Neutral Citation no.: [2008] NIQB 91 **FINAL** *Ref:* **DEE7249**

Judgment: approved by the Court for handing down *Delivered:* **11/09/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

ACTION 2008 NO. 5070

_____

McLAUGHLIN AND HARVEY LIMITED

Plaintiff;

-v-

DEPARTMENT OF FINANCE AND PERSONNEL
[No. 2]

Defendant.

_____

DEENY J

[1] This case raises interesting issues regarding transparency and the disclosure of award criteria and weightings in the developing field of public procurement law. The plaintiff's claim arises in this way. The Central Procurement Directorate ("CPD") is a Directorate of the defendant department. In affidavits before the court officials of the CPD explain with reference to a series of reports including one by Lord Levene, as he now is, of 1995, how Government thinking with regard to construction procurement has evolved over the last 15 years. A view has been formed that competitive tenders awarded to the tenderer with the lowest price do not, in fact, always yield the best value for the public. The Government now favours a "partnering approach rather than confrontational relationships which have often marred the successful delivery of projects. It is based on contractors and their design teams working together in Integrated Supply Teams with the Client." (Stewart Heaney first affidavit).

[2] An example of that approach is the current proposed Framework Agreement. This process will select five contractors to lead integrated supply teams to undertake projects, as the need arises, by means of a secondary competition among those appointed to the Framework Agreement. The process is conducted by the CPD. This particular Framework Agreement relates to a number of construction contracts which it is hoped to implement over the next four years at a cost of £500-£800m. They include urban regeneration, further education, arts and sports developments. It is relevant to note that they do not cover schools, health or roads ie. that a contractor excluded from this Framework Agreement may well still be eligible for much other public procurement work over the coming four years. These developments in public procurement have clearly not been confined to the United Kingdom as they are recognised under the relevant current European Directive 2004/18/EC, to which I will refer in due course.

[3] In this case a contract notice was published, as required, in the official journal of the European Union on 15 March 2007. The primary tender documents were issued on 24 April 2007. The tender of the plaintiff was submitted on 5 October 2007. On 17 December 2007 they were informed that they had been unsuccessful. They sought a debrief meeting as they were entitled to but for various reasons this did not take place until 10 January. The plaintiff would say that it was only on this occasion that they realised and learnt that the defendant through the CPD had marked the plaintiff's tenders alongside all the other tenders with a particular methodology that had not been disclosed in advance to the plaintiff. The heart of the case is the plaintiff's attack on the very fact of that methodology which it alleges constitutes new and undisclosed criteria relied on by the defendant in breach of the European requirement of transparency and in a way that was unfair to the plaintiff. As the plaintiff came sixth in the competition only 1% behind the contractors placed fifth and fourth even a modest improvement in its marking by a proper approach, it contends, would materially affect the outcome. The defendant denies these are new criteria but says they are a perfectly legitimate working out in detail of the material which had been included in the tender documents. Furthermore, in an analysis furnished to the court on the third day of the hearing, the defendant's expert drew attention to the fact that the plaintiff's solicitors had furnished the defendant with the first draft of their tender. He was able to point out that it anticipated correctly the very points which the plaintiff's expert was now saying were unexpected and not foreseeable. In a number of instances, however, these matters were deleted between the first and second tenders. For reasons that will appear I do not consider it necessary for me to go much further into the detail of the argument on the merits between the parties.

[4] The plaintiff sought an interlocutory injunction restraining the defendant from proceeding with the implementation of the Framework

Agreement until the resolution of the plaintiff's claim in this action. Following a hearing from February 12 to 15 2008 I gave judgment in favour of the defendant refusing an interlocutory injunction. See McLaughlin and Harvey Limited v. Department of Finance and Personnel (No 1) [2008] NIQB 25. Having heard submissions from counsel, who were largely but not completely in agreement, I directed that the trial should proceed on liability only. If the defendant succeeded there would be no need to go further. Even if the plaintiff succeeded there was fruitful ground for discussion between the parties before the court proceeded to the issues of whether the plaintiff could be added to the Framework Agreement as a sixth economic operator, and whether, if so, that were appropriate or whether damages would be the only remedy.

[5] The hearing of the substantive action took place before me on 9 to 13 June and 20 June 2008. Mr Michael Bowsher QC appeared for the plaintiff with Mr David Scoffield. Mr Stephen Shaw QC appeared for the defendant with Mr David McMillen and Mr Rhodri Williams. The court had the assistance of helpful oral and written submissions from counsel for both parties. In addition to the oral evidence received at the trial some reference was made by agreement to earlier affidavit evidence in the case.

The law

[6] The topic of tendering for contracts has received some attention at common law in recent years; cf. my judgment in Natural World Products Limited v. Arc 21 [2007] NIQB 19. However consideration of it has been of long standing in other Member States of the European Union. There had been a succession of Directives addressing the issue of which the one applicable at the time of this tender process was Directive 2004/18/EC on the Co-ordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts. While this directive has been implemented in our municipal law by regulations to which I will turn it is helpful to make some reference to the directive itself. The second sentence of recital (1) reads as follows:

> "This directive is based on Court of Justice caselaw, in particular caselaw on award of criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2."

(My emphasis throughout).

