with the Regulations and any enforceable Community obligation in respect of a public contract "*… is a duty owed to an economic operator*". Regulation 47(6) continues:

> "*A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court*".

Regulation 47(5) empowers the court to grant certain remedies. These include an interim order suspending the procedure leading to the award of the contract; an order setting aside any decision to award the contract; an order requiring the contracting authority to amend any document; and the award of damages to any economic operator which has suffered loss or damage in consequence of the breach of duty.

V THE TERRORISM ACT 2000

[32] The relevant provisions of this statute are worthy of separate mention, as they regulate the topic of security services licences, a discrete issue of some prominence in these proceedings. Schedule 13 provides, in material part:

"1. In this Schedule 'security services' means the services of one or more individuals as security guards (whether or not provided together with other services relating to the protection of property or persons).

2. A person commits an offence if he provides or offers to provide security services for reward unless he –

(a) holds a licence under this Schedule …

5(1) A person guilty of an offence under paragraph 2 or 3 shall be liable –

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, to a fine or to both, or

(b) on summary conviction, to imprisonment to a term not exceeding six months, to a find not exceeding the statutory maximum or to both …

6(1) An application for a licence under this Schedule shall be made to the Secretary of State –

(a) in such manner and form as he may specify, and

(b) accompanied by such information as he may specify …

7(1) The Secretary of State shall grant an application for a licence unless satisfied that –

(a) an organisation within subparagraph (4) would be likely to benefit from the licence …

(b) that the applicant has persistently failed to comply with the requirements of this Schedule, or

(c) that the applicant has failed to comply with a condition imposed under subparagraph (2).

(2) The Secretary of State may on granting a licence impose a condition if satisfied that it is necessary in order to prevent an organisation within subparagraph (4) from benefiting from the licence.

(4) An organisation is within this subparagraph if –

(a) it is a proscribed organisation, or

> *(b) it appears to the Secretary of state to be closely associated with a proscribed organisation.*"

Finally, paragraph 8 of Schedule 3 is of some importance in the present context:

> "*8(1) A licence –*
>
> *(a) shall come into force at the beginning of the day on which it is issued, and*
>
> *(b) subject to subparagraph (2), shall expire at the end of the period of twelve months beginning with that day.*
>
> *(2) Where a licence is issued to a person who already holds a licence, the new licence shall expire at the end of the period of twelve months beginning with the day after the day on which the current licence expires.*
>
> *(3) The Secretary of State may by order substitute a period exceeding twelve months for the period for the time being specified in subparagraphs (1)(b) and (2)*".

The court was informed that the Secretary of State has not exercised the last-mentioned power. For completeness, paragraph 9 of Schedule 13 empowers the Secretary of State to revoke a licence in specified circumstances and this triggers certain requirements of procedural fairness, including a right of appeal.

VI RELEVANT EUROPEAN AND DOMESTIC JURISPRUDENCE

[33] The judicial decisions, both European and domestic, which fall to be considered in order to resolve the issues in these proceedings essentially belong to two streams. The first of these streams provides guidance on how the principles of transparency and equal treatment impact on the information furnished to tenderers about the criteria and weightings to be applied in the contract award decision. The second stream of jurisprudence is concerned with the principles and constraints which govern a decision by the national contracting authority to discontinue a contract award competition and/or to recommence afresh.

[34] The issue of undisclosed contract award criteria was considered by the European Court of Justice in ***Universale-Bau and Others*** [2002] ECR 1–11617. The Court ruled in favour of the tendering party. It its judgment, it stated:

> "*[91] The principle of equal treatment, which underlies the Directives on procedures for the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with …*

> *[93] It follows … that the procedure for awarding a public contract must comply, at every stage, particularly that of selecting the candidates in a restricted procedure, both with the principle of the equal treatment of the potential tenderers and the principle of transparency so as to afford all equality of opportunity in formulating the terms of their applications to take part and their tenders …*
>
> *[97] …* [the Directive] *… imposes on the contracting authority the obligation to state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of their importance …*
>
> *[98] … The requirement thus imposed on the contracting authorities is intended precisely to inform all potential tenderers, before the preparation of their tenders, of the award criteria to be satisfied by these tenders and the relative importance of those criteria, thus ensuring the observance of the principles of equal treatment of tenderers and of transparency.*"

To like effect is the decision of the European Court in ***ATIEAC*** [2005] ECR 1 – 10109: see paragraphs [22] – [31] and, in particular, paragraph [28]:

> "*Second, it must be determined whether the decision contains elements which, if they had been known at the time the tenders were prepared, could have affected that preparation*".

