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Ref:	**McCL8241**

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered:	**30/06/11**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(COMMERCIAL LIST)

BETWEEN:

FIRST4SKILLS LIMITED

Plaintiff;

-and-

DEPARTMENT FOR EMPLOYMENT
AND LEARNING

Defendant.

McCLOSKEY J

I INTRODUCTION

[1] This is an application by the Department for Employment and Learning ("*the Department*"), the Defendant herein, for an order pursuant to Regulation 47H of the Public Contracts Regulations 2006 terminating the requirement imposed by Regulation 47G(1) whereby the Department is currently precluded from entering into any contract for the provision of training services under the "Department for Employment and Learning Training for Success and Apprenticeships Northern Ireland" Procurement Project.

[2] I consider that this application raises two main issues to be determined by the court:

(a) The first is whether it is open to the court to grant the relief sought by the Department in the particular circumstances prevailing.

(b) The second is whether, in any event, there is a sufficient basis for granting the relief in question.

II LEGAL FRAMEWORK

[3] The legal framework within which this application unfolds is contained in The Public Contracts Regulations 2006 ("*the 2006 Regulations*"), as amended by The Public Contracts (Amendment) Regulations 2009 ("*the 2009 Regulations").* By Regulation 4(3) of the 2006 Regulations:

> *"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."*

Under the scheme of the Regulations, there are two different types of contract, "Part A" and "Part B". [The contract being procured in the process giving rise to the present challenge is of the latter variety]. The distinction between these two species of contract is of some significance, given that the regulatory and restrictive regime established by the 2006 Regulations is less intrusive in the case of a Part B public services contract: see, in particular, Regulation 5. The general principles enshrined in Regulation 4(3), quoted above, apply to both types of contract. Bearing in mind the issues raised in the present litigation, it is appropriate to highlight Regulation 26:

> *"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."*

This Regulation applies only to Part A contracts. Accordingly, the powers which it expressly confers on a contracting authority were not exercisable by the Department in the competition giving rise to these proceedings. However, there is jurisprudence of the European Court of Justice in support of the proposition that it may be appropriate for a contracting authority to seek clarification of a tender in furtherance of the principle of proportionality (*infra*).

[4] The issue of the criteria governing the award of a public contract is addressed in Regulation 30, in the following terms:

> *"(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."

The subject matter of Part 9 of the 2006 Regulations is "*Applications to the Court*". The whole of Part 9 was substituted by Regulation 10 of the 2009 Regulations. The scheme of Part 9 is, firstly, to impose certain duties on contracting authorities. To this end, Regulation 47A provides:

"*(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 Community 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."*

This is followed by Regulation 47B, which is not material for present purposes as it does not apply to Part B contracts.

[5] In short, the obligation imposed on a contracting authority to comply with specified provisions of the 2006 Regulations is characterised "*a duty owed to an economic operator*". The Regulations then make provision for an enforcement mechanism, under the rubric "Enforcement of Duties through the Court". Per Regulation 47C:

> *"(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."*

Regulation 47D prescribes a time limit for the initiation of such 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) and (4), such proceedings must be started promptly and in any event within 3 months beginning with the date when grounds for starting the proceedings first arose."*

The initiation of proceedings has important consequences, by virtue of Regulation 47G:

> *"(1) Where –*
>
> *(a) proceedings are started in respect of a contracting authority's decision to award the contract; and*
>
> *(b) the contract has not been entered into,*
>
> *the starting of the proceedings requires the contracting authority 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).*
>
> *(3) For the purposes of paragraph (1), proceedings are to be regarded as started only when the claim form is served in compliance with regulation 47F(1).*
>
> *(4) This regulation does not affect the obligations imposed by regulation 32A."*

The provision lying at the heart of the present application is that contained in Regulation 47H, which provides:

> *"(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."

[6] The remedies which the court is empowered to grant to a successful challenger vary according to whether the contract in question has been executed. Regulation 47I is concerned with available remedies where the contract has not been executed:

"(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."

Notably, each of the remedies in the Regulation 47I list is discretionary in nature. This may be contrasted with Regulation 47J, which applies where the relevant contract has been executed:

> *"(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)."*

The concept of "*ineffectiveness*" is elaborated in Regulation 47K and is not germane for present purposes. Regulation 47L prescribes certain public interest grounds which may be invoked for declining to grant the remedy of a declaration of ineffectiveness. By Regulation 47M, where such a declaration is made, the contract is deemed ineffective prospectively, rather than retrospectively. By virtue of Regulation 47N, where such a declaration is made the court *must* also order the contracting party to pay a "*civil financial penalty*" of a determined amount. It is unnecessary to consider the outworkings of this regime in the present context.