The importance of criteria and their express mention is returned to, inter alia, at recital paragraphs (46) and (47). I quote the former.

> "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 an award of contracts, it is appropriate to lay down an obligation – establish by caselaw – 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, but 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 their criteria.
>
> Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they 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 determination of these criteria depends on the object of the contract since they must allow the level of performance offered

> by each tenderer to be assessed on the light of the object of the contract, as defined in the technical specifications and the value for money of each tender to be measured.
>
> In order to guarantee equal treatment the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs – defined in the specifications of the contract – of particularly disadvantageous groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong."

It can be seen immediately from this that the directive uses the term criteria both for the overriding distinction between "lowest price" and "most economically advantageous tender" and for a series of economic and qualitative criteria which may be applicable to particular contracts. (This tends to undermine an important part of the Defendant's argument at a later stage.)

[7] Article 1.5 and Article 1.10 make it clear that the provisions of the Directive apply to Framework Agreements. Article 2 is headed "Principles of Awarding Contracts" and states that contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way. Article 32 deals with Framework Agreements. It applies Article 53 to those Agreements. It provides a maximum time limit of 4 years save in exceptional circumstances for the duration of the Agreement and a minimum number of economic operators of three but no maximum number.

[8] Article 53 of the directive deals with contract award criteria and provides at 1A that –

> "When the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics,

> environmental characteristics, running costs, cost effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion,"

shall be the basis of the award of the contract.

[9] Furthermore the contracting authority is obliged to specify "the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender." The defendant points out that those weightings can be expressed by a range with an appropriate maximum spread or even, where it is not possible for demonstrable reasons, by merely placing the criteria "in descending order of importance". The latter was not the situation here.

[10] Directive 2004/18/EC has been implemented in our domestic law by The Public Contracts Regulations 2006 which govern public procurement in England and Wales and in Northern Ireland. Regulation 2 deals with interpretation including Framework Agreements. "Framework Agreement" means an agreement or other arrangement between one or more contracting authorities and one more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the Framework Agreement applies.

[11] However with relevance to the task before this court there is no definition of criterion or criteria. Regulation 4(3) reiterates the provisions of the directive by stating that "a contracting authority shall treat economic operators equally and in a non discriminatory way and act in a transparent way.

[12] Regulation 16(15) is important.

> "The contracting authority shall include the following information in the information [to each economic operator selected to tender]
>
> . . .
>
> (d) The relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (2)."

[13] Regulation 19 deals with Framework Agreements. Contracting authorities may follow one of the procedures set out in Regulations 15, 16, 17 or 18 for these purposes.

[14] Regulation 30 commences Part 5 dealing with the award of a public contract. It expressly deals with "Criteria for the Award of a Public Contract". A contracting authority may award a public contract on the basis of the offer which is the most economically advantageous from the point of view of the contracting authority rather than merely offering the lowest price. If so Regulation 30(2) applies. "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, aescethetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion. It will be borne in mind that Article 53(1)(a) of the directive uses the words "for example" instead of "including" in dealing with criteria and that it is indisputable that not all of these criteria are relevant to every contract nor are necessarily therefore to be included. Regulation 30(3) enacts the obligation to state the weighting which the authority gives to each of the criteria chosen in the contract notice or in the contract documents. Again there is scope for giving a range of weightings or if it is not possible to provide weightings to indicate a descending order of importance.

[15] A subsidiary point raised by the plaintiff arises from Regulation 32(4) which requires the contracting authority to inform an unsuccessful economic operator of the characteristics and relative advantages of the successful tender. There is a dispute between the parties as to whether that was adequately done.

[16] Regulation 47 deals with applications to the court and the enforcement of obligations. It expressly establishes that a contracting authority does owe a duty to an economic operator. By Regulation 46(6) a breach of that duty is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage. Any proceedings for breach of that duty shall be brought in the High Court. Although not expressly referred to in the plaintiff's Writ of Summons that is the basis of this claim. For completeness I mention Regulation 46(9) which provides that in such proceedings the court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into. It is at present a disputed question between the parties as to whether that Regulation would prevent the court from ordering that the plaintiff, if successful, be added to the number of economic operators eligible for actual contracts under the Framework Agreement.

European Authorities

[17] In Universale-Bau AG, Case C – 470/99, [2002] ECR I – 11617 the Sixth Chamber of the European Court of Justice was considering a precursor directive to the current directive. Paragraph 99 of that judgment is relevant and I quote it in full.

> "It is therefore clear that the interpretation according to which, where, in the context of a restricted procedure, the contracting authority has laid down prior to the publication of the contract notice the rules for the weighting of the selection criteria it intends to use, it is obliged to bring them to the prior knowledge of the candidates, is the only interpretation which complies with the objective of directive 93-37, as explained in paragraphs 88 to 92 of this judgment, since it is the only one which is apt to guarantee an appropriate level of transparency and, therefore, compliance with the principle of equal treatment in the procedures awarding contracts to which that directive applies."

This is clearly one of the decisions which informed the current Directive. it is relied on by the Plaintiff here.