The same approach is discernible in the subsequent decision of the European Court in ***Lianikis,*** Case C – 532/06: see paragraphs [36] – [40] especially.

[35] In ***SIAC Construction –v- Mayo County Council*** [Case C-19/00] [2002] All ER (EC) 272, the European Court considered the interaction between the obligation of equal treatment and the principle of transparency, from the perspective of the formulation of contract award criteria. The Court stated:

> "[32] *The Court has held … that the purpose of co-ordinating 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 interest of traders established in a Member State in which to offer goods or services to contracting authorities established in another Member State …*
>
> [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 …*

> [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*".

The judgment then recalls that the Court had previously ruled that, in the determination of the most economically advantageous tender, it is permissible to include the reliability of supplies amongst the contract award criteria. It continues:

> "[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 … 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 …*
>
> [42] ***More specifically, this means that the award criteria must be formulated, in the contract documents or in the contract notice, in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret the in the same way***".

[Emphasis added].

[36] Belonging to the first stream of authority is the decision of the English Court of Appeal in ***Letting International –v- Newham London Borough Council*** [2007] EWCA. Civ 1522, where the main issue concerned a failure by the contract awarding agency, a local authority, to disclose to tenderers the sub-weightings to be applied to the five published criteria. Compliance with the specification carried a 50% weighting. However, assessment of this compliance was conducted by reference to five aspects on which method statements had been required. To each of these aspects the authority had allocated a specific proportion of the overall score applicable to the criterion as a whole. These proportions varied between 5% and 17% and had not been published in the tender documents. The Court stated:

> "*[23] … The point of publishing criteria and their weighting is to enable bidders to know the relevance importance which the contracting authority attaches to different aspects of the contract as a whole and to formulate their bids in that knowledge. If the published criteria are broadly defined, the adoption of sub-criteria is capable of frustrating their objective …*
>
> *Whether they do have that effect will depend on the circumstances of the case*".

The Court concluded that an interim order should be made under Regulation 47(8)(a) of the 2006 Regulations.

[37] This was followed by the trial of the main action, reported at [2008] EWHC.1583 (QB). In his judgment, Silber J identified six issues for determination. The first and second of these were formulated thus:

> "*[20] The issues in dispute are:*
>
> *(a) Whether Newham acted without the requisite degree of transparency required by Regulation 30 in failing sufficiently to disclose contract award criteria and weightings in advance by not setting out in advance the detailed criteria and sub criteria against which it actually marked the tenders, nor the way in which they were weighted relative to each other …*
>
> *(b) Whether Newham acted without the requisite degree of transparency required by Regulation 30 in failing to apply those criteria which were disclosed and instead only awarding three marks out of five under each detailed award criterion for compliance with the specification, with the remaining two marks awarded for exceeding the contract specification.*"

The judge rejected the argument that proper disclosure would not have altered the outcome: see paragraphs [72] – [75]. In response to the further argument that the Plaintiff tenderer ought to have anticipated some of the undisclosed award criteria, the judge stated:

> "*[77] I am unable to accept this submission. First, it means rewriting Regulation 30(3) so that a tendering authority is excused from disclosing weightings and criteria if the tenderer* ***ought*** *to have known them. In other words, this is an implied exception to this Regulation. Second, there is no basis in ECJ jurisprudence for such an approach …*
>
> *[78] Third, in any event, even if Newham was correct, it has not come close to establishing that the relative weightings of the award criteria was in fact predictable to tenderers or ought to have been known to the Claimant …*
>
> *The fact that … it was possible to predict that customer service would be of considerable importance to Newham is immaterial. Predicting that some criterion might be used is not the same as predicting the precise weighting and if need be the relative importance or the precise nature of it. It was plainly a matter of judgment for a particular local authority as to what relative weight it would give to these different matters. After all, perfectly sensible arguments could have been adduced for attaching more or less weight to particular matters than Newham actually did.*

> *[79] Finally, the rationale of requiring a contracting authority to state its award criteria in advance is to ensure that tenderers will not have to second guess what the award criteria are and how they will be weighted*".

