Neutral Citation No: [2020] NIQB 79 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HOR11271** *ICOS No:* **2015/110296** *Delivered:* **29/07/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

NORTHSTONE (NI) LIMITED

Plaintiff

and

DEPARTMENT FOR REGIONAL DEVELOPMENT (TRANSPORT NI)

Defendant

_____

Michael Bowsher QC with Richard Coghlin QC
(instructed by Carson McDowell LLP Solicitors) for the Plaintiff
David Millen QC with Paul McLaughlin QC
(instructed by Departmental Solicitors' Office) for the Defendant

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HORNER J

A. INTRODUCTION

[1] The plaintiff is a civil engineering contractor and asphalt producer carrying on business in Northern Ireland. It seeks damages against the Department for Regional Development (Transport NI) ("DRD") which is the Northern Ireland government department responsible for public roads in Northern Ireland. This claim arises out of the award of 8 public road resurfacing contracts known as the Term Contracts for Asphalt Resurfacing 2015 ("the Contracts").

[2] The Contracts were governed by the Public Contract Regulations 2006 ("the Regulations") and Directive 2004/18/EC ("the Directive"). The nature of the Contracts and the Rules of the competition were set out in "the Term Contracts for Asphalt Resurfacing 2015: Instructions for Tendering" ("IFT").

[3] The object of the exercise was to find the most economically advantageous tender in respect of each contract, otherwise known as the "MEAT". The MEAT was

to be determined in accordance with the Award Criteria which were weighted Price (70%) and Quality (30%).

[4] Following the commencement of proceedings, the DRD applied pursuant to Regulation 47H(1)(a) of the Regulations to lift the automatic stay thus permitting it to award the contracts. The application was opposed by the plaintiff but was granted by Treacy LJ. The plaintiff's claim is now confined to an award of damages if it can prove that the DRD acted unlawfully in awarding seven of the Contracts to other contractors and that it would have been successful should the DRD have acted lawfully in making the awards of all of some of these contracts. By agreement the court is only concerned at this stage with the following issues:

(a) Did DRD commit a manifest error or errors in marking the bids of John McQuillan (Contracts) Ltd ("McQuillans") in respect of seven Contracts none of which were awarded to the plaintiff?

(b) Did DRD breach its duties of equal treatment and/or its duty of transparency in resolving its concerns about the capacity of McQuillans to perform multiple contracts?

[5] By agreement the issues of causation, availability of damages as compensation for any breaches found at this trial and quantification of any loss suffered as a result of any breaches were matters left for another day.

[6] Mr Bowsher QC appeared with Mr Coghlin QC for the plaintiff. Mr McMillen QC appeared with Mr McLaughlin QC for the DRD. I should at the outset express the court's gratitude to both teams for the quality of their submissions, both written and oral.

B. BACKGROUND INFORMATION

[7] This claim relates to the competition held by the DRD for the award of eight of the twelve different term contracts covering the whole of Northern Ireland for asphalt resurfacing. They were:

(i) ARN1 (2015) relating to the Causeway Coast and the Glens of Antrim with an estimated annual value of £3m-£8m and a maximum duration of five years.

(ii) ARS1 (2015) relating to Armagh, Banbridge and Craigavon and with an estimated annual value of £5m-£10m and a maximum duration of three years.

(iii) ARE2 (2015) relating to Lisburn and Castlereagh with an estimated annual value of £2.5m-£5.5m and a maximum duration of five years.

(iv) ARE1 (2015) relating to Belfast with an estimated annual value of £3.5m-£8.5m and a maximum duration of three years.

(v) ARN3 (2015) relating to Antrim and Newtownabbey with an estimated annual value of £2m-£3.5m and a maximum duration of five years.

(vi) ARW3 (2015) relating to Fermanagh and with an estimated annual value of £2m-£6.5m and a maximum duration of three years.

(vii) ARS3 (2015) relating to North Down and Ards and with an estimated annual value of £2m-£6m and a maximum duration of three years.

(viii) ARN2 relating to Mid and East Antrim with an estimated value of £1.5m-£4.5m and a maximum duration of three years.

[8] The Contracts were to be awarded separately in the order set out above from (i)-(viii): see paragraph 10 and paragraph 55 of A2 of the IFT. The initial term of each of the eight contracts was one year. However, at the sole discretion of the DRD a contract extension might be made on any number of occasions up to the maximum contract duration as set out above.

[9] Paragraph 12 of the IFT provided, inter alia:

> "Many of the work activities to be carried out will require the successful economic operator to employ and use skilled personnel and specialist equipment and resources associated with such work activities."

[10] It was also provided that the successful Economic Operator would be expected to have a sufficient number of skilled and available resources to work at more than one location at any one time. Further, the Economic Operator would be expected to price in the inevitable "peaks and troughs that will be inherent in any such programme."