[18] Perhaps the most important judgment for the purposes of this hearing is the decision in ATI v. ACTV Venezia et alia, Case C – 331/04, [2005] ECR 1-10109. In those proceedings the defendant and the province and commune of Venice were awarding a contract for public passenger transport services on the basis of the economically most advantageous tender. The parties were given four award criteria with a maximum of 60% marks for the first criterion and maxima of a smaller order for the other criteria. Subsequently after the submission of tenders but before the envelopes were opened the jury weighted the 25% points available under criterion 3 into five sub headings. This was analogous to the actions of the defendant here. A disappointed contractor challenged that step before the regional administrative tribunal but failed. They appealed to the Consiglio Di Stato which referred certain questions to the court for preliminary ruling. I set out the decision of ECJ in extenso.

> "18. As a preliminary point, it must be observed, as the referring court pointed out, that, by the decision at issue in the main proceedings, the jury simply decided how the 25 points allocated for the third award criterion had to be distributed among the five subheadings in the contract documents.
> 19. Accordingly, the questions referred should be understood to relate essentially to the question whether Article 36 of Directive 92/50 and Article 34

of Directive 93/3 8 must be interpreted as meaning that Community law precludes a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those subheadings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared.

20. First, as the Austrian Government rightly observed, the provisions of Article 36 of Directive 92/50 and Article 34 of Directive 93/38 cannot be applied simultaneously to the same set of facts. However, the provisions cited in the questions referred for a preliminary ruling have substantially the same wording (see Case C-513/99 Concordia Bus Finland [2002] ECR P7213, paragraph 91). Therefore, the Court can give a proper answer to the question as reformulated without there being any need for it to rule as to which of the two directives is applicable in the case in the main proceedings.

21. Next, it must be observed that the award criteria defined by a contracting authority must be linked to the subject matter of the contract, may not confer an unrestricted freedom of choice on the authority, must be expressly mentioned in the contract documents or the tender notice, and must comply with the fundamental principles of equal treatment non-discrimination and transparency (see Concordia Bus, cited above, paragraph 64).

22. In the present case, it must be observed, in particular, that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives (see Concordia Bus Finland, paragraph 81) and that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed (see Case C-19/00 SIAC Construction [2001] ECR 17725, paragraph 34).

23. It must also be observed that, in accordance with Article 36 of Directive

92/50 and Article 34 of Directive 93/3 8, all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their

existence and scope (see Concordia Bus Finland , paragraph 62).

24. Similarly, in order to ensure respect for the principles of equal treatment and transparency, 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 (see, to that effect, Case C-87/94 Commission v Belgium [1996] ECR 1-2043, paragraph 88, and Case C470/99 Universale-Bau and Others [2002] ECR 1-11617, paragraph 98).

25. Finally, it is for the national court to assess, in the light of these rules and principles, whether, in the case in the main proceedings, the jury infringed Community law by applying a weighting to the various subheadings of the third criterion for the award of the contract.

26. In that regard, it must be determined first whether, in the light of all the relevant facts of the case in the main proceedings, the decision applying such weighting altered the criteria for the award of the contract set out in the contract documents or on the contract notice.

27. If it did the decision would be contrary to Community law.

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. (My underlining).

29. If it did the decision would be contrary to Community law.

30. Third, it must be determined whether the jury adopted the decision to apply weighting on the basis of matters likely to give rise to discrimination against one of the tenderers.

31. If it did the decision would be contrary to Community law.

32. Accordingly, the answer to the questions referred must be that Article 36 of Directive 92/50 and Article 34 of Directive 93/3 8 must be interpreted as meaning that 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 tender was 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."

[19] The defendant in its thorough closing submissions adverts to the language of this judgment both in the language of the case, which was Italian, and of the court, which is French. They point out that in Italian the words "elementi" and "sub elementi" are used in paragraph 25, 28 and 32. Therefore the use by the English translator of the word "sub-headings" in paragraph 32 is something of a gloss or an attempt at a synonym. This they say is borne out by the fact that in French the words used are "eĺéments" and "sous-eĺéments". This is correct. I might add that in paragraph 24 eĺémenti and eĺéments are used instead of the word features in the phrase "all the features to be taken into account by the contracting authority". This rather undermines the defendant's argument that features only refers to award criteria and nothing else. Indeed that submission cannot be correct. The defendant subsequently accepts that there is an obligation to disclose sub criteria without asking the court to expressly rule on that point. That express term is not found in this judgment. It seems to me likely that elements and sub headings, or sub elements if one prefers, are intended to cover both criteria (including subsidiary criteria) and the weight to be given to them. Paragraph 25 might imply that it was lawful for the contracting authority jury to have sub headings (which are not in detail described in the judgment). It does make it clear that it is for the national court to assess whether applying a weighting to those various sub headings or "sub eĺémenti" infringes Community law. The giving of weightings is therefore important. This is relevant in the decision before this court.

[20] I direct attention to paragraphs 28 and 29 in particular of the judgment. The court must determine whether the decision contained elements which if they had been known at the time the tenders were prepared, "could have affected that preparation". If so the decision is contrary to Community law. Note that the court is saying "could" have affected the preparation and not

"would" have affected the preparation. The court does not use the word criteria there and as indicated above it seems to me it is contemplating criteria and weighting, including, clearly in the context of paragraph 25 and of paragraph 32, the weighting of sub criteria.

