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Judgment: approved by the Court for handing down | *Delivered:* **26/09/2011**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

McLAUGHLIN AND HARVEY LIMITED
Plaintiff/Respondent;

-and-

DEPARTMENT OF FINANCE AND PERSONNEL

Defendant/Appellant.

Before: Morgan LCJ, Higgins LJ, and Weatherup J

MORGAN LCJ

[1] The appellant issued an open competition for contractors to be placed on a Framework Agreement whereby they could then tender for individual works contracts. Following their failure to be placed on the Framework Agreement the respondents, a consortium of building contractors, commenced proceedings under the Public Contracts Regulations 2006 (the 2006 Regulations) claiming breach of statutory duty, breach of obligations under the EC Treaty and breach of contract. Deeny J found for the respondents on the issue of liability and ordered that the Framework Agreement be set aside as the remedy for the breach. The appellant now appeals on the grounds that the learned Judge erred in finding that appellant had failed to disclose 39 award sub-criteria and their weighting and that he was not barred by the 2006 Regulations from ordering the Framework Agreement to be set aside.

Background

[2] The appellant published a contract notice in the Official Journal of the European Union on 15 March 2007 inviting tenders for the inclusion in a Framework Agreement relating to various constructions contracts which it hoped to implement over the coming four year period. The contracts under

the Agreement would include urban regeneration, further education, arts and sports development, with a total value of £500 million to £800 million. The Framework Agreement would comprise five contractors, from whom one would be selected by means of secondary competition as the need arose to lead integrated supply teams to undertake projects.

[3] Tender documents were issued on 24 April 2007 and included 'Instructions to Tenderers'. These instructions stated that tenders would be evaluated against the criteria set out in section 8.3 of the instructions. Section 8.3, entitled "Tender Award Criteria" stated:

> "The PSCPs' tender package shall be evaluated on both quality and price based on the following ratio.
>
> Quality submission 70%
> Price submission 30%
> Total .. .. 100%"

[4] Section 8.3.2 then set out the following Evaluation Matrix.

QUALITY SUBMISSION – EVALUATION MATRIX				
QUESTION NUMBER		QUALITY PARTICULAR	TOTAL MARKS AVAILABLE	RELATIVE WEIGHTING AS APPLIED TO AVERAGE SCORE IN EACH SECTION A,B, C, D & E
Part B	B01	Whole-life costs	100	25%
	B02	Target prices	100	
	B03	Price for Work Done to Date	100	
Part C	C01	Planning and programming	100	25%
	C02	Risk management	100	
	C03	Monitoring of Employer's requirements	100	
Part D	D01	Continuous improvement	100	15%
	D02	Efficiency and fair dealing	100	
Part E	E01	Design Quality	100	25%
	E02	Build Quality	100	
Part F	F01	Management of H&S throughout IST	100	10%
	F02	CDM Regulations	100	

[5] The next part of the tender package was entitled "Tender Package – Quality Submission". This posed the question referred to in the first column of the evaluation matrix against which a bid was to be assessed in respect of the relevant quality particular referred to in the second column. Thus, for example, for Question B01 in respect of 'Whole-life costs', the tender documents provided:

PART B – Value for money

[B01] WHOLE-LIFE COSTS

Aim
The Authority wishes to appoint ISTs who will deliver design and construction solutions that represent the best value in whole-life terms.

Question
Describe in detail how the IST will prepare and use whole-life costing to demonstrate to the Employer that the proposed solution will deliver best VFM over the economic life of the project. The response should include how the PSCP, MSCMs and wider supply chain will use whole-life costing to develop design solutions, specifications, systems, components, construction methods and assess technological developments.

Scoring guidance – maximum score 100

Assessment	Score	Approach
Excellent	86-100	The PSCP has provided excellent detailed evidence that the IST's methodologies will ensure the preparation, application and presentation to the Employer of accurate and realistic whole-life costs in support of all proposals.
Good	71-85	The PSCP has provided good evidence that the IST's methodologies will ensure the preparation, application and presentation to the Employer of whole-life costs in support of all proposals.
Satisfactory	51-70	The PSCP has provided some evidence that their methodologies will ensure the application of whole-life costs in support of key proposals
Poor	0-50	Any aspect of the response gives major concern.

This exercise was repeated for each of the 12 quality particulars given in the Evaluation Matrix.