[11] Paragraph 17 provided that in respect of multiple tender submissions there must be "a separate and fully complete tender submission package for each contract." It then provided guidance should the Economic Operator wish to create a fully or partially identical Quality Submission ("QS") document for each separate contract.

[12] Paragraph 27 made it clear that "none of the information contained in this IFT, or any part of the evaluation documentation shall constitute a contract or part of a contract in any way …"

[13] Paragraph 39 required that "**all information within the Tender Submission Package is accurate.** The inclusion of information that is found to be false or misleading will result in the Economic Operator's exclusion from this procurement process." (Emphasis added)

[14] Paragraph 42 expressly provided that Economic Operators who had registered an Expression of Interest in the Competition, that is in the Term Contacts might withdraw this at any time. The withdrawal of interest is in the competition. However, such a withdrawal of interest should be accompanied by a reason for withdrawal.

[15] Paragraph 43 expressly prohibited the tenders from being qualified **in any way** and required that they must be submitted strictly in accordance with the Tender Data and the IFT. (Emphasis added)

[16] Paragraph 45 required that all questions in the Quality Submission Document had to be completed by the Economic Operator and submitted together with all specifically requested supporting information as part of the Economic Operator's Tenderer's Submission package.

[17] Paragraph 50 set out how the scoring for the Quality Submission would take place and how the Quality Assessment Mark would be calculated.

[18] Paragraph 51 did the same in respect of the Price Assessment Mark. This was the "two envelope" approach.

[19] Paragraph 52 dealt with abnormally low tender ("ALT") price submissions and their identification, which was to be in accordance with the current CPD guidance.

[20] Paragraph 55 provided that the DRD was not bound to accept the lowest or any tender and that there was a minimum Financial Standing requirement for each contract which involved a calculation based on the Construction Line Notational category value in respect of each contractor. It said in respect of multiple awards that:

> "Economic Operators who have been invited to tender for more than one Contract shall not take this as an indication they have been deemed to be economically and financially suitable to undertake more than one Contract. The award of multiple contracts (2 or more) to an individual Economic Operator shall be limited to the aggregate of the minimum Construction Line Notational Category values shown in the Table being less than 4/3 of the Economic Operator's highest turnover in the last three years.
>
> Where the award of "multiple contracts to an individual Economic Operator is being assessed, the Contract Authorities shall do so in the order shown in the table above." (This is the same order as the one in which the

Contracts are to be awarded under Paragraph 10 of the IFT.)

[21] Section 2-01 of the TS-QS document entitled "Project Delivery Team" for each Team Contract required the Economic Operator to provide an "organisational chart including names, highlighting the key roles and percentage of time allocated for all personnel whom you propose would be directly responsible for the management and delivery of this Term Contract." It provided that such contractors should be clearly identified and that details should be provided of key personnel including the Contracts Manager, the Site Supervisor/Engineer, General Foreman and others. Finally, a Competency Development Plan for all personnel (including sub-contractors) whom it was proposed would be directly responsible for the management and delivery of each Term Contract had to be provided together with details of how those personnel shall remain "competent and adequately trained during the term of the contract."

[22] Section 2-03 of the TS-QS submission provided a similarly structured question relating to non-human resources that each Tenderer's QS showed it would have in place if awarded the contract.

[23] The marking system for the Quality Submission provided 5 for an excellent response, 4 for a very good response, 3 for a good response, 2 for a satisfactory response, and 1 for an unacceptable response. An award of 0 was an automatic fail. The mark of 5 out of 5 demonstrated that "the Economic Operator will have in place excellent plant/equipment, resources and processes to undertake the contract." Thus, an excellent response merited a mark of 5 out of 5 and demonstrated that "the Economic Operator will have in place excellent plant/equipment, resources and processes to undertake the contract."

[24] In this judgment I will use the term "Resources" to refer to personnel and plant which are available to the Contractor, that is personnel and plant which it possesses and personnel and plant which it can access for use in carrying out the Term Contract(s). The DRD emphasises that the sections 2-01 and 2-03 look forward to what the Contractor "will have in place when the contract commences."

[25] The Competition was conducted in accordance with the restricted procedure and Contracts were to be awarded to the MEAT which as I have noted was weighted Price (70%) and Quality (30%). The plaintiff submitted tenders for all eight Contracts. McQuillans provided tenders for seven of the Contracts, that is, for all of the Contracts bar ARW3 – Fermanagh. In its Quality Submission for each of the seven contracts which McQuillans tendered for, McQuillans provided a completely identical organisational chart in response to the question at Section 2-01 in which it allocated 100% of its time to the specified members of staff. It also duplicated resources in its response to question 2-03 which dealt with plant, equipment and other resources. However, McQuillans were awarded 5 out of 5 for its responses to Sections 2-01 and 2-03 for all of its Quality Submissions in each of the Term

Contracts. No allowance whatsoever was made for the total number of competitions McQuillans had entered despite the identical submissions made in respect of each of them and the obvious duplication of both personnel and plant. Thus, for example, the organisational chart showed that McQuillans were putting forward four site engineers and each one would have to give 100% of his or her time to any Contract awarded to McQuillans. This meant that on the face of the chart McQuillans could provide site engineers for four Contracts at most.