[21] I would just briefly reaffirm that with the assistance of the French and Italian text the word "features" in paragraph 24 of the judgment is not therefore confined only to award criteria, as the defendant submits, despite the fact that the two cases cited there namely, case C-87-94 Commission v. Belgium [1996] ECR I-2043, at paragraph 88 and case C-470/99 Universale-Bau & Others [2002] ECR I-11617, at paragraph 98 are referring to criteria. The court in ATI had to address its mind expressly to the issue of weighting of subsidiary criteria.

[22] The First Chamber of the court had occasion to return to these matters in Lianakis v. Alexandroupolis & Others, Case C 53206 (24 January 2008). These proceedings related to contracts related to the defendant municipality. It should be noted that though this case was only decided in the current year the Council Directive which was applicable at the relevant time was Directive 92-50-EEC of 18 June 1992. At paragraph 21 the European Court said:

> "By its question, the referring court asks in essence whether, in a tendering procedure, Article 36(2) of Directive 92-50 [the equivalent of Article 53(1) in the current directive] precludes the contracting authority from stipulating at a later date the weighting factors and sub criteria to be applied to the award criteria referred to in the contract documents or contract notice."

[23] The judgment draws a distinction between "award criteria" and "qualitative selection criteria" upon which I was not addressed by counsel. So far as award criteria are concerned the view of the court was clear –

> "38. Therefore, a contracting authority cannot apply weighting rules or sub criteria in respect of the award criteria which it has not previously brought to the tenderers' attention (see, by analogy, in relation to public works contracts, Universale-Bau & Others, at paragraph 99)".

[24] The court reminds us at paragraph 42 that in the ATI case the sub criteria had been disclosed in advance and it was only the weighting that were settled on after the tenders had been submitted. The court goes on to repeat with approval the conditions laid down by the chambers in ATI. I set out paragraph 44 of the Lianakis judgment –

> "It must be noted that in the case of the main proceedings, by contrast, the Project Award Committee referred only to the award criteria themselves in the contract notice, and later, after the submission of tenders and the opening of applications expressing interest, stipulated both the weighting factors and the sub criteria to be applied to those award criteria. Clearly that does not comply with the requirement laid down in Article 36(2) of Directive 92/50 to publicise such criteria, read in the light of the principle of equal treatment of economic operators and the obligation of transparency.
>
> 45. Having regarding to the foregoing, the answer to the question referred must therefore be that, read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, Article 36(2) of Directive 92/50 precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub criteria to be applied to the award criteria referred to in the contract documents or contract notice."

The plaintiff relies on this authority also. It should be noted that the contention of the defendant is they complied with that dictum and that the new material complained of by the plaintiff does not fall into the category of sub criteria let alone criteria.

National Authorities

[25] In Regina (Law Society) v. Legal Services Commission [2008] 2WLR 803 the Court of Appeal in England had to consider the applicability of the Public Contracts Regulations 2006 to contracts for the provision of legal services to be awarded by the Legal Services Commission. In the judgment of the court Lord Phillips of Worth Matravers CJ helpfully sets out at paragraphs 42 and 43 the importance and reasons for the principle of transparency and its application in these cases –

> "42 In Commission of the European Communities v French Republic (Case-C-340/02) [2004] ECR 1-9845, para 34 the European court said that -

> "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."
>
> 43 The rationale of the principle has been expressed in a number of different ways. (i) First, it enables the contracting authority to satisfy itself that the principles of equal treatment and of non-discrimination on the grounds of nationality have been complied with: Telaustria Verlags GmbH v Telekom Austria AG (Case C-324/98) [2000] ECR 1-10745, para 61; SIAC Construction Ltd v Mayo County Council (Case C-19/00) [2001] ECR 1-7725, para 41 and Commission of the European Communities v French Republic (Case C-340/02) [2004] ECR 1-9845, para 34. (a) Second, it facilitates competition: Telaustria Veriags GmbH v Telekom Austria AG (Case C-324/98) [2000] ECR 1-10745, para 62; Parking Brixen GmbH v Gemeinde Brixen (Case C-458/03) [2005] ECR I-88, paras 50, 52 and Impresa Portuale di Cagliari Sri v Tirrenia di Navagazione SpA (Case C-174/03) (unreported) 21 April para 75, per Advocate General Jacobs. (3) Third, it enables the impartiality of procurement procedures to be reviewed: Telaustria Veriags GmbH v Telekom Austria AG (Case C-324/98) [2000] ECR 1-10745, para 62 and Impresa Portuale di Cagliari Sri v Tirrenia di Navagazione SpA (Case C-174/03), para 75, per Advocate General Jacobs. (4) Fourth, it precludes any risk of favouritism or arbitrariness on the part of the contracting authority: Commission of the European Communities v CAS Succhi di Frutta SpA (Case C-496/99 P) [2004] ECR 1-3801, para iii. (5) 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; SIAC Construction Ltd v Mayo County Council (Case C-19/00) [2001] ECR 1-7725, para 38, per Advocate General Jacobs."

[26] I would make a brief comment on the judgment cited to me of Morgan J in Lion Apparel Systems Limited v. Fireby Limited [2007] EWHC 2179 (Ch).

The judge summarises the relevant legal principles in his judgment and at paragraph 36 says –

> "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."