The judge described his conclusion as "*an inevitable consequence of the overarching principles of transparency and equal treatment*": paragraph [87]. He continued:

> "*[88] For the purpose of completeness, I should add if, contrary to the above conclusions, the consequences of non-disclosure are material at all to the question of Newham's liability, then … the issue can only be whether non-disclosure **could** (and not **would**) have made a difference to the preparation of the claimant's tender*".

[38] Further guidance is found in the decision of the English Court of Appeal in ***Regina (Law Society) –v- Legal Services Commission*** [2008] 2 WLR, where the central issue related to a provision in a contract, devised by the Legal Services Commission, empowering the Commission to amend any of the contractual terms in certain circumstances. The Law Society brought proceedings, contending that this was incompatible with Regulations 4 and 9 of the 2006 Regulations. Parallel proceedings were brought by an affected firm of solicitors. Delivering the judgment of the court, Lord Phillips MR noted, firstly, the pronouncement of the European Court in ***Commission –v- French Republic*** [2004] ECR1 – 9845, at paragraph [34]:

> "*The principle of equal treatment of service providers, laid down in … the Directive and the principle of transparency which flows from it … require the subject matter of each contract and the criteria governing its award to be **clearly defined**.*"

[Emphasis added].

Elaborating, his Lordship explained that the rationale of this principle is that it enables the contracting authority to satisfy itself that the principles of equal treatment and non-discrimination on the grounds of nationality have been observed; it facilitates competition; it enables the impartiality of procurement procedures to be reviewed; and it precludes any risk of favouritism or arbitrariness on the part of the contracting authority. Lord Phillips MR continues:

> "*[43] … Fifth, it promotes a level playing field by enabling all tenderers to know in advance on what criteria their tenders will be judged and those criteria are assessed objectively …*
>
> *[45] It is clear that, where amendments to the tender criteria or to the contract are made after an award to one party, such amendments are liable to infringe the principles in that, **had the***

> ***other tenderers been aware in advance of the terms of the contract actually put in place, this might have affected the terms of their tenders.*** *Such amendments can violate the principle of transparency and of equality of treatment*".

[Emphasis added].

Thus the test devised is as follows: If the tenderers had known in advance of the relevant information, bearing on the award criteria or the proposed contract, might this have influenced the terms in which they formulated their tenders?

[39] The second stream of authority, on which emphasis was placed on behalf of the Plaintiff, is identifiable in three decisions of the European Court of Justice. It concerns the approach to be applied to decisions by national contract awarding authorities to discontinue and/or recommence a contract award competition. This issue arose in ***Hospital Ingenieure –v- Stadt Wien*** [2004] 3 CMLR 16, where the contracting authority, following a process of inviting tenders and receipt thereof, purported to withdraw the invitations to tender. The reason proffered for this decision was that, following a study, results indicated that the service in question would have to be developed in a de-centralised manner, thereby rendering the award of the contract to an outside project leader unnecessary. A disappointed tenderer challenged this decision on a series of grounds. One of the questions referred to the European Court was "*… whether national rules limiting the extent of the review of the legality of the withdrawal of an invitation to tender for a public service contract to mere examination of whether that decision was arbitrary is compatible with Directives 89/665 and 92/50*": see paragraph [56] of the judgment. Referring to the Remedies Directive (No. 89/665), the European Court observed that "*… the scope of the judicial review to be exercised in the context of the review procedures referred to therein cannot be interpreted restrictively*": see paragraph [61]. It concluded:

> "*[63] In those circumstances, it must be held that neither the letter nor the spirit of Directive 89/665 permits the conclusion that it is lawful for Member States to limit the review of the legality of a decision to withdraw an invitation to tender to mere examination of whether it was arbitrary*".

The judgment of the European Court goes a little further, providing guidance on the correct approach to be applied by the reviewing court. In paragraph [40] referring to its earlier decision in ***Fracasso,*** the Court reiterates that –

> "*…Article 8(2) of Directive 93/37 does* ***not*** *provide that the option of the contracting authority to decide not to award a contract put out to tender, implicitly allowed by Directive 93/37, is limited to exceptional cases or must necessarily be based on serious grounds*".

[Emphasis added].

Simultaneously, the Court affirms that "*… there is no implied obligation on that authority to carry the award procedure to its conclusion*": see paragraph [41]. The judgment continues:

> "*[47] It follows that, even though Directive 92/50 does not specifically govern the detailed procedures for withdrawing an invitation to tender for a public service contract, the contracting authorities are nevertheless required, when adopting such a decision, to comply with the fundamental rules of the Treaty in general and the principle of non-discrimination on the ground of nationality in particular*".