[6] The Quality Submission element of the bids submitted by the tenderers was to be assessed by a Quality Assessment Team comprised of three experts who were to deal with Parts B, C, D and E referred to in the Evaluation Matrix. Part F related to Health and Safety and was separately marked. This team had not been finalised prior to the submission of the tenders. After the tenders had been submitted, but before they were opened, the Quality Assessment Team was finalised. They held a meeting to determine their approach to their task. In relation to each of the questions posed in the evaluation matrix the team prepared a guidance sheet which they would use in the assessments. As an example, the guidance sheet for Question B01 on Whole-life Costs was:

B01 – Whole Life Costs

Database of cost information • recognised industry sources • manufacturers/ suppliers • IST experience	20
Reliable WLC model • capital and running costs for project and key elements • risk/sensitivity analysis • obsolescence of components / systems • impact of replacement works on endusers	20
Application of WLC process at key stages • increased detail as project develops • workshops • option appraisals • availability of spares / backup for components and equipment • proportional to size and complexity of project	20
Leadership and management of process by PSCP with input from • PSCP, MSCMs and wider supply chain • ICT and Employer • Reporting to Employer and sign off at key stages	10
Bench marking of WLC with similar projects	10
Affordability	10
Continuous development of IST's expertise in application of WLC	10

[7] The learned trial judge referred to the headings in these guidance notes as topics and the subheadings as items. In total the guidance notes across Parts B, C, D and E, provided for some 39 topics and 186 items. The plaintiff submitted its tender documents on 5 October 2007 within the timescale provided. On 17 December 2007 it was informed that it had been unsuccessful (coming only 1% behind the bidders placed in fourth and fifth positions). A debriefing meeting took place on 10 January 2008. The plaintiff claims that it was only at this meeting that it became aware of the existence of the guidance documents used by the assessment team. The learned trial judge held that the appellant was in breach of its duty of transparency owed to the respondent as an economic operator by not disclosing the 39 topics and the weightings attached to them in the assessment process.

Directive 2004/18/EC and the 2006 Regulations

[8] The 2006 Regulations transpose into domestic law the obligations arising from Directive 2004/18/EC on the coordination of procedures for the award of public contracts. The first recital of the Directive notes that it is

based on Court of Justice case-law on award criteria which provides that such criteria must be linked to the subject-matter of the contract, must not confer unrestricted freedom of choice on the contracting authority, must be expressly mentioned and must comply with the fundamental principles of the Treaty. The fundamental principles include the principle of equal treatment and the principle of transparency. Recital 11 deals with framework agreements and notes that where these involve the reopening of competition between those on the framework agreement the aim is to guarantee the required flexibility and respect for the general principles including, in particular, the principle of equal treatment.

[9] Recital 46 states that in order to ensure compliance with the principles of transparency, non-discrimination and equal treatment it is only appropriate to allow the application of two award criteria: the lowest price and the most economically advantageous tender. The recital then goes on to deal with the requirements of equal treatment and transparency.

> "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. Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria."

The recital provides that the economic and quality criteria taken as a whole must make it possible to determine the most economically advantageous tender for the contracting authority and that the criteria for the award should enable tenders to be compared and assessed objectively.

[10] There is no issue with the transposition of the Directive. Regulation 4(3) of the 2006 Regulations requires a contracting authority to treat economic operators equally and in a non-discriminatory way and to act in a transparent way. In this case the appellant used the restricted procedure under Regulation

16 which can be applied to framework agreements by virtue of Regulation 19. Regulation 16(15)(d) requires the contracting authority to include the relative weighting of the criteria for the award of the contract in the invitation to tender if it has not already been published in the contract notice. Regulation 30(1) provides for the two permitted award criteria and the following subsections deal with the nature of those criteria and the requirement to notify economic operators of the weighting of the chosen criteria.

> "(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."

It is common case that the criteria listed in Regulation 30(2) are neither compulsory nor comprehensive.

The case-law

[11] Like the learned trial judge we intend to look at the European and domestic case-law. The recitals to the Directive make it clear that the cases provide the basis upon which to interpret the obligations created by the Directive. We have the advantage of having the benefit of one further European authority and one additional domestic authority neither of which had been delivered when the learned trial judge gave his judgment on liability.

[12] The requirement that a contracting authority has to disclose not just the selection criteria it intends to use in the award of a public contract but also the weighting that it intends to apply in respect of those criteria has been authoritatively established in Universale-Bau AG (Case C-470-99). We agree, however, with the learned trial judge that the critical case for the purpose of this dispute is the decision of the ECJ in ATI v ACTV Venetzia (Case C-331-04). That case concerned a contract for the provision of public transport

services for the town of Mestre between June 2002 and December 2003. The applicant was invited to tender and was informed that there were four criteria against which the most economically advantageous tender would be selected. The points allocated to each were set out and 25 points were allocated for the third criterion; organisational procedures and support structures used in carrying out the service.