I do not think that dictum should be interpreted as meaning, for example, that the maxim de minimis non curat lex is no longer of any application. If the breach of transparency was of a trivial nature the court would, in my view, have a discretion with regard to any order it would make. Lord Hoffman in Pratt Contractors Limited v. Transit New Zealand [2003] UKPC 83; [2003] All ER (D) 26 at paragraph 49 , giving judgment on behalf of the Board said that their Lordships " agree with the Court of Appeal that even if there was such a breach in the first round, it would have had no causative effect on Pratt's failure to obtain the contract." The courts in the United Kingdom may choose to apply that dictum in transparency cases. ATI, para.25, is authority for the proposition that they have some discretion as to whether to do so.

[27] Following the hearing of this action but before the completion of my judgment the judgment of Silber J in Letting International Limited v London Borough of Newham [2008] EWHC 1583 (QB) became available. The plaintiff was an unsuccessful tenderer for a contract for procuring and managing properties leased to local authorities in order to enable them to meet their statutory housing obligations. There is some significant analogy with this case. The authority did publish criteria with weightings including 50% for compliance with specification. But they then went on after the tenders were submitted to divide that 50% unevenly between five sub headings within the criterion "compliance for specification". Furthermore they developed 28 other matters which they described as sub sub criteria which the authority therefore contended they did not have to disclose but which the judge found to be sub criteria. They do not seem to be set out in full in the judgment. The learned judge found that they were sub criteria and they were not merely machinery for assessing the tender bid as the defendant contended but were criteria being used to decide whether the bid was the most economically advantageous to the authority. Furthermore he followed the European decisions set out above and considered that disclosure of the sub weightings for compliance with specification could have affected the preparation of the tender bid and were not disclosed and were therefore unlawful. There were significant number of other matters in the decision which were not touched on the case before me. Suffice it to say that my decision which follows seems to be in accordance with that of Silber J .

Actual approach of the defendant

[28] As indicated above the selection of the economic operators for this Framework Agreement was to be carried out by a panel of the central procurement directorate of the defendant. A number of documents were prepared under the rubric of the integrated supply team framework agreement. Document 1 of 4 was an" Invitation to tender: instructions to tenderers". The abbreviation TP is used for the tender package. The abbreviation "PSCP" refers to a principal supply chain partner, a role the plaintiff was bidding for. I note in paragraph 4.2 of the first document under the rubric 'purpose of the tender package' the following:

> "The purpose of the TP is to provide the Authority with sufficient information to allow ISTs to be evaluated. PSCP's in conjunction with their MSCM's (Main Supply Chain Members) are directed to read all documents carefully before completing the TP. PSCPs' responses to the TP will be evaluated against the criteria set out in Section 8.3 of this document."

[29] I observe that not only was the plaintiff directed to read all the documents but it was stated that their response would be evaluated against the criteria in Section 8.3. In fact there was to be additional material not in the documents given to them and on the plaintiff's case that additional material consisted of criteria or sub criteria to be used for evaluation.

[30] The defendant relies strongly on paragraph 8.3 of this document which has the heading "tender award criteria" and reads:

> "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%" |

[31] The defendant uses this to justify describing the next level of criteria as sub criteria thereby, on their submission, rendering the material complained of by the plaintiff as sub-sub-criteria and therefore not something that has to be disclosed. As indicated above that seems inconsistent with para. (46) of the Directive.

[32] On the defendant's case the material to be found at 8.3.2 consists of the sub criteria but the defendant faces the difficulty that that is not the term it chose to use. It is necessary really to set out this panel in full for it to be appreciated.

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	

[33] Examination of this shows a series of "quality particulars" which the department has set out. They address various areas which, it is common case, they ought to address in deciding on the most economically advantageous tenders. It can be seen that while there are 100 marks available for each of these 10 quality particulars they are given different weights in the right hand column in percentage terms. The department's jury called into question here were dealing with part B to part E while colleagues dealt with part A and part F. For completeness I observe that the reference to relative weighting as applied to average score in each section A , B, C, D and E should read B, C, D, E and F. A "worked up" example of this was to be found on the next page.

[34] The next part of the tender package still within the same rubric was "Tender Package – Quality Submission". It began with guidance for completion of the tender. It laid down that there could not be cross reference between each of the questions. Paragraph 16 (on page 73 of bundle 6) provided that "TSCPs" must ensure that the response to each question is relevant and focused and addressing the question asked. The plaintiff points out that that directed the bidder to the question rather than alerting them to there being additional views held by the panel. At page 78 of the same bundle 6 one finds the first category, to use a neutral word. Under the heading "Part V – Value for Money" we find [BO1] Whole Life Costs. (I consider it appropriate to set out this page in full so that the matter can be followed). It should be understood that there is no dispute that this was a perfectly proper topic for the authority to consider as were all the other categories. Having stated the aim of best value

in whole life terms a related question is set out encouraging the applicant in their response to say how the PSCP and its colleagues "will use whole life costing to develop design solutions, specifications, etc". The maximum score of 100 is stated to be given as is the case for all these other categories. It is relevant to a subsidiary complaint of the plaintiff that the assessment scores say that at 0-50 score is poor and means "any aspect of the response gives major concern". In bundle 6 this tenderer's response to BO1 then follows. It is important to note that there was a strict limit of 6,000 characters (including spaces) which the bidder could use to deal with each of these categories/questions. There was always therefore going to be pressure of space on a bidder to say as much as possible in support of their bid without transgressing this strict rule, enforced by electronic locking.