[40] In ***Metalmeccanica –v- Ant Der Salzburger*** [1999] All ER(D) 1015, an Austrian local authority, having issued an invitation to tender for motorway surface works and following receipt of tenders, decided to use concrete instead of steel and abandoned the contract award process in consequence, invoking a provision of Austrian law which permitted cancellation if only one tender was considered suitable. The European Court was required to rule on whether by virtue of Article 18(1) of Directive 93/37, the contracting authority which had invited tenders was required to award the contract to the only tenderer adjudged suitable. The Court ruled:

> "*[23] In the first place … Article 8(2) of Directive 93/37, which requires a contracting authority to inform candidates or tenderers as soon as possible of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure,* ***does not provide that such a decision is to be limited to exceptional cases or has necessarily to be based on serious grounds.***
>
> *[24] Similarly, as regards Article 7, 18 and 30 of Directive 93/37… it need merely be observed that no obligation to award the contract in the event that only one undertaking proved to be suitable can be inferred from those provisions.*
>
> *[25] It follows that the contracting authority's option, implicitly recognised by Directive 93/37, to decide not to award a contract put out to tender or to recommence the tendering procedure is not made subject by that Directive to the requirement that there must be serious or exceptional circumstances*".

{Emphasis added].

[41] Further guidance on the correct approach to be adopted is provided by the decision in ***Kauppatalo Hansel –v- Imatran Kaupunki*** [2004] 3 CMLR 17 where, having invited and received tenders for the award of an electricity supply contract, the Finnish authority discovered that to change the supplier would generate

additional costs not previously appreciated, precipitating a decision to publish a new invitation to tender. A disappointed tenderer challenged the discontinuance of the original tendering procedure. The question to be decided by the European Court, in its preliminary ruling, was:

> "*[24] … whether Directive 93/36 must be interpreted as meaning that a contracting authority which has commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of errors committed by itself in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender*".

The court reiterated that a decision of this *genre* "*… is still subject to fundamental rules of Community law and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services*": see paragraph [31]. In paragraph [32], the court highlighted that the obligation to give reasons for a discontinuance decision is linked to "*the twofold objective of exposure to competition and transparency*" and is "*… dictated precisely by concern to ensure a minimum level of transparency in the contract awarding procedures …*". The judgment continues:

> "*[33] Therefore the court held* [in ***Hospital Ingenieure***] *that the contracting authorities are … required … to comply with the fundamental rules of the Treaty in general and the principle of non-discrimination on the ground of nationality in particular …*
>
> *[34] Therefore the answer to the questions referred by the national court must be that Directive 93/36 needs to be interpreted as meaning that a contacting authority which commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of errors committed by itself in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender, provided that, when it adopts such a decision, it complies with the fundamental rules of Community law on public procurement such as the principle of equal treatment*".

[42] Factually, each of the three decisions of the European Court considered immediately above is different from the present case. The decision in ***Kauppatalo*** comes closest to the factual matrix in the instant case. From these decisions certain general principles can be readily distilled. It is the task of the court to apply such principles to the present factual matrix, in determining the issues thrown up by the Plaintiff's challenge.

[43] Separate mention should be made of the European law principle of proportionality, given the prominence which this occupies in the arguments advanced on behalf of the Plaintiff. One of the leading textbooks contains the following observation:

> "*Furthermore, Member States are also bound by the general principles of Community law, including proportionality, when acting within the field of Community law. This is particularly the case when the national authorities seek to limit the free movement rights enshrined in Articles 28, 39, 43, 49 and 56 EC by relying on the mandatory requirement doctrine or on the Treaty derogations. In this context, the Court has consistently held that a rule which impacts on one of those rights not only has to pursue an interest consistent with Community Law, but it also have to be proportionate to that end.*"

[Wyatt and Dashwood, ***European Union Law,*** 5th Edition, p. 243].

The concept of proportionality entails the notion of balance and an appropriate relationship between the end pursued and the means employed to achieve the end in question. By way of example, the European Court has described the contours of this principle in the following terms:

> "*The court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures* ***are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question;*** *when there is a choice between several appropriate measures recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued*".

[***Case C – 331/88*** (1990) ECR 4023, paragraph 13].