III THE FIRST ISSUE

[7] The first issue to be determined by the court concerns the propriety of granting the relief sought in the somewhat unusual circumstances prevailing. For the purposes of determining this issue, the relevant factual matrix is undisputed and is constituted by the following components:

(a) This Plaintiff and another private sector commercial operator tendered unsuccessfully for the award of the contract in question.

(b) Following notification of the impugned decisions, each of the disappointed bidders corresponded with the Department, intimating a possible legal challenge.

(c) This stimulated a letter dated 18th April 2009 written by the Department of Finance and Personnel ("DFP") and addressed to all interested parties, notifying a decision that the award of the contract would be deferred for an unspecified period.

(d) The other challenging party initiated proceedings by Writ of Summons issued on 4th April 2011.

(e) The Writ in the present case was issued on 27th May 2011.

(f) The court heard the Department's application in the related case for an interim order pursuant to Regulation 47H of the 2006 Regulations on 27th June 2011 and gave judgment on the same date, refusing the application.

(g) The hearing of the Department's application in this case ensued the following day, 28th June 2011.

[8] It is clear that the initiation of proceedings by both this Plaintiff and the other challenging party had the effect of triggering the moratorium prescribed by Regulation 47G of the 2006 Regulations. As appears from the above chronology, on 27th June 2011, the court refused the Department's application for an order extinguishing the Regulation 47G prohibition, thereby enabling it to execute the contract in question. The question which arises is whether, in the light of that decision, it is open to the court to accede to the present application, which seeks precisely the same relief.

[9] The new legal proceedings regime contained in Part 9 of the 2006 Regulations, as substituted, gives effect to what is commonly described as the "Amending Remedies Directive". The 2009 Regulations constitute the domestic transposition of Article 1 of Directive 2007/66/EC of the European Parliament and Council amending Council Directives 89/665/EEC and 92/13/EEC. It is clear that the overarching aim of the Amending Remedies Directive is to improve the efficacy of the procedures for review and challenge in the context of contract procurement processes governed by the 2006 Regulations and the earlier instruments of European law. The rationale of the Amending Remedies Directive is readily ascertained from certain of its recitals:

> *"(3) Consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States.*

As a result of these weaknesses, the mechanisms established by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. Consequently, the guarantees of transparency and non-discrimination sought by those Directives should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC. Directives 89/665/EEC and 92/13/EEC should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.

(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.

(5) The duration of the minimum standstill period should take into account different means of communication. If rapid means of communication are used, a shorter period can be provided for than if other means of communication are used. This Directive only provides for minimum standstill periods. Member States are free to introduce or to maintain periods which exceed those minimum periods. Member States are also free to decide which period should apply, if different means of communication are used cumulatively…

(17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

(18) In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective sanctions should

apply. Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004/17/EC to the extent that those infringements have affected the chances of the tenderer applying for review to obtain the contract…

(25) Furthermore, the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective."

Finally, the recitals address the issues of effective remedy and fair hearing:

"(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter."

[10] In my opinion, in the unusual matrix within which the present application for interim relief is brought by the Department, the correct approach for the court is as follows. Firstly, it would be plainly inappropriate – and manifestly illogical – for the court to make an order in the second application conflicting with its order in the first application. Secondly, in the exercise of what is plainly a discretionary jurisdiction, it would be simply incongruous for the court to make an order in the second application purporting to authorise the Department to take a course (viz. execute the contract) which would be unlawful, as it would be in breach of the court's first order. Thirdly, the present application may be viewed through the prism of misuse of the court's process. In my view, for the reasons elaborated, the present application entails a misuse of the court's process. Fourthly, I reject the submission that applications of the present kind are in some way specific or particular to the individual disappointed bidder who has chosen to initiate proceedings. In my opinion, Regulations 47G and 47H are not framed in this way but are, rather, formulated in terms which confound this argument. In short, they are directed to the impersonal issue of awarding the contract and do not speak in any way to the challenging party or his identity. Thus, in my view, the word "*proceedings*" in the two provisions in question is to be construed as "*any proceedings*". Accordingly, where, as here, one has the circumstance that more than one disappointed bidder has initiated separate legal challenges, the court's dismissal of the Department's application for an interim order under Regulation 47H in *any* of the actions thereby commenced prohibits the execution of the contract with *any* party and, hence, renders otiose any further such application brought under the aegis of a different

Writ. While there might be possible exceptions to this rule, they are not easily envisaged.