[26] The terms and conditions of the Contracts to be awarded were the Infrastructure Conditions of Contract, Term Version, August 2011 with amendments. An amendment was made to Clause 77 to provide that Quality Submission answers would constitute pre-contractual representations. The bids submitted were ranked as follows:

(a) ARN1: Patrick Keenan first, the plaintiff second by .07%.

(b) ARS1: McQuillans first, the plaintiff third.

(c) ARE2: McQuillans first, the plaintiff third.

(d) ARE1: McQuillans first, the plaintiff third.

(e) ARN3: McQuillans first, the plaintiff second.

(f) ARW3: The plaintiff first, FP McCann second.

(g) ARS3: McQuillans first, the plaintiff second.

(h) ARN2: McQuillans first, the plaintiff second.

[27] On 15 September 2015 the minutes of a meeting of the "TNI Procurement Committee" attended by Pat Doherty, Philip Hammond, Jim McClean, Stephen Bradshaw and Adam Heanen record at a paragraph entitled "AOB":

> "(Jim McClean) raised a query relating to the award of multiple lots within term contracts. Pat Doherty advised that communication with Contractors may resolve issues relating to operational capabilities and that DSO advice should be sought. Jim McClean to seek DSO advice on multiple lots relating to operational capability."

[28] On 24 September 2015 a meeting took place in respect of Term Contract for Asphalt Resurfacing 2015; Assessment, Issues for Consideration and recorded at paragraph 2(c) as follows:

> "(c) Multiple Awards (IFT Clause CL55-page 37):

i. Resources

1. EO2 Duplication of
   Key Personnel/Operatives/
   Sub-Contractors/Plant in Quality Submission
   for each of the 6 contracts.

ii. Order of Assessment/Withdrawal of MEAT from one or more Tender Intention to Award.

iii. Meeting(s) with tenderers before Intention to Award Stage (see attached extracts from Contractors/DSO/Council correspondence from a previous Contract)."

[29] There are no minutes of the meeting of 24 September 2015 available for the court to consider. No satisfactory explanation has been provided to the court for the absence of minutes. I would have expected the meeting to be minuted, and in particular, I have difficulty in understanding why there is no record of any discussion about "the duplication of key personnel/operatives/sub-contractors/plant in the Quality Submissions" for each of the six Contracts. This is a telling omission. If minutes had been taken and lost I would have expected to be told this in no uncertain terms. The other alternative explanations are that there are minutes but that as these undermine DRD's defence they have not been disclosed. Alternatively, the decision to keep no minutes was a deliberate one because DRD was fearful of creating a hostage to fortune. Neither of these explanations reflect well on DRD.

[30] The court was told that the DRD (and the Civil Service in Northern Ireland) did not have any policy for when meetings should be minuted. If this is correct, then it is about time such a policy was drawn up by the Civil Service in general, and the DRD in particular. The DRD should be accountable to the tax payer and its decision should be transparent and lawful. The records of its meetings, especially where they relate to the award of contracts worth millions of pounds, should be accurately minuted as a matter of course. I would expect such a meeting, as the one on 24 September 2015, to be minuted and, if not, a good reason why no record was kept. In this instance I was offered no explanation other than it was informal meeting. I do not accept that this is an adequate or acceptable explanation.

[31] The court's attention was drawn to the apparent failure of the DRD to comply with the Order of the Master of 16 October 2018 which required the DRD to make an Order 24 Rule 7 affidavit in respect of various categories of documents which included:

"**Schedule 1**

(i) All documentation including without prejudice the foregoing, the minutes of meetings and email correspondence, containing information relating to the process of deciding the structure of the procurement exercise.

(ii) All documentation including without prejudice the foregoing, the minutes of meetings and email correspondence, containing information relating to the design of the Competitions and the drafting of the documents issued to the bidders setting out the Rules of the Competition.

(iii) All documentation including without prejudice the foregoing, the minutes of meetings and email correspondence, containing information the mechanism that the Department used to deal with the duplication of resources across multiple tenderers in which any one Economic Operator was assessed as MEAT. (sic)

(iv) All documentation including without prejudice the foregoing, the minutes of meetings and email correspondence, regarding the order in which the contracts were to be awarded or were awarded."