[35] I note that again the language used here by the authority is not that of sub criterion or sub heading or sub criteria. It is entirely consistent with the view that this was one aspect of the relevant criteria to be used in evaluating the bid rather than being a sub criterion of the very broad "award criteria" of quality and price.

[36] I should observe that a subsidiary criticism of the plaintiff was that an allocation of only 30% for price was unusually low in their view and that of their expert, Mr Hackett. Without ruling on that expressly it certainly is the case that where 70% of the marks are being given on an assessment of quality based on value judgments by the relevant panel it is all the more important that the principles of transparency and equal treatment are adhered to.

[37] The quality submission therefore as included in bundle 6 includes both the questions asked by the department under the various topics and the responses given by this plaintiff bidder. However it has emerged from the affidavits and evidence of Mr Stewart Heaney that matters developed in a somewhat different way. Apparently the make up of the panel to assess these bids had not been agreed prior to receipt of the tenders. Mr Heaney, chartered engineer, as Head of Construction Strategy for the central procurement directorate was to be a member of the quality assessment team. Ultimately he was joined by Mr Robert Mitchell a structural engineer and Mr Joe Hamill a civil engineer both in the employment of the defendant. These three gentlemen were clearly all appropriately qualified and senior persons. The difficulty however was that not having met before the tender documents were prepared they had not formed a view as to how they would in detail assess the quality submissions. They therefore met but, on Mr Heaney's sworn evidence, before opening the 11 tenders which had been received but were stored unopened in a locked storage room by contracts branch staff.

[38] For completeness I should say that category F was dealt with by a construction health and safety team which was separate consisting of Messrs Murray, Russell and Gardiner. It is interesting to note that they adopted a

different approach in one respect to Mr Heaney's team to which I will avert briefly in due course. In addition there was a price assessment team comprising three quantity surveyors, Messrs Wray, Beggs and Craig. The Plaintiff company did well under this price heading. These teams all made their assessments separately. Mr Heaney's team in addition to the documents referred to above also prepared an assessment team valuation guidance sheet for each question in order, as he said in his affidavit, to determine the merits of the evidence provided by each tenderer in a fair, objective and consistent way. The whole process was to take them some two months. Thirteen pre qualification questionnaires had been received by CPD so there was a considerable volume of material to be assessed. For my part it does not seem right to criticise the panel for reflecting in advance of examination of the tenders on material which would assist them in marking the tenders consistently. What is controversial is both the timing of this document and its form. In regard to these, each topic, to seek for a neutral word, under BO1 is given a weighting. 3 are given 20% and 4 are given 10%. Of the first four a number of additional matters act as sub categories. It can be seen therefore that the weighting between these categories is uneven. At BO2 it is 25% for each of four categories as it is at BO3 but at CO1 programming gets 50% of weighting and the other two topics get 20% and 30% respectively. It must be borne in mind of course that these documents were wholly new to the plaintiff after it failed and were only disclosed, they would say very late in the day. For ease of reference I set out pages 720 and 721 which both relate to BO1.

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.

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

[39] The evidence before the court was that the number of detailed points in all came to some 186 across the board. The defendant has established that 177 of those were correctly anticipated by the plaintiff in either its final tender bid or in an earlier draft, copies of which were made available to the defendant in the course of the proceedings. The defendant goes on to point out that the defendant's own expert witness Mr Hackett accepted either before or at the hearing of the action that a further 7 of these 186 items were reasonably foreseeable, to borrow a phrase from another area of law. Mr Rowsell believes the last two were also items that followed reasonably from the rubric which Mr Hackett disagrees with. It seems to me that they are both entitled to their opinion in that regard but it does mean that the defendant has established that all or 99% of the 186 items, again using a neutral word, were "linked to" the subject matter of the Framework Agreement. There was nothing irrational about them. Even if 2 were not I consider that at most tangential.

[40] But the plaintiff says that that was in truth a debate which should not ultimately assist the defendant. They complain that the material in the evaluation guidance e.g. at page 723 was not given to them at all. In that regard it breached the decision in ATI by failing to give them the weighting of sub criteria and it breached the decision in Lianakis by failing to give them the corresponding sub criteria. One matter to which it will be necessary to return is whether the topics as I called them of which there are 33 from BO2 to EO2 are either "elements" or "sub criteria" which ought to have been disclosed, with their weightings but even if they are whether that is also true of the further itemisations set out in evaluation guidance document which amount to some 186 items.

[41] At this point I look at FO1 and FO2. The separate panel which was dealing with health and safety and relevant regulations to that, did also break down the questions which had been disclosed to the bidders. They did bring in material which was parallel with the work of Mr Heaney's panel. But in both cases they did not break down the weighting. They kept those various items at large within the 100 marks to be awarded under each category. As indicated I was not expressly addressed by counsel on that point.