Similar formulations of the principle are readily found in other decisions of the European Court.

VII THE PARTIES' MAIN CONTENTIONS

[44] What follows is a short outline of the central arguments advanced by the parties. I have considered fully the clear and detailed skeleton arguments prepared by the main parties, as supplemented and refined in oral argument.

[45] On behalf of the Plaintiff, Mr. Hanna QC (appearing with Mr. Coyle) acknowledged, properly, that in the context under consideration a contracting

authority is entitled, in appropriate circumstances, to discontinue and/or recommence a contract award competition. However, the constraints on this power featured prominently in the Plaintiff's submissions, which laid some emphasis on the second stream of authority outlined above. Mr. Hanna's submissions drew attention to the principles of proportionality and transparency in particular, while reminding the court also of the related principle of legitimate expectation.

[46] The cornerstone of the Plaintiff's submissions was the twofold contention that (a) the instructions to tenderers imported a requirement to submit a valid, current statutory security licence with their tender, in unambiguous terms and (b) this requirement was mandatory, in the sense that, as framed, it admitted of no possible relaxation or exception and operated as a precondition to further evaluation of tenders submitted. Building on this base proposition, Mr. Hanna contended that the impugned decision was disproportionate. The Defendant, he argued, erred in concluding that the instructions to tenderers, in this respect, could have been the cause of uncertainty or possible confusion on the part of any tenderer. Lack of proportionality was further evidenced by the considerations that the competition had reached an advanced stage and the Plaintiff was a suitable and high scoring candidate. Thus, it was submitted, the Defendant's decision was arbitrary and, further, discriminatory as it gave an unfair advantage to a candidate (Maybin/Resource) which, through its own fault, had failed to observe an unambiguously phrased mandatory requirement. It was further submitted that, the requirement being statutory in nature, Maybin/Resource should have been aware of it and could not invoke ignorance of the law as an excuse. While a complaint of improper purpose had formed part of the Plaintiff's case at an earlier stage, Mr. Hanna expressly disavowed any reliance on this at the trial.

[47] The submissions of Mr. Gerald Simpson QC, appearing with Mr. Henshaw on behalf of the Defendant, placed due emphasis on the first of the streams of authority discussed above. Mr. Simpson submitted that the Defendant did not have to establish any exceptional or serious grounds to justify its decision. Rather, the standard against which the Defendant's decision is to be measured is a less exacting one. He drew attention to the following passage in ***The Law of Public and Utilities Procurement*** (Arrowsmith, 2nd Edition), paragraph 7.168:

> "*For various reasons a purchaser may wish to terminate an award procedure. It may decide to abandon the project altogether – for example because changed circumstances mean that the goods are no longer required, or because the offers received indicate that the project is too expensive. Alternatively, it may decide to begin a new procedure – for example, if it thinks this might produce better results,* ***or where it has made a mistake in the first procedure, such as omitting appropriate award criteria***".

[Emphasis added].

In the same passage, Professor Arrowsmith derives from the ECJ decisions summarised above the proposition that, in this sphere, national contracting authorities "*enjoy a broad discretion*".

[48] Mr. Simpson's submissions placed particular emphasis on the principle of transparency. This, he argued, requires that, in this sphere, tenderers must know, and clearly understand, when compiling their tenders, the criteria to be applied in awarding the contract and the relative weightings to be allocated to each of the criteria. This submission was based predominantly on the various provisions of the Directive highlighted in paragraphs [25] – [27] above and paragraph [42] of the decision in ***SIAC Construction –v- Mayo County Council*** (cf. paragraph [35] above). The Defendant's submissions were to the effect that the relevant passages in the instructions to tenderers were capable of misleading and confusing those concerned. As regards proportionality, it was submitted that the evidence establishes that the impugned decision was the product of careful and considered reflection on the part of the decision makers, to whose reasoning and deliberations the stigma of disproportionality could not properly attach. It was further argued that the decision to discontinue and recommence will not simply benefit Maybin/Resource. Rather, it will afford an opportunity to all interested undertakers to submit a tender for the contract, participating on equal terms. The Defendant's submissions were supported by Mr. Horner, QC, appearing with Mrs. Danes QC, on behalf of Maybin/Resource.

VIII CONCLUSIONS

[49] The legal framework within which the Plaintiff's challenge falls to be determined is constituted by a combination of the salient provisions of the Directive and the 2006 Regulations set out above, together with the relevant decisions of the European and domestic courts and the principles considered in paragraphs [25] – [43], *supra*. I propose to give effect to this framework in the following way.