[32] The plaintiff pointed out in its written submissions at the conclusion that it was striking that the DRD was in default of this Order. However the plaintiff had never asked the court to take steps to enforce the Order. It appears that the parties were trying to reach agreement as to how the proceedings should be shaped. Further discussion arose about further discovery from the DRD during the trial and I understand that this issue of further disclosure was resolved between the parties. No further complaint was made to the court by the plaintiff during the trial.

[33] The inferences I draw from the omission on the part of the DRD to keep minutes of the meeting of 24th September 2015 are:

(a) No thought or planning had been given to what would happen if a bidder tendered successfully for more Contracts than it had resources available to it to service;

(b) Or if thought or planning had been given to such a scenario, then such thinking had been particularly shallow and superficial and provided no answer to such problems as what should happen when a successful tenderer had insufficient resources to service all the Contracts it had won.

[34] I pause to note that the defence to the plaintiff's complaints about duplication of Resources is that any problem of this nature could and should be resolved by requiring verification of the plant and resources for each Contract before all the Contracts are awarded. However, this begs the question as to what was to happen if the successful tenderer could not verify and had to withdraw. Did the successful tenderer have to withdraw from that Contract or did the successful tenderer under the Rules of the IFT have to withdraw from the Competition in its entirety? Or did the successful tenderer have the ability to decide what Contracts it would perform and what Contracts it would give up? There were no clear, precise and unequivocal rules as to how such a situation was to be managed. The plaintiff claims that a procurement Competition that bases its outcome on a bidder "being permitted to change its mind and to withdraw from lots it selects before any award is a Competition that has necessarily failed." There is force in such a submission. The DRD on the other hand contends that the court should not be concerned about whether alternative award criteria could have been chosen or alternative rules could have been used for conducting a competition leading to multiple awards. With good reason it complains that any new challenge to the rules is long since out of time. Accordingly, it submits, the court must focus on the rules of the Competition as drafted and as they appear in the IFT. I will return to this argument later in the judgment.

[35] On 2 October 2015 DRD wrote to McQuillans seeking justification for its tendered rates in respect of ARN3. The letter also stated:

> "With reference to paragraph 50 of IFT in your Quality Submission confirmation is required that the project delivery team, sub-contractors, operatives, squads, sub-contractors and plant would be available in the numbers and percentage of time detailed in your Quality Submission should you be awarded this contract. Where this has been provided (e.g. Contract Manager) please confirm which persons would be assigned to this contract. Your response is required by 3pm on 7 October 2015."

[36] The same letters were also sent to McQuillans in respect of ARS3, ARE2, ARN2 and ARS1. A letter was sent in respect of ARE1 requiring the same information "with reference to para 50" but with reference to paragraphs 46 and 52 stated "your tender dated 28 July 2015 is abnormally low." Letters were also sent in respect of ARW3 and ARN1 seeking justification for McQuillan's tendered rates on these bids only.

[37] Again, there is force in the plaintiff's complaint that when the problem about duplication of Resources arose the behaviour of the DRD suggests that it hoped by a policy of encouraging withdrawals to escape the consequence of its own failure to plan for what might happen if a successful tenderer had overcommitted or was

unable to acquire resources of sufficient quality and/or quantity to perform all the Contracts it was going to be awarded.

[38] On 7 October 2015, McQuillans wrote to the DRD with reference to ARE1, ARE2, ARS1, ARS3, ARN2 and ARN3 stating:

> "On the individual merits of each contract we are satisfied that we can deliver the works as set out in the contract documentation and it was on this basis we tendered for the works.
>
> Notwithstanding this we may have some concerns in relation to the capacity of the company to deal with the 5 competitions we have requested to remain within, given the level of uncertainty which exists in relation to budgets, the variability of expenditure levels and the unpredictable nature of the pattern of annual expenditure.
>
> Given this we would wish to meet with you to discuss the potential award of any contracts and whether there are any decisions which may be required which would be to the mutual benefit of our company and TNI, given the matters which may be raised."

[39] On 7 October 2015 in respect of the Term Contract ARE1, McQuillans wrote as follows:

> "We note from the letter our bid is considered abnormally low overall in relation to the weighted average of the other tenderers.
>
> We would confirm that in consideration of the list of items for this Contract we are concerned the full allowance has not been factored into the rates for the particular issues which may be encountered in the Belfast Contract and that we can complete the works under this Term Contract in accordance with the tender documentation as provided.
>
> Given this it is we would wish to withdraw from this tenderer Competition." (sic)

[40] There was then a meeting on 19 October 2015 between McQuillans and Transport NI Procurement Branch of the DRD. DRD wanted confirmation that McQuillans could deliver on the basis that they had tendered. Jim McClean is

recorded as highlighting McQuillan's concerns "in relation to the capacity of the company to deal with the five competitions given the level of uncertainty which exists in relation to budgets." Patrick Brogan of McQuillans explained that McQuillans had a concern with the timing of the award of the Contracts in November/December 2015 which did not provide a bedding-in period or scope for ramping up of resource which would be afforded if the Contracts had been awarded during the summer months. Jim McClean and Rosin Wilson said that they were not "in a position to or could they give a guarantee as to the available budget or resulting workload as a result of the January monitoring round." McQuillans was asked to confirm which of the five Contracts it wished to be considered for and to confirm that it could provide the project delivery team and resources tendered for each of these Contracts.