Consideration

[42] In the absence of any definition of criteria or sub criteria in either the European Directive or the 2006 Regulations one looks to the ordinary meaning of the word. According to Chambers 20th Century dictionary a criterion is a means or standard of judging; a test; a rule, standard or canon. The root of it is the Greek word krites meaning a judge. The Shorter Oxford Dictionary defines it as a canon or standard by which anything is judged or estimated or, a characteristic attaching to a thing, by which it can be judged or estimated. When one bears that in mind it seems to be that the defendant's reference to this as evaluation guidance is almost an admission that these or some of these

are indeed criteria. They are being used to evaluate the tender bids i.e. to judge them. To call them a scoring methodology or a marking sheet is really saying the same thing e.g. at CO2 there is a topic : "realistic processes to quantify and allocate risk". At DO1 there is : "industry best practice in innovation". Did the bidder have this? Although obviously the language varies from topic to topic they seem at least or in some cases more like criteria than phrases like "whole life costs" or "target prices". These were not described as criteria in the original documents and they are more like an attempt to categorise the various relevant factors or criteria.

[43] The word criteria is not defined in Stroud but one does find it in Words and Phrases Legally Defined (4th Edition) Volume 1, p.552. The issue was whether a 12 month time limit in the regulations made under an Australian Act constituted a "criterion" within clause 31(3). –

> "The case for a wide meaning of Section 31(3) . . . is also supported by other factors. Firstly, the ordinary meaning of the word "criteria" supports a wide construction. The Oxford English dictionary, 2nd Edition, Volume 4, page 29 defines "criterion" as meaning a "a test, principle, rule, canon or standard, by which anything is judged or estimated". The Macquarie Dictionary, revised edition at page 437, defines "criterion" as "a standard of judgment or criticism; an established rule or principle for testing anything". These definitions are sufficiently broad to embrace a time limit for the lodging of a visa application". Pillay v. Minister for Immigration and Multicultural Affairs [2000] FCA 112 at para [32], per Carr, Sackville and Nicholson JJ."

[44] Admittedly one could argue that there was not a true breach of transparency as long as these topics were reasonably predictable by an informed bidder and were consistent with the published criteria. I find that that was true of these topics. But that argument is undermined by the fact that they are then given weightings which vary from topic to topic. It did not seem to me to be made out, or indeed even argued, that the weightings for each topic were predicted or predictable by a reasonable bidder. There may not have been anything irrational about them but they were very much subjective judgments formed by the panel collectively. I find that the sub-weightings were not predictable. It seems to me therefore that on that basis the topics as I have called them beginning with 'data base of cost information' under whole life costs in BO1 down to 'liaison with employer/ICT' in EO2 are elements which ought to have been disclosed with their weightings to the plaintiff and other bidders.

[45] I do not find persuasive the defendant's contention that quality and price were the only criteria and that the matters set out in the quality submission – evaluation matrix were not "quality particulars" as stated therein but sub criteria. As the plaintiff's counsel has pointed out in submissions there are elements of the criteria to be found in the directive and the regulations in various parts of these documents e.g. aesthetic considerations have a clear correspondence with EO1 design quality. If it is, as undoubtedly it must be, a criterion and not a sub criterion anything within and under EO1 must be sub criteria. (In theory therefore one might determine that only some of the material in the evaluation guidance document first level were sub criteria but that is an unattractive option which I do not propose to pursue). The defendants interpretation of criteria flies in the face of the Directive itself, at para [46]. See para [6] above.

[46] The defendant's attempt at a rigid stratification does not seem to me borne out by the caselaw of the European Court. It seems to me that the language of ATI in particular is designed to secure, as it says, that the bidders know all the elements or sub elements which could affect their preparation of the bid. I readily accept that that is a significant onus on a contracting authority, particularly where as here they are dealing not with a single contract for the provision of bus services in Venice, (and one notes it is for Mestre rather than the ancient city), but with a Framework Agreement covering 4 years and a wide range of different construction and functional tasks. However having chosen to have a Framework Agreement for all those tasks it is clear that at least so far as the 39 items are concerned that they and their weightings did have to be furnished to the bidders in advance to comply with the decisions of the European Court. I find as a fact that this material, and the evidence before me, could have affected the preparation of the document. Indeed I consider it likely that it would have affected such preparation. A bidder would be bound to take it carefully into account in allocating their strictly limited number of characters in each section.

[47] What I regard as elements or sub elements and sub criteria are numbered by Mr Rowsell at 49. I number them at 39 thereby excluding those included in F. It does not seem to me necessary to decide F in the circumstances and I have not heard counsel address me specifically on the point. If the parties require a ruling on that point I will hear further submissions.

[48] A separate important issue is whether the 186 items to be found under these various 39 sub criteria or elements or sub elements are permissible. Although there was some brief reference in the oral argument it has not been substantially addressed in the written submissions which the court received in writing in lieu of oral submissions. Given that I am making a finding against the defendant in any event I am therefore minded not to make an express ruling in connection with them. However to assist the parties I would indicate

that I consider there is force in the evidence of Mr Rowsell that to have provided these in such detail to the bidders would have in fact undermined the efficacy of the process. One wanted to find the most economically advantageous tender bids. If you provided all 186 items even an incompetent tenderer might manage to and quite possibly would manage to put together a bid which referred to all 186 leaving the panel uncertain as to which the preferable bidder was. Although not a point I think made on behalf of the defendant it may be that the 186 are properly described as pieces of evidence for performance of the criteria or sub criteria rather than ranking as either of those themselves. To approach it in another way while unattracted by the defendant's attempt at a rigid classification beginning with quality and price being the only two criteria one might on the view which I prefer nevertheless acknowledge that the 186 were sub sub criteria. Also bear in mind the approach of the court in Lianakis which drew a distinction between award criteria and what might be described as performance criteria. They are not directly analogous but they do seem to contemplate that not everything taken into account by a panel needs to be disclosed in advance to the bidder.