[13] The letter of invitation also set out further information that was required in respect of the third criterion.

> "As regards the third criterion for the award of the contract, the contract documents provided in paragraph 3(10)(6) that the tender papers must contain a descriptive account of the organisation and of the logistical and support structures to be used in the management of the services which are the subject-matter of the contract, if it is awarded; that account had to include at least the following information:
>
> – 'depots and/or areas where buses can be parked, owned by or available to the undertaking, within the territory of the Provincia di Venezia …;
>
> – procedures for supervising the service supplied and number of employees supervising the service itself;
>
> – number of drivers on the route and kind of licence held;
>
> – number of places of business owned by or available to the undertaking (other than depots) within the territory of the Provincia di Venezia …;
>
> - number of employees engaged in organising drivers' shifts'."

[14] After the receipt of the tenders the jury met to consider the assessment process and decided to weigh the 25 points available for this criterion by giving 8, 7 and 6 points for the first three subheadings and two each for the last two subheadings. The essential issue for the ECJ was whether it was contrary to the principles of equal treatment and transparency for the jury to weigh the subheadings without prior notice to the applicant and the other tenderers. At paragraph 24 of the judgment the court stated that "it is

important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, their relative importance, when they prepare their tenders". This is the principle upon which the respondents place emphasis in this appeal.

[15] The court went on in paragraph 32 to set out the requirements of community law in these circumstances.

> "Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that that decision:
>
> – does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;
>
> – does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;
>
> - was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers."

It is apparent, therefore, that the principle in paragraph 24 of the judgment does not prevent the contracting authority applying weighting to those features which the tenderer is aware are to be taken into account as long as the three conditions of paragraph 32 are not breached. In both this case and ATI the weighting was decided after the receipt of the tenders so we do not have to consider how this principle applies if the weighting has been decided in advance.

[16] The third of the European cases is Lianakis v Androupolis Case C-532/06. This was a case where the contracting authority had published the three award criteria but had not published the weighting attached to them. At the assessment stage a weighting of the award criteria was agreed and the identification of sub-criteria was applied to each of the three criteria. The sub-criteria had not previously been brought to the attention of the tenderers. Unsurprisingly the ECJ found a breach of the obligation of transparency by reason of the failure to bring to the attention of the tenderers the weighting of the criteria or the nature of the sub-criteria which were not predictable by the

tenderers. The court, at paragraphs 41 and 42 of its judgment, made it clear that this was a decision entirely in line with ATI where the contract documents had published the award criteria weightings and notified the tenderers of the sub-criteria. We do not consider that Lianakis adds materially to the discussion in this case.

[17] The last European authority to which we propose to refer is Evropaiki Dynamiki v EMSA Case T-70/05, a decision given after the judgment of the learned trial judge. The European Maritime Safety Agency called for tenders in relation to two projects relating to the provision of maritime services. The legal principles are the same as those applicable in this appeal. The contracting authority decide to use the most economically advantageous criterion for the award and published to the tenderers the weighting of three quality criteria totalling 70% of the award criteria with the balance determined by the total price. The first quality criterion was:

> "Proposed methodology for the project; this includes the detailed proposals of how the project would be carried out including milestones and deliverables (as defined in [point] 3 [of the tender specifications]). (40%)"

The contracting authority decided at the evaluation stage to subdivide that criterion into two sub-criteria:

> "repartition of tasks, manpower offered of quality and man-days (roadmap) 20%; deliverables 20%"

[18] The court noted that each tenderer was required to submit the detailed information relevant to the criteria set out at paragraphs 19 and 150 of the judgment. The important aspect of this judgment is that the court held that, in light of that information required by the contract documents, the applicant was aware of the matters upon which the evaluation would be made. The essence of the decision is contained in paragraphs 154 and 155.

> "154. It is apparent from the case-law cited in paragraph 148 above that a contracting authority cannot infringe the Financial Regulation or the implementing rules when it divides among the subheadings of an award criterion which are defined in advance the number of points allotted to that criterion when the tender specifications were prepared, provided that that division does not alter the award criteria defined in the tender specifications or the contract notice, does not contain elements

> which, if they had been known at the time the tenders were prepared, could have affected that preparation, and was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.
>
> 155. In the present case, the applicant, by merely referring generically to the fact that the contracting authority subdivided a criterion into two sub-criteria, has not shown that the decision of the contracting authority to make such a division led to an alteration of the contract award criteria previously defined in the tender documents, or that it contained elements which could have affected the preparation of the tenders, or that it gave rise to discrimination against the applicant or one of the tenderers."