[41] By letter of 22 October 2015 McQuillans withdrew from ARS1 and confirmed that in respect of the four remaining Contracts in which they were MEAT, that is ARE2, ARN3, ARS3 and ARN2 that their Resources were as per their submission and available to meet all four contracts.

[42] The actions of McQuillans which, I feel, were are least tacitly encouraged by the DRD, spared the DRD its blushes and allowed the DRD to announce on 3 November 2015 its intention to award the Contracts as follows:

(a) ARN1 to Patrick Keenan.

(b) ARS1 to Whitemountain Quarries.

(c) ARE2 to McQuillans.

(d) ARE1 to Whitemountain Quarries.

(e) ARN3 to McQuillans.

(f) ARW3 to the plaintiff.

(g) ARS3 to McQuillans.

(h) ARN2 to McQuillans.

[43] The plaintiff was second to Patrick Keenan in ARN1. It was also runner-up to McQuillans in the competitions for ARN3, ARS2 and ARN2. It succeeded in winning ARW3 in its own right with FP McCann ranked second. On 23 November 2015 the plaintiff issued a writ which commenced these legal proceedings. The DRD then applied successfully to lift the statutory suspension of the contract award. On 28 January 2016 the defendant notified Term Contractors of a restriction on the award of multiple contracts in the future. It stated:

> "In order to ensure security of service, preserve competition and encourage participation by SMEs, Transport NI has decided to limit the number of Term Contracts that can be allocated to any single Contractor. In future tender competitions, the maximum number of contracts to be awarded to any single contractor will generally not exceed 50% of the contracts released for tender.
>
> **The allocation of multiple contracts will be completed in a pre-determined order** and will incorporate a review of the contractor's financial standing." (Emphasis added)

[44] I am satisfied from all the evidence adduced that McQuillans only ever had the capacity (or potential), that is the Resources, to carry out and supervise four Contracts at most given the "variability of the expenditure levels and the unpredictable nature of the patterns of annual expenditure." That is the reason, I conclude, why McQuillans withdrew from Contracts ARE1 and ARS1. Certainly, at the very least, it does not appear to be disputed that the Resources identified by McQuillans in its organisational chart equated to those required for four Contracts.

C. LEGAL DISCUSSION

[45] There was a large measure of agreement, but not complete agreement, as to the legal principles which should apply to a challenge such as this.

[46] The procurement was subject to the Public Contracts Regulations 2006. Regulation 12 provided for the purpose of seeking offers in relation to a proposed public contract:

> "a contracting authority shall use:
>
> (a) the open procedure in accordance with Regulation 14; or
>
> (b) the restrictive procedure in accordance with Regulation 16."

[47] Regulation 16 sets out the procedure which has to be followed, where, as here, it is intended that there should be restricted procedure, and only a number of Economic Operators are invited to tender. The criteria for the award of a public contract are set out at Regulation 30 which provides that:

> "(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."

[48] The public authority may reject a tender if the offer is felt to be abnormally low ("ALT"), but only after it has requested an explanation for the offer being abnormally low: see Regulation 30(6). This is also set out at paragraph 52 of the IFT.

[49] Regulation 32 provides that after an award has been made the contracting authority has to inform the tenderers and candidates of its decision to award the contract and must do so by the "most rapid means of communication practicable."

[50] The contracting authority can be in breach of the law in three different ways:

(a) Failure to comply with the express Regulations;

(b) Breach of general principles of European Court of Justice ("ECJ") now applied by the Regulations which include breach of duty of transparency and the duty of equal treatment; and

(c) Manifest error.

[51] The relevant legal principles were set out by Morgan J in *Lion Apparel Systems Ltd v Firebuy Limited* [2007] EWHC 2179 (Ch) when he said:

> "The relevant legal principles (TRLP):
>
> 26. The procurement process must comply with Council Directive 92/50/EEC, the 1993 Regulations and any relevant enforceable Community obligation.
>
> 27. The principally relevant enforceable Community obligations are obligations on the part of the Authority to treat bidders equally and in a non-discriminatory way and to act in a transparent way.
>
> 28. The purpose of the Directive and the Regulations is to ensure that the Authority is guided only by economic considerations.
>
> 29. The criteria used by the Authority must be transparent, objective and related to the proposed contract.