[49] A further distinction can be drawn between the 186 items and the 39 or 49 sub criteria. The individual items have not been given weightings whereas the former of course have been given weightings. That may make their use more defensible by the defendant.

[50] I therefore find the plaintiff's case made out to the extent that the 39 matters to be found from BO1 to EO2 ought to have been disclosed with their respective weightings to the bidders in advance. I now proceed to deal with other subsidiary or related matters.

[51] Firstly, I find that there was no intention on the part of the defendant or its panel to discriminate against the plaintiff. There was no indication of that at all. Mr Heaney made the point in his evidence that one of the five successful tenderers was based in the Republic of Ireland while the plaintiff company, in one form or another has traded in the province of Ulster for a century and a half. I am satisfied there was no intention on the part of the panel or the department to discriminate in any way. Nor was there discrimination in the sense that some other bidder was given this information, rather than the plaintiff. There was no evidence of that.

[52] Secondly, I accept the evidence of Mr Heaney that he and his colleagues prepared the evaluation guidance document before they looked at the tenders. I say that although, contrary to what I think would be the practice in the employment field, I did not hear the other two members of the panel. However I enter a note of caution. In other circumstances a disappointed bidder such as the plaintiff here might well be much less ready to accept that a document like the evaluation guidance document was prepared before the

tenders were looked at. It is preferable that not only any sub criteria are developed before the tenders are invited so that bidders are aware of those with any sub weightings to be given to them but that any lists which a panel was going to use as a checklist to ensure consistency in its marking and not to disclose to the bidders (a practice upon which I have not expressly ruled) should be formulated before the tenders are received so as to avoid the suspicion of some special treatment. Both sub criteria and their weightings are elements which could affect the preparation of the bid.

[53] Thirdly, I reiterate that the 39 sub criteria which ought to have been disclosed to the bidder do appear to have been both reasonable and consistent with the principal award criteria.

[54] Fourthly, it is somewhat surprising that this panel managed to do all the work over a period of 2 months without making any notes at all. At first the court was told that there was absolutely nothing and then this was corrected to say that Mr Heaney would have had a piece of paper for adding up the arithmetic of the marking as they went along but absolutely no other notes were kept. All three members of the panel worked from the tender documents through each question such as BO1 from each tenderer and marked them sequentially on a computer controlled by Mr Heaney. It may be, however, that engineers are less accustomed to keeping notes than some other professions and I need not say anything further about that, save for one thing. One of the criticisms made by the plaintiff is that the very detailed scheme of sub weightings in the evaluation guidance document was an exhaustive scheme. Where a bidder such as the plaintiff furnished in their quality submission an idea which had not previously occurred to the panel the plaintiff's concern was that there was no opportunity for them to get additional marks for that. The sub-weightings added up to 100% so where were additional marks to be allocated? When this was put to Mr Heaney in evidence he expressly accepted that in two respects, at least, the plaintiff's submissions had gone outside the evaluation guidance document in a way which justified extra marks but he said marks were given to the plaintiff. It is difficult to see how he can be confident about that, or how the court can be confident about his recollection of eight months before, when he had no notes of a process that was taking place over a period of two months and involved a considerable number of tender submissions each of which was being marked not only on foot of the ten categories BO1 to EO2 but also on foot of the complex sub weightings and sub criteria which he and his colleagues had developed. Certainly the way in which the weightings for the sub criteria are set out would lend force to the view that there was no provision in them for good points made by a bidder which had not been anticipated by the panel. It may be unwise to use sub weightings for that reason but if used they must be disclosed in advance.

[55] The plaintiff had two subsidiary grounds of complaint. One of those was that there was manifest error on the part of the defendant in giving the

plaintiff a poor mark for BO1 whole life costs and EO2 build quality. A poor mark required on foot of the tender document itself that some aspect of the response gave major concern. However while that language was not used I accept the evidence of Mr Heaney and Mr Rowsell that there was concern overall about their answers on those two topics. Mr Hackett may be quite right in his opinion with regard to those two matters but it seems to me within the margin of discretion of the panel to form the view they did and I find in favour of the defendant in that regard.

[56] Likewise while I understand the points made by the defendant about the debriefing it does not seem to me that, although it was not utterly and completely full and frank, that it amounts to a separate ground for finding against the defendant. An adverse finding in this regard might have unduly onerous consequences for the conduct of expeditious debriefing meetings.

Conclusion

[57] I therefore find in favour of the plaintiff that the 39 topics and their weightings to be found from BO1 to EO2 were elements or features which, following the European case law, ought to have been disclosed in advance to bidders. If, contrary to my view, the stratified language of the plaintiff is appropriate then I consider that those matters constituted sub criteria. I therefore find that there was a breach by the defendant, the contracting authority, to the plaintiff as economic operator of the duty owed under Regulation 47 of the Public Contracts Regulations 2006. I will hear the parties on how they wish to proceed with regard to quantum.