Apart from the fact that this endorses the propositions set out in ATI this case also demonstrates that where an applicant challenges the weighting applied to sub-criteria there must be an evidential base for any contention that there has been a failure to satisfy any of the three ATI conditions.

[19] We now turn briefly to two domestic decisions. The first is Letting International Limited v London Borough of Newham [2008] EWHC 1583 (QB). This decision was given just before the learned trial judge gave judgment. The case concerned a claim that materials used in the evaluation of the tenders constituted award criteria rather than sub-criteria as a result of which their weightings ought to have been disclosed. In dealing with that issue at paragraph 63 of his judgment Silber J looked to the dictionary definition of criterion; "*principle, standard or test by which a thing is judged, assessed or identified*". The breadth of this definition almost inevitably includes any material used in the evaluation process. It was disapproved as a test in the next case which we are about to consider and we agree that it is not an appropriate test for the identification of criteria. Understandably the learned trial judge in this case proceeded down a similar line in his approach to the issue of what constituted a criterion.

[20] The other decision which was not available to the learned trial judge was J Varney and Sons Waste Management Limited v Hertfordshire County Council [2011] EWCA Civ 708. That was a case in which the contracting authority invited tenders for its household waste recycling centres. It adopted the most economically advantageous tender criterion with 65% for price and 35% for customer satisfaction. The tender documentation required the tenderers to answer sixteen return schedules of which fifteen concentrated on aspects of the service to be provided at each site. The authority decided to award 5 marks for all of the schedules excluding staffing where a system of comparative position in the competition for each site was used.

[21] There were two issues of significance in this case. The first was whether the return schedules constituted criteria or sub-criteria and secondly if they were sub-criteria whether the applicant had sufficient notice of them. The Court of Appeal rejected the approach of Silber J to the definition of criterion as being much too wide. It approved the conclusion of Flaux J that the return schedules were dealing with different aspects of customer satisfaction and were, therefore, sub-criteria. In those circumstances there was no absolute requirement to specify their weightings.

[22] Stanley Burnton LJ giving the only judgment also held that the principles of equality and transparency were also satisfied where the same information was given to each tenderer and it would have been clear that the information gathered in the return schedules would have been used to determine how to award the contracts. This is to be distinguished from the Linakis case where the tenderers had no prior notice of the sub-criteria used.

Discussion

[23] The issue in this appeal is whether the process for the selection of the persons to enter the Framework Agreement was in contravention of the principles of transparency and equal treatment contrary to Regulation 4(3) of the 2006 Regulations. In order to determine that issue it is necessary to deal with the following questions.

(i) Are the 39 topics in the evaluation document sub-criteria or sub-headings to which the ATI tests apply?

(ii) If so, were they sufficiently brought to the attention of the tenderers so as to satisfy the requirements of transparency?

(iii) If so, does the application of those sub-criteria contravene any of the three tests established by the ECJ in ATI ?

[24] In agreement with the learned trial judge we are satisfied that the 39 topics were sub-criteria. They were dealing with different aspects of the quality particulars. In the example within the judgment they were breaking down the elements of whole life cost. Although the learned trial judge approached the definition of criterion on the same basis as Silber J we are satisfied that his categorisation of the topics as sub-criteria is clearly consistent with the decisions in Evropaiki Dynamiki and J Varney and Sons. We accept, however, that this nomenclature can divert attention from the real question which is whether the requirements of equal treatment and transparency have been respected. The conclusion of the learned trial judge with which we agree is that these were matters to which the attention of tenderers should have been drawn in broadly the same manner as described in ATI for sub-criteria.

[25] The learned trial judge found that the sub-criteria were predictable on the basis of the information provided by the contracting authority. As is clear from ATI, Evropaiki Dynamiki and J Varney and Sons it is a matter of judgment in each case as to whether the sub-criteria were sufficiently brought to the attention of the tenderers. There was clearly considerable concentration on this within the hearing and the learned trial judge eventually concluded that at least 184 of the 186 detailed points were predictable and that each was relevant to the evaluation of the tenders. In relation to the sub-criteria with which this appeal is concerned the learned trial judge addressed this very issue at paragraph 44 of his judgment where he concluded that the sub-criteria were reasonably predictable and consistent with the published criteria. In our view this finding inevitably leads to the conclusion that there was sufficient disclosure of the sub-criteria to satisfy the requirements of transparency. We do not consider that this conflicts with the reasoning of the learned trial judge as his emphasis was on the failure to provide details of the weightings of the sub-criteria to which we will shortly turn.