> 30. When the Authority publishes its criteria, which conform to the above requirements, it must then apply those criteria. The published criteria may contain express provision for their amendment. If those provisions are complied with, then the criteria may be amended and the Authority may, and must, then comply with the amended criteria.
>
> 31. In relation to equality of treatment, speaking generally, this involves treating equal cases equally and different cases differently.
>
> …
>
> 35. The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.
>
> 36. If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a "margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.
>
> 37. In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a "manifest error".
>
> 38. When referring to "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made."

[52] The principle of equal treatment was considered in the joint cases of C-21/03 and C-34/03 where the ECJ said at paras [26] and [27]:

> "[26] In that regard, it must be borne in mind that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply

> and which lay down criteria for the award of contracts which are intended to ensure such competition …
>
> [27] Furthermore, it is settled case law that the principal of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified …"
>
> It is settled case law that the principle of equal treatment requires a comparable situation should not be treated differently and that the different situations must not be treated in the same way unless such treatment is objectively justified …" (Emphasis added)

[53] In *Commission v Denmark* C-243/89 the Advocate General in his opinion said at para [18]:

> "… it is hardly necessary to point out then, where a public contract falls to be awarded, it is precisely because the procedure is a competition that **it must be ensured that all those who take part have an equal chance**: otherwise, it would no longer be a public tendering procedure but private bargaining." (Emphasis added)

[54] The duty of transparency is owed to the tenderers so that tenderers can be satisfied that there has been equal and non-discriminatory treatment. Professor Arrowsmith in the Law of Public and Utilities Procurement 3rd Edition at 7.23 states:

> "… there is a general obligation to ensure that all conditions and detailed rules of the procedure are drawn up in the contract notice of the contract documents in a manner that is **clear, precise, and unequivocal** so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether tenderers satisfy the criteria. This seems to envisage, inter alia, a degree of precision in the formulation, of all criteria (qualification, award, etc) that authorities are obliged to state, that constrains discretion in decision-making and facilitates monitoring by tenderers. It also ensures that tenderers are better placed to respond to the criteria, irrelevant consideration of one objective of

> the directive is to ensure selection of the best tenderer through a competitive process."

[55] In *SIAC Construction Ltd v County Council for the Council of Mayo* [2001] ECR 1-7725 at paragraph 41 the European Court found that:

> "The award criteria must be formulated, in the contract documents of the contract notice, in such a way as to allow all reasonably well-informed and diligent tenderers to interpret them in the same way."

[56] The importance of the understanding of the reasonably well-informed and diligent tenderer ("RWINDT") cannot be stressed enough. In the *Commission v The Netherlands* [2013] All ER (EC) 804 at 109 the court said that award criteria must be drawn up "in a clear, precise and unequivocal manner in the notice of a contract document so that first, all reasonably well-informed tenderers exercising care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenderers submitted satisfied criteria applying to the relevant contract." In the UK, the courts have taken the approach that if a RWINDT could understandably and plausibly have construed the criteria in a different way to that intended by the Contracting Authority, then those criteria are insufficiently transparent: see, for example, *Federal Security Services Ltd v NICS* [2009] NIQB 15 at [52].

[57] In *Embassy Limousines v Parliament* in case T-903/96 at paragraph 85 the ECJ said:

> "On that subject, it should be noted that the contracting body must comply, at each stage of a tendering procedure, not only with the principle of the equal treatment of tenderers, but also with the principle of transparency."

[58] In *Ministeriet for Forskning, Innovation etc v Manova* A/S KC-336/12 the ECJ said:

> "The principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical

> requirements of the tender specifications, it cannot require the tenderer to provide clarification …"

[59] DRD made the case that when it came to award criteria it is unlawful to use matters that are properly selection criteria as award criteria and claimed that this rule was established beyond doubt in *Lianakis* C-532/06 and in particular at paragraphs [30] and [31].

[60] Professor Arrowsmith in her book, the Law of Public Utilities and Procurement, Volume 1 (3rd Edition) disagrees. She notes at 7-183 that there has been some uncertainty over the precise relationship "between, on the one hand, the stage of applying the award criteria to choose the most economically advantageous tender, and, on the other hand, the processes of qualification and of choosing economic operators to tender from those qualified (which we refer to here as a qualification/selection stage)."