[50] The court must examine in particular whether the relevant parts of the instructions to tenderers were "*… formulated in the contract documents … in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret them in the same way*": ***SIAC***, paragraph [42]. This conjures up the notice of the hypothetical reasonably well informed and usually diligent tenderer and is suggestive of an objective test. The court must also consider whether the matter in question *might* or *could* have affected the terms in which tenders were compiled: ***ATI,*** paragraph [28] and ***Legal Services Commission***, paragraph [45].

[51] I consider the most significant features of the documents under consideration to be the following:

(a) Although the pre-qualification materials specifically address the topic of security services, they make no mention of a security licence.

(b) The same observation applies to the questionnaire which was to be submitted, at the preliminary stage, by those undertakings expressing an interest in tendering at the second, later stage.

(c) At the second stage, the instructions to tenderers stated, unambiguously, that a tender "*… must be fully compliant with the requirements detailed in the tender documentation*". However, while an extensive number of these requirements carried the label "mandatory", this adjective was nowhere defined.

(d) Tenderers were explicitly instructed, in paragraph [12], to outline fully "*how **and to what extent** the mandatory requirements will be met*": the highlighted words are suggestive of a less than absolute standard and are to be contrasted with, for example, phraseology such as "*in what manner*". This terminology was repeated in the instructions. Moreover, the words "*will be*", repeated in this paragraph, could be construed as referring to the tenderer's ability to comply with relevant requirements *in the future* (at the contract award stage), to be contrasted with *compliance at present*. Objectively, I find it unsurprising that one of the six tenderers considered it in order to reply to paragraph 3.2.2 by stating that it had taken steps which would secure a statutory security services licence *at a future date*.

(e) The instruction in paragraph 3.2.1 ("*Tenderers are to provide information concerning their current application of the standards listed below. Where a contractor is working towards a standard this is to be stated*"), considered in conjunction with the immediately succeeding paragraph 3.2.2, could be construed to the effect that present compliance with the standards listed was not an absolute requirement: rather, where appropriate, the tenderer would be entitled to outline steps being taken with a view to the future attainment of the standard/s in question. My observation at the conclusion of subparagraph (d) above applies fully in this context also.

(f) The instructions further stated that *each* of the evaluation criteria would receive a score of 0-10 and would then be multiplied by the weighting. Neither the scoring mechanism nor the related weighting mechanism is easily reconcilable with the notion of an absolute, rigid standard.

(g) In particular, if a requirement were of an absolute, inflexible nature one might expect that non-compliance would give rise to a score of zero and/or automatic disqualification. Conversely, one might expect compliance with such a requirement to automatically give rise to a pre-

determined score – to be contrasted with a score to be extracted from *a scoring range,* a variable score, as in this instance.

(h) Under the heading "Mandatory Requirements", the instructions unequivocally stated that both security services and ancillary services would receive a weighting of 5.

(i) Next, the instructions informed tenderers that, with regard to mandatory requirements, only those tenders achieving a score of 20 or higher would have the remainder of their bid evaluated. This could, conceivably, convey to certain tenderers that the pre-requisite to further evaluation of their bids was the attainment of a minimum score – to be contrasted with an inflexible precondition that compliance with a requirement such as the provision of a current, valid statutory security services licence must be achieved.

(j) The instructions further categorised possession of a "*Secretary of State Certificate/Licence*" as a mandatory requirement. However, this was followed by an instruction giving rise to two alternatives. The first alternative was to submit this authorisation with the tender. The second was to provide an explanation for failing to do so. Thus, in the same passage, language which might appear suggestive of a requirement of an absolute nature was followed immediately by words indicative of a relaxation or dilution.

(k) Certain provisions in the instructions to tenderers, in common with the stage 1 instructions, explicitly addressed the issue of disqualification, or ineligibility. However, there is no suggestion anywhere in the documents that non-possession of a valid, current statutory security licence would automatically disqualify a tenderer or render him ineligible.