[11] It follows that the Department's application in the present case fails at first base. There is no prospect of the court acceding to it for the reasons elaborated above. In short, the application is misconceived.

[12] For future reference, in circumstances where, as here, there are multiple Writs and the Defendant proposes to pursue an application under Regulation 47H, the court will give careful consideration to appropriate case management directions. One possibility would be to direct conjoined applications. Another would be to list the first application issued, adjourning the other/s. If any such application is refused, it seems likely that the Defendant's only recourse in any other action relating to the same contract award process would be to move an application for an order of dismiss on the ground of disclosing no reasonable cause of action or on any of the other grounds specified in Rules of the Court of Judicature Order 18, Rule 19. The requirements of the over-riding objective will dictate the most appropriate case handling mechanisms to be adopted by the court.

IV THE SECOND ISSUE

[13] The second issue concerns the merits of the Department's application. I proceed to determine this issue having regard to decisions of the Northern Ireland Court of Appeal in cases such as ***Cullen –v- Chief Constable of the Royal Ulster Constabulary*** [unreported, NICA, 1998] and ***Re Lemon's Application*** [unreported, NICA, 1995]. These decisions establish the principle that appeals to the Court of Appeal should be whole, rather than fragmented. Thus it is incumbent on a court of first instance to address and determine all issues in its judgment. This avoids the spectre of limited scope first instance hearings, ensuing successful appeals to the Court of Appeal and remittal to the first instance court to consider and determine the unresolved issues. It also gives effect to the values and standards promoted by the over-riding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature.

[14] I am in agreement with the consistent line of decisions in England that applications of the present *genre* are to be determined by applying the principles in ***American Cyanamid –v- Ethicon*** [1973] AC 396. In short, it is incumbent on the court, fundamentally, to decide at this stage whether the Plaintiff has a good arguable case (or has raised a serious issue to be tried) and, further, to evaluate the balance of convenience, taking into account particularly (but not exhaustively) the adequacy of damages as a remedy; the availability, terms and apparent efficacy of any cross undertaking in damages by the Plaintiff; the possibility of irremediable prejudice to third parties; the obligation imposed by Article 4(3) of the Treaty on European Union (frequently labelled "*the Maastricht Treaty*") to take all appropriate measures to ensure the fulfilment of obligations arising under the Treaties; and the demands of the public interest. The correct approach in principle was expressed by

Akenhead J in ***Exel Europe –v- University Hospitals Coventry and Warwickshire NHS Trust*** [2010] EWHC 3332 (TCC) in the following way:

> *"26. For many years, the Courts of England and Wales have, with regard to interlocutory or interim injunctions, applied the principles and practice laid down in the well-known case of **American Cyanamid Co v Ethicon** [1975] AC 396. The first question which must be answered is whether there is a serious question to be tried and the second step involves considering 'whether the balance of convenience lies in favour of granting or refusing interlocutory relief that is sought (page 408B). The 'governing principle' in relation to the balance of convenience is whether or not the claimant 'would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was thought to be enjoined between the time of the application and the time of the trial.'*
>
> *27. It is quite clear that, prior to the amendments to Regulation 47 made by the 2009 Regulations (see above), **Cyanamid** principles were applied in considering whether or not an injunction should be granted to an unsuccessful or discontented tenderer preventing the placing of the relevant contract or agreement by the contracting authority. A good example is the recent case of **Alstom Transport v Eurostar International Ltd and another** [2010] EWHC 2747 (Ch), a decision of Mr Justice Vos. The Court of Appeal had upheld this approach in **Letting International v London Borough of Newham** [2007] EWCA Civ 1522.*
>
> *28. The issue arises whether these principles apply following the imposition of the amendments to the Regulations. Regulation 47H addresses interim orders which the Court may make in circumstances, where, pursuant to Regulation 47G, the commencement of proceedings, as in this case, has meant that the contracting authority (the Defendant in this case) is statutorily required to refrain from entering into the framework agreement (in this case). In my judgement this is primarily simply a question of interpretation of Regulation 47H. Regulation 47H(1) gives the Court the widest powers in terms of what it may do with regard to entering into contracts. It is in Regulation 47H(2) that one finds what exercise the Court 'must' do: it must consider whether, if regulation 47G(1) was not applicable, 'it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract'; it then goes on to say that it is '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)'. This is saying in the clearest terms*

> *that the Court approaches the exercise of interim relief as if the statutory suspension in Regulation 47 G(1) was not applicable. That means that one does not as such weight the exercise in some way in favour of maintaining the prohibition on the contracting authority against entering into the contract in question. What in practice it means is that the Court should go about the* ***Cyanamid*** *exercise in the way in which courts in this country have done for many years."*

I concur fully with this approach.