[61] While there is no doubt that the two stages are distinct this does not mean that there can be no overlap at all between the criteria and evidence that may be used at the two stages. Professor Arrowsmith says some confusion has arisen in the case law as the possibility of overlap between the criteria and evidence that may be used at each stage. She notes that the ECJ ruling in *Lianakis* [2008] ECR I-00251 is capable of being interpreted to mean that any criteria and evidence permitted by the Directive for the qualifications in the selection stage is not permitted to be used in comparing tenders during the award process. She considers that such an interpretation is incorrect and that overlap is possible. She says at 7-184:

> "This issue is relevant, most notably, as regards the extent to which the qualities of the tendering firm and/or the individuals who will carry out the work on the contract can be taken into account at the award stage. These qualities are relevant on the issue both of qualification – for example, whether Economic Operators have sufficient experience to be able to perform the contract – and selection of firms to receive invitations to tender in restricted procedures. However, in practice it may also be important for value for money to consider such matters at the award stage, especially with services contracts, as such qualities can often be crucial in determining the quality of what will be delivered by the different qualified tenderers. For example, the qualifications and knowledge from past experience of the personnel involved in delivering professional services may affect not just their ability to deliver the services to the minimum standard required on the contract, but the quality of the services they can offer relative to other firms. When pricing is by the hour, these factors may also

> affect the cost, since knowledge from past experience may enable a bidder to perform the same services more quickly."

[62] She sets out at 7-185 the interpretation of *Lianakis* which she prefers namely that it:

> "does not preclude considering either the abilities of the tenderer or the qualities of the individuals or team working on the contract, to the extent that these are actually relevant to the quality of the work that will be done under the contract i.e. in determining which offer is the most economically advantageous."

[63] She then goes on to look at the arguments that support such an interpretation. Firstly, the 2004 Public Procurement Directive says nothing to deny that "no overlap" exists between the criteria permitted in the qualification of each selection stage and the award stage. Secondly, there does not appear to be any cogent policy grounds why the abilities of both individuals and tenderers should not be considered at the award stage. Indeed, forbidding this prevents Member States obtaining value for money and is contrary to the statement in the recitals that Directives seek to be consistent as far as possible with the existing practices of the Member States: see 7-186.

[64] Indeed, at 7-188 Professor Arrowsmith then states:

> "… it can be argued that when a tenderer proposes in its offer to use either staff with particular attributes – such as particular qualifications, or specific named staff, the Directive in fact requires the authority to include (or national law to apply) a **legal obligation** for the tenderer to comply with this offer as part of the contract – when this proposal is taken into consideration in applying the award criteria."

[65] DRD claim that this is a mistaken approach and that the issue of which personnel and what plant will perform in a term contract is simply a question of verification after the winner has been selected. Accordingly, it is up to the DRD to verify that McQuillans can provide the necessary personnel and plant as promised.

[66] My view is that Professor Arrowsmith is correct and that when a tenderer offers to use staff with particular experience and/or qualifications, the Directive in fact:

> "requires the authority to include (or national law to apply) a legal obligation for the tenderer to comply with

> this offer as part of the contract, when this proposal as taken into consideration in applying the award criteria. This would be an obligation for the staff involved to hold the required attributes, and **obligation for the authority to use named staff or equivalents** …" (Emphasis added)

[67] In *Ambisig* [2015] PTRSR 1072 the CJEU stated at paragraphs 31-35 as follows:

> "[31] The quality of performance of a public contract may depend decisively on the **professional merit** of the people entrusted with this performance, which is made up of their professional experience and background.
>
> …
>
> [33] Where a contract of this nature is to be performed by a team, it is the abilities and experience of its members which are decisive for the evaluation of the professional quality of the team. That quality may be an intrinsic characteristic of the tender and linked to the subject matter of the contract for the purposes of Article 53(1)(a) of Directive 2004/18.
>
> [34] Consequently, that quality may be included as an award criterion in the contract notice or in the relevant tendering specifications.
>
> [35] … The Directive does not preclude the contracting authority from using a criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration a composition of the team and the experience and academic and professional background of the team members."

[68] I accept that this is a different type of contract and that the DRD was entitled, indeed, obliged to carry out an evaluation of the experience and skills of the team being put forward to carry out the Contracts (or any equivalents available to the Contractor). I further agree with the plaintiff's submission that it is also necessary to consider whether the bidder does have the resources and skills necessary to perform the Contract when considering each Quality Submission. Indeed, this is what McClean did when he reached a conclusion on McQuillans inability to carry out all the contracts it had been awarded.

[69] It is claimed on behalf of the DRD that what was offered in the tender in respect of each of the Term Contracts was only a future proposal as to what the

tenderer would do and was not intended to be a legally enforceable promise. The court accepts that there must be a mis-statement of an existing fact for there to be a misrepresentation. But as Bowen LJ said in *Edington v Fitzmaurice* [1885] 29 Ch D 459 at 482:

> "… the state of a man's mind is as much a matter of fact as the state of his digestion … a misrepresentation as to the state of a man's mind is, therefore, a mis-statement of fact."

[70] McQuillans (and, at least, Mr McClean) knew that it could never perform all the Contracts it tendered for because it did not have and could not access the necessary Resources to service all those Contracts. It follows that those were statements not as to future conduct but statements as to present intention, and as such they were misrepresentations of fact. David Richards J said in *Jaffray v Society of Lloyds* [2002] EWCA Civ 1101 at [59]:

> "… there is no rule of law that any particular statement carries with it any particular implication. All depends upon the particular statement in its particular context."