[26] There is no material to suggest that the weightings attached to the sub-criteria altered the criteria set out in the contract documents or contract notice. Indeed there is abundant material in the findings of the learned trial judge to indicate that the sub-criteria themselves flowed from the quality particulars which can be described as the quality criteria and nothing to indicate that there was anything about the application of the weightings which altered the criteria. Similarly there was nothing to suggest that the weighting was likely to give rise to discrimination against any of the tenderers.

[27] At paragraph 44 of his judgment the learned trial judge accepted that the weightings of the sub-criteria were not irrational but asserted that because they were not predictable it followed from paragraph 24 of ATI that those weightings ought to have been disclosed. We do not accept that conclusion. ATI does not create a test based upon the predictability of the weighting of the sub-criteria. The only three circumstances in which there may be a breach of community law because of any failure to disclose sub-criteria are set out at paragraph 15 above. In that paragraph we expressly drew attention to our conclusion that the principle asserted in paragraph 24 of ATI does not require of itself the disclosure of the weighting of sub-criteria.

[28] The learned trial judge concluded, however, at paragraph 20 of his judgment that the weightings of the sub-criteria were elements which if they had been known in advance at the time the tenders were prepared could have affected that preparation. He laid considerable emphasis on the fact that the respondent only had to show a possibility rather than a likelihood. It can be seen from J Varney and Sons that the mere assertion that the preparation of the tender could or would have been affected is not sufficient to engage this exception. There must be some evidential material.

[29] Within the liability judgment there is no such material set out upon which the learned trial judge based his conclusion but in fairness to him the issue was discussed within the initial judgment at the interlocutory stage. The case made by Alan Coulter, the procurement director of the respondent, was that the answers to the questions were electronically locked so as to prevent any answer in excess of 6,000 words to each question. The respondent had exceeded this in the first draft of its answer to B01 and had to delete material in order to ensure compliance. Mr Coulter complained that over 2,000 words of his answer to the question at B01 arose from the question but was not taken into account in the evaluation. The respondent's answer to question B01 was marked down because of a lack of detail on various aspects which he maintained would have been addressed if the criteria and weighting were known. In substance, therefore, the complaint was that some elements of the question did not have weight attached to them, a matter not known to the bidder who wasted part of his answer on them.

[30] The learned trial judge clearly accepted some aspect of this because at paragraph 54 of his judgment he noted that the submission by the respondent covered aspects which were not taken into account in the evaluation material and it is tolerably clear that the learned trial judge was not persuaded that the respondent had been properly rewarded for those aspects. It appears to have been accepted that some allowance for that should have been made.

[31] This complaint was supported by the report of Mr Hackett, the expert retained on behalf of the respondent. He and Mr Rowsell, the expert for the appellant, both gave evidence in the court below. Neither party submitted any transcript of the evidence nor was there any analysis of the reports or the evidence to seek to undermine the learned trial judge's conclusion that the failure in this case to identify the sub-headings and the weighting attached to them could have affected the preparation of their tender.

[32] We accept that the tests in ATI have to be examined in the context of the obligation of transparency but that obligation is properly stated in recital 46 of the Directive as an obligation to ensure that tenderers are reasonably informed. At paragraph 46 of his judgment the learned trial judge placed some emphasis upon the need for bidders to know all elements which could affect the preparation of the bid which is derived from paragraph 24 of ATI. It is clear, however, from paragraph 32 of the judgment that in many cases the absence of knowledge about the weighting of the sub-headings will not lead to any breach of community law and it will be for the bidder in each case to produce a case supported by adequate evidence before one of the exceptions under paragraph 32 of that judgment could be established.

[33] We have carefully considered the relatively limited material available to us which seeks to undermine the finding of the learned trial judge that the information disclosed in this case was not adequate in the circumstances and

could have affected the preparation of the tender. We do not feel that there is a sufficient basis for us to interfere with his finding on that issue.

Conclusion

[34] For the above reasons we do not consider that the grounds of appeal on liability have been made out. In our decision in Department of Education v Henry Brothers and others [2011] NICA we concluded that where a framework agreement has been entered into there is no bar by virtue of Regulation 47(9) of the 2006 Regulations to the jurisdiction of the judge to make an order setting aside the framework agreement. We see no basis upon which to interfere with the conclusion of the learned trial judge on this issue.

[35] The appellants argue that we should refer two points of law to the European court. The first is whether a contracting authority must disclose to potential bidders its evaluation methodology as well as the award criteria and sub-criteria and their weightings. For the reasons set out the issue as to whether disclosure of selection mechanisms is required is in each case a matter of fact for the national court applying the European case-law. The second point is that related to remedy which we declined to refer in Department of Education v Henry Brothers and others. We take the same view in this appeal.

[36] We conclude that the appeal must be dismissed.