[15] In the present case, the Plaintiff was guilty of an uncontested error in the formulation and submission of its tender for the relevant contract. The "Instructions to Tenderers" (*"the Main Instructions"*) prescribed, *inter alia*, various "Stage 1" selection criteria and "Stage 2" award criteria. All of these criteria operated on a pass/fail basis. There were seven selection criteria. The fifth stated:

> *"Tenderers shall complete the appropriate Bid Spreadsheet/s detailing the programme/s for which they are tendering. This will include the professional and technical group, geographical areas, trainee capacity and in the case of Apprenticeships NI the frameworks to be delivered."*

It is common case that, in submitting its tender, the Plaintiff failed to include the Spreadsheet required by this criterion. The explanation for this error would appear to be (at this stage of the proceedings) that, in purported compliance with the *second* of the selection criteria, the Plaintiff uploaded and duly completed and submitted two of the quite different Spreadsheets stipulated by this requirement. The evidential matrix includes certain materials belonging to the pre-tender phase in which some of the relevant requirements were emphasized and containing appropriate warnings to potentially interested parties. This is exemplified in the DFP pro-forma letter dated 26th November 2010 inviting tenders and giving instructions on the electronic response methodology, which included information on how to "*upload attachments where appropriate*" and emphasize the importance of formal submission of all requisite documents prior to the closing date. This was reiterated in paragraph 1(iii) of the Instructions and paragraphs 9 and 10, which stated in material part:

> *"Tenderers will only be evaluated on the information provided in their response …*
>
> *Tenders must be submitted in accordance with these Instructions to Tenderers. Failure to comply may result in a tender being rejected …".*

The Plaintiff's error is, in my view, properly characterised elementary, or serious.

[16] There is one peculiar fact which should be highlighted at this stage. The evidence establishes that the act of uploading the relevant Spreadsheet would have brought to the attention of the interested parties a separate "Instructions to Tenderers" document relating specifically to completion of the "*pro forma worksheet*" in question (I shall describe these as "*the Supplementary Instructions*"). These instructed tendering parties to complete the "geographical" and "occupational area" fields; to specify the occupational groups to which the tender related by reference to each of the 26 geographical areas in question; to particularise the tendering party's organisational capacity; and to identify the "*frameworks for each occupational area that you initially intend to deliver*". Accordingly, four separate types of information had to be supplied. At the conclusion of the description/specification of the third and fourth types of information, the Supplementary Instructions stated:

> "*Please note that this information will not form part of the selection or award process*".

This statement was not included in the description/specification governing the first and second types of information requested. By letter dated 25th March 2011, DFP informed the Plaintiff that its tender "*… did not meet the Stage 1 Selection Criterion 5 and was therefore not considered further*". In the feedback process which followed, it emerged that the Evaluation Panel had allocated a "fail" to Selection Criterion No. 5, a "pass" to four of the other criteria and a "clarification request" to the other two Selection Criteria. In the pre-proceedings correspondence which ensued, DFP elaborated on the impugned decision (by letter dated 12th April 2011) in the following terms:

> "*The Instructions within the Apprenticeships NI Bid Spreadsheet were Instructions on how to complete the worksheet. The final line of these instructions stated 'please note that this* ***information*** *will not form part of the selection or award process'. The bidders were therefore required to upload a completed spreadsheet in order to pass the Selection Criterion. The completed* [Spreadsheet] *was not uploaded by* [the Plaintiff] *thereby failing to satisfy Selection Criterion 5*".

In this letter, the word "*information*" is emphasized in italics. The reason for this is unclear to me at present.

[17] The parties' respective affidavits address this discrete issue in the following way. In the affidavit sworn by the Plaintiff's Contracting Director, two assertions are made. The first is that the Plaintiff was informed (at some unspecified time) by DFP that "*… the Bid Spreadsheet did not form part of the selection process at Stage 1 in any event*". The second is that "*… the significance of the Bid Spreadsheet is minimal in terms of the overall tender*".