[52] Bearing in mind the features and factors highlighted above, which must be considered cumulatively, the relevant tests and principles fall to be applied to both the contract award criteria and the impugned decision. In my opinion, the contract award criteria bearing on the issue of the security licence were not formulated and expressed in such a manner as to allow all reasonably well informed and normally diligent tenderers to interpret them uniformly. This conclusion flows from an assessment of those aspects of the contract award documents highlighted particularly above. In particular, the instructions to tenderers, while stating that certain requirements were "mandatory", on the one hand, explicitly provided that all mandatory requirements, in common with other factors, would be subjected to a variable scoring exercise and a weighting exercise. Whether viewed in isolation or in tandem with some or all of the other considerations highlighted in paragraph [51] above, I consider that this could have conveyed to some tenderers the notion of differing values and variable scores. Simultaneously, it could, plausibly, have failed

to convey to all tenderers that "mandatory" requirements were of an absolute, inflexible character. Rather, the language used, in my view, was capable of leading some tenderers to believe that full compliance with all so-called "mandatory" requirements was not a pre-requisite to further evaluation of their tenders, but would be the subject of an exercise involving the application of variable scores and relative weights. Equally, the terms in which the instructions to tenderers were framed, in particular paragraph 3.2.2, could have conveyed to *other* tenderers that compliance with all "mandatory" requirements, including the provision of a current valid statutory security licence (or an explanation for its absence) *was* a precondition of an absolute nature to which no exceptions would be made. I further consider that the instructions could have conveyed to a reasonably well informed and normally diligent tenderer that the requirement of possession of a security services licence would be satisfied by obtaining this at a later date.

[53] I consider that the hypothetical reasonably well informed and normally diligent tenderer could, understandably and plausibly, have construed and understood the instructions to tenderers in the various ways outlined above. There was sufficient uncertainty and ambiguity in the key passages in the instructions to give rise to this real possibility. There was scope for differing interpretations and viewpoints, none of which could be condemned as unreasonable, unarguable or illegitimate. I take into account also the absence of any statement in the instructions to the effect that a failure to provide a valid, current security licence with a tender would automatically disqualify the tenderer or, alternatively formulated, would render the tenderer's bid ineligible for further evaluation. Thus, I reject the central submission advanced on behalf of the Plaintiff, summarised in paragraph [44] above.

[54] I further conclude that if the requirement of possession of a valid, current security services licence had been expressed unambiguously as an absolute standard, a precondition to further evaluation of tenders, without which a tenderer would be disqualified or declared ineligible, this *could* have affected the terms in which tenders were formulated. This would have conveyed unequivocally to all tenderers the nature and substance of this requirement and the Draconian consequences of non-compliance. I consider that there was a significant shortcoming in the tendering instructions, in this respect.

[55] Having made the aforementioned conclusions, it is a relatively short step to further conclude that the impugned decision was harmonious with the principle of proportionality. Properly analysed, the view formed by the Defendant, expressed in its internal documents and in the letter of decision, dated 8th December 2006, was that the instructions to tenderers and associated documents did not comply with the principle of transparency and the associated principle of equal treatment, as explained in the European jurisprudence. As appears from the above, I concur with this conclusion. To have proceeded further, awarding the contract, would have been in breach of European law. Furthermore, the principles of transparency and equal treatment are key elements of the Directive and the 2006 Regulations. The

legitimacy of the aim to be achieved in deciding to abort the existing competition and initiate a fresh one cannot be gainsaid. A fresh competition, curing the shortcomings which blighted its predecessor, will ensure that the EU law principle of transparency and the associated principle of equal treatment will be fully observed. The proportionality of the impugned decision is reinforced by the evidence of the care with which it was taken and the consideration that the Plaintiff's final score was significantly lower than the score allocated to Maybin/Resource. It follows that the decision to discontinue and recommence afresh cannot be condemned as disproportionate.

[56] Finally, at the trial, the Plaintiff did not seek to make the case that the decision to abort the competition had been motivated by a desire to confer some unfair benefit or advantage on Maybin/Resource. I would observe that, having regard to the extensive materials considered by the court, there is absolutely no evidence, direct or inferential, of an improper motive of this kind. Bearing in mind that this type of allegation must never be made lightly, I would add that the Plaintiff and its legal representatives acted with the utmost propriety, in this respect

[57] Accordingly, the Plaintiff's challenge fails. In light of my conclusions, the answer to the first of the three questions enshrined in the final amended version of the Plaintiff's originating summons must be "No". It follows that the ensuing two questions do not fall to be determined. I propose to give judgment for the Defendant against the Plaintiff. The parties will have an opportunity to address the court on the issue of costs.