This stimulated the following rejoinder by the Department's main deponent:

> "*I have no record or recollection of* [stating] *that the Bid Spreadsheet did not form part of the selection process …*
>
> *The instructions stated that information relating to level 2 capacity, level 3 capacity and the frameworks to be delivered would not form part of* ***the selection or award process****. The intention of this was that* ***the selection stage*** *would not rely on whether any tenderer had high or low capacity or on the number of frameworks it planned to deliver; the pass/fail analysis was to be determined on whether the tenderer submitted the spreadsheet containing the information specified …*
>
> *It is denied that the information in the Bid Spreadsheet is minimal in terms of the overall tender as it contained information regarding the tenderer's capacity and the specific frameworks to be delivered in each geographical area*".

[My emphasis].

At this stage of the proceedings, I find myself grappling with the Department's approach to this discrete issue with some difficulty. In particular:

(a) I do not clearly understand why a tendering party's capacity to deliver the contract being pursued would be immaterial at the selection stage. If a tenderer plainly did not possess the requisite capacity, would this not be a classic knock out blow at the preliminary stage?

(b) The Main Instructions are entirely silent on this issue.

(c) The averments of the Department's deponent are confounded by the plain language of the two statements reproduced above, which represent unequivocally that the third and fourth types of the information requested in the completed Spreadsheet will not form part of the selection **or** award process. [See the highlighted portions of the averments set out above].

(d) Furthermore, these averments do not engage directly with the language of the Supplementary Instructions: the deponent has elected to employ a different vocabularly ("*level 2 capacity*" and "*level 3 capacity*") which, at this stage, I find to be unclear.

(e) The distinction which the Supplementary Instructions purported to make between the first and second types of information (on the one

hand) and the third and fourth (on the other) is obscure. Why the dichotomy? The rationale is not easily ascertained, at this juncture.

(f) The court does not grasp clearly at this stage how the third and fourth types of information sought in the Spreadsheet would be immaterial to the *award* process.

I conclude that, at this stage of the proceedings, there is no clear or satisfactory explanation for either of the "*Please note*" statements in the Supplementary Instructions. I suggested during the course of the hearing, and repeat, that DFP/CPD may wish to reflect carefully – and speedily – on the desirability of incorporating the statements in future contract award processes. The uncertainty, obscurity and confusion which they generate are highly undesirable *per se*, do nothing to further the overarching principles of EU law in play and are pre-eminently avoidable.

[18] The Plaintiff attacks the impugned decision on two grounds. The first argument developed by Mr. Humphries (of counsel) was that, having regard to the statements in the Supplementary Instructions (quoted above), the Department's rejection of the Plaintiff's tender for non-compliance with Selection Criterion No. 5 was disproportionate. In ***Tideland Signal –v- European Commission*** [2002] All ER(D) 10, the ECJ Court of First Instance annulled a decision of the European Commission rejecting a tender for a particular contract. The Applicant's chief complaint was that the decision was vitiated by the Commission's failure to seek clarification of an obvious ambiguity or uncertainty in its tender. In its judgment, the court adverted to the principle of proportionality in the following way:

> "[39] *It is also relevant to recall, in the present context, that the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued and that where there is a choice between several appropriate measures recourse must be had to the least onerous …*".

I consider this to be an orthodox formulation of the European law principle of proportionality, which has a lengthy history and unquestionable pedigree in the Community's administrative law and is now enshrined in Article 5(4) of the Maastricht Treaty. The principle has two basic components. Firstly, the means employed by the public authority concerned should be appropriate for the purpose of achieving the objective in question. Secondly, such means should not exceed what is necessary to achieve the relevant objective. See, for example, ***Germany –v- Council*** [1995] ECR I – 3723, paragraph [42].

[19] Where issues of proportionality arise, the margin of appreciation available to the decision making authority must be duly considered. In ***R –v- Secretary of State for Health, ex parte Eastside*** [1999] 3 CMLR 123, Lord Bingham CJ stated:

> "[41] *Because the principle* [of proportionality] *is so general and may affect a range of issues from the validity of primary legislation … to much narrower points … it must be related to the particular situation in which it is invoked …*
>
> [48] *…The margin of appreciation for a decision maker … may be broad or narrow. The margin is broadest when the national court is concerned with primary legislation enacted by its own legislature in an area where a general policy of the Community must be given effect in the particular economic and social circumstances of the Member State in question. The margin narrows gradually rather than abruptly with changes in the character of the decision maker and the scope of what has to be decided*".

In the recent decision in ***R (Sinclair Collis Lim) –v- Secretary of State for Health*** [2011] EWCA. Civ 437, the Master of the Rolls stated:

> "[200] *The breadth of the margin of appreciation in relation to a decision thus depends on the circumstances of the case and, in particular, on the identity of the decision maker, the nature of the decision, the reasons for the decision and the effect of the decision. Further, because the extent of the breadth cannot be expressed in arithmetical terms, it is not easy to describe in words which have the same meaning to everybody the precise test to be applied to determine whether, in a particular case, a decision is outside the margin. It is therefore unsurprising that in different judgments the same expression is sometimes used to describe different things and that sometimes different expressions are used to mean the same thing*".

By analogy with the decision of the ECJ in ***Fedesa and Others*** [1990] ECR I – 4023, paragraph [13] one may formulate the proposition that where (as here) a decision has the effect of precluding an economic operator from the prospect of securing the benefits associated with pursuing a specified economic activity –

> "*… The prohibitory measures* [must be] *appropriate and necessary in order to achieve the objectives legitimately pursued …* [and] *… the disadvantages caused must not be disproportionate to the aims pursued*".

Finally, it is clear that this principle extends to Member States and their institutions: see for example the decision in ***Azienda Agricola*** [2004] ECR I – 2943.

[19] The first limb of the Plaintiff's challenge (as I understand it) incorporates a discrete contention that the proportionate course which ought to have been taken was to raise the omission of the relevant Spreadsheet with the Plaintiff under the aegis of a request for clarification. Slightly reformulated, the complaint is that the Department's decision to reject the Plaintiff's tender on account of the omission of the Spreadsheet was disproportionate in the circumstances. The second central complaint advanced by the Plaintiff is that the Department has acted in breach of the principle of equal treatment. The particulars of this complaint are based on the evidence that the Department chose to engage in a process with thirteen other tenderers whereby it purported to seek clarification of their tenders in circumstances where, properly analysed, the Department was actually requesting the supply of missing information which should properly have been included in the tenders. It is contended on behalf of the Plaintiff that, in furtherance of the equal treatment principle, it too should have been accorded the same facility.

[20] The riposte of Mr. McMillen (of counsel) on behalf of the Department relied on decisions such as ***Leadbitter –v- Devon County Council*** [2009] EWHC 930 (Ch), ***Azal –v- Legal Services Commission*** [2010] EWCA. Civ 1194 and ***R (All About Rights Practice) –v- Legal Services Commission*** [2011] EWHC 964 (Admin). I consider that, properly analysed, each of these decisions is an illustration of the application of settled principles to their particular factual matrices. I take into account particularly what was said by David Richards J in ***Leadbitter***:

> "[55] *I conclude therefore that the principle of proportionality is capable of applying to the implementation of the terms of a procurement process. In considering its application in a particular case, there are obvious factors to be borne in mind. First, as Mr Henshaw accepts, the exercise of discretionary powers necessarily involves judgment on the part of the contracting authority. The court must respect this area for judgment and will not intervene unless the decision is unjustifiable. This, I would think, is the proper meaning of a manifest error in this context. It will be remembered that in paragraph 43 of the judgment in Tideland Signal, the court stated that the Commission's decision to reject the tender without first seeking clarification "was clearly disproportionate and thus initiated by a manifest error of assessment". In Lion Apparel Systems Ltd v Firebuy Ltd [2007] EWHC 2179 (Ch), [2008] EuLR 191, Morgan J at paras 26-38 set out a number of principles applicable to procurement distilled from the decision of the Supreme Court of Ireland in SIAC Construction Ltd v Mayo County Council [2002] IESC 39, [2003] EuLR 1 and the decision of the Court of First Instance in Case T-25-/05 Evropaiki Dynamiki v Commission. He said at paragraphs 36-38*

> *'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.'…*

> [68] *There may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender, most obviously where, as noted by Professor Arrowsmith, it results from fault on the part of the procuring authority. But in general, even if there is discretion to accept late submissions, there is no requirement to do so, particularly where, as here, it results from a fault on the part of the tenderer. In addition to the considerations already mentioned, the particular facts on which the claimant relies to characterise its case as exceptional would require investigation and determination by Devon CC and I do not see that it was required to undertake those tasks. In my judgment, the decision of Devon CC to reject the claimant's tender was well within the margin of discretion given to contracting authorities."*

All of these decisions illustrate the close association between the principles of proportionality and equal treatment. The contract award authority holds the ring amongst all tendering parties at all times and must accord equal treatment to each of them.

[21] I shall determine the second issue on the hypothesis that my determination of the first issue (which is determinative of this entire application) has not been made or is incorrect. In doing so, I take into account the following factors in particular:

(a) There is a live evidential dispute between the parties about a potentially significant conversation between their representatives.

(b) At this stage of the proceedings, the Department's explanation for and construction of the Supplementary Instructions to Tenderers lacks clarity and cogency.

(c) Many of the Department's purported requests for clarification from other tenderers bear, at least, *prima facie,* the hallmarks of eliciting missing information, rather than illuminating genuine uncertainties or ambiguities.

(d) The Department's evidence at this stage of the proceedings is untested.

(e) It is clear that there is scope for discovery of further material documents to ensue. Interrogatories may also materialise.

(f) This ruling is made in the context of an interlocutory application, rather than the substantive trial.

Taking these factors particularly into account I consider, by an admittedly narrow margin, that there is sufficient merit and force in the Plaintiff's twin complaints to warrant the conclusion that, on these discrete issues, there is a serious issue to be tried. A good arguable case has been made out.

[22] As regards the balance of convenience, the Department's case resolves to the contention that, for the reasons highlighted, it should be at liberty at this stage to let the contract. Given my determination of the first issue, I consider this contention unsustainable. The court's resolution of the first issue is determinative of the question of where the balance of convenience is to be struck.

[23] However, I shall proceed on the hypothetical basis that the court's first conclusion is incorrect. In doing so, I take into account all of the factors emphasized by Mr. McMillen – the projected savings to the public purse; the improvements in the proposed new contractual arrangements; the advantages to both trainees and employers; the requirements of legal certainty; the limitation on any potential contract extension (not beyond March 2012); and the desirability of uniformity throughout the United Kingdom in the provision of training to apprentices. In the related proceedings, where the court dismissed the Department's application for an interim order, these factors did not hold sway. Consistent with the decision in that case, I conclude, on an issue which is unquestionably finely balanced, that the balance of convenience pendulum tips marginally in favour of the Plaintiff, taking into account (*inter alia*) the twin factors of the Plaintiff's cross-undertaking in damages and the reasonable prediction that these proceedings will be completed to the stage of judgment in advance of March 2012, when the contract extension will expire.

V CONCLUSION

[24] I determine each of the issues formulated above in the Plaintiff's favour. In conclusion, I add the following:

(a) Where the unusual circumstance of coincident legal challenges which has arisen in the context of this particular procurement competition recurs, there will be important issues of case management for the court to consider.

(b) In particular, if the Defendant's application in the first case is dismissed (as here) the court might well consider simply adjourning the second of the applications, taking into account the intrinsic vagaries of all litigation, which include the possibility that the first case might not proceed to trial for whatever reason.

(c) It is undoubtedly of benefit to all parties to receive the court's preliminary assessment of the merits of the particular challenge, to include a grading of each of the grounds. This, in my view, is an inevitable consequence of the court having to rule on any application made under Regulation 47H of the 2006 Regulations. However, court time and resources cannot properly be devoted to exercises of this kind which are truly moot and/or have no prospect of success.

(d) In the course of the hearing, I indicated my willingness to permit the Department to convert this application to one under Rules of the Court of Judicature Order 18, Rule 19 to strike out the Plaintiff's claim as disclosing no reasonable cause of action. Given my conclusions on the question of serious issue to be tried, this alternative method of challenge inevitably fails.

(e) I have invested (ever diminishing) court time and resources in the preparation of a written judgment herein in acknowledgement of the consideration that the first of the issues determined is one of some novelty and importance and could conceivably recur. It also raises important case management issues. I record further that, thus far, it has been possible for the court to determine all applications of this *genre* by the medium of *ex tempore* judgments.

[25] Finally, I incline to the view that the appropriate order as to costs is that the Plaintiff's costs should be costs in the cause. There will be an opportunity for further argument on this discrete issue. I record the court's appreciation to both counsel for the quality and economy of their submissions.