[71] Accordingly, the key issue is whether McQuillans who only had the Resources for four Contracts had ever any intention of fulfilling all seven Contracts if they were successful in respect of each Competition. I conclude that McQuillans never intended to perform all seven Contracts because, I find, it never expected to be successful in all seven Contracts for which it had submitted tenders. Success on this scale had never occurred in the past. McQuillans was probably as surprised as the DRD at the outcome of the competitions.

[72] In *Clinton (t/a Oriel Training Services) v Department of Employment and Learning* [2012] NICA 48 Girvan LJ giving the judgment of the Court of Appeal in Northern Ireland said at [24]:

> "Once tenders have been submitted those tenders in principle can no longer be amended either at the request of the contracting authority or of the tenderers. The principle of equal treatment precludes negotiation. For an authority to provide clarification runs the risk of making the authority appear to have negotiated with the tenderer …
>
> Article 2 of the Directive does not preclude the correction or amplification of a tender where on an exceptional basis it would be appropriate to allow such correction or clarification, particularly when it is clear that mere clarification or correct obvious material errors (sic)

> provided that such an amendment does not in reality lead to the submission of a new tender. The authority must treat the various tenderers equally and fairly in such a way that a request for clarification does not appear to have unduly favoured or disadvantaged the tenderer to whom the request is addressed."

The behaviour of the DRD in writing to McQuillans on 2 October 2015 came perilously close to at least encouraging McQuillans to amend its tenders with the consequence that those ranked second in ARE2 and ARS1 were not treated equally to those ranked second to the plaintiff in other Contracts. But I will return to this later in the judgment.

D. PATRICK KEENAN – CONTRACT ARN1

[73] The plaintiff has challenged the award of the Contract ARN1 to Patrick Keenan. It is common case that Patrick Keenan beat the plaintiff by .07 of a percentage point. However, no evidence was adduced as to any problem with the award of the Contract ARN1 to Patrick Keenan. No other Contract was awarded to Patrick Keenan. There was no duplication of resources to consider. Patrick Keenan was the winner by the slimmest of margins. The complaint appears to be that the approach of the DRD to "marking was generally error prone" and that the award is thus unsafe. However, the plaintiff has not chosen to flesh out its complaint. It is a hopeless argument when there is no factual basis to support it. Counsel for the plaintiff did not pursue this argument before me. There was no evidence of any manifest error and/or lack of transparency and/or breach of the principle of equal treatment. In the circumstances I can find no possible basis for concluding that Patrick Keenan is not the worthy winner of ARN1.

E. DISCUSSION: THE AWARD OF THE OTHER CONTRACTS

The case made on the pleadings

[74] The plaintiff in its Statement of Claim makes the case, inter alia, that:

(a) DRD's decision to award McQuillans 5 out of 5 for its responses to sections 2-01 and 2-03 in each of the seven tenderers it completed was a manifest error and so was its failure to revise its markings when the defendant realised that McQuillans lacked the operational capability to carry out all the six Contacts in which it came out on top.

(b) The DRD failed to act transparently or in compliance with the equal treatment because the rules of the Competition did not provide any transparent mechanism for the resolution of the problem of the duplication of resources across multiple tenders in which any one economic operator was assessed as MEAT, and in particular:

"37. As it was clear that the nature of the mechanism devised and the results of which its deployment could affect the tenders ranked second in each of the Contracts in which McQuillans was ranked first, the defendant had a duty to:

- Act transparently in the course of devising the mechanism.

- Ensure that the mechanism devised entailed the equal treatment of each of the second ranked tenderers.

- Ensure that it complied with the principle of transparency so that second ranked tenderers would be able to verify that they were treated equally and were not treated differently to other second ranked tenderers unless that different treatment was objectively justified.

38. In breach of the duty to act transparently, the Defendant failed to take minutes of the meeting of 24 September 2015. As a result, the Plaintiff is unable to verify the nature of the mechanism adopted by the Defendant or the reasons for its adoption. The Plaintiff is therefore unable to determine whether it was treated equally to other second ranked tenderers in the course of the choice of the mechanism and/or what mechanism was actually adopted, whether the choice of mechanism was informed by subjective preferences and/or what considerations/criteria actually informed the choice of mechanism and/or whether the mechanism chosen was properly applied."

[75] The defendant in its defence avers that:

(a) The plaintiff's response to the Quality Submission had the status of a pre-contract representation about the manner in which it proposed to perform the Contract and the DRD was therefore entitled to mark a response on the basis that the operator proposed to perform the Contract by deploying either precisely the same resources and personnel identified or by deploying alternatives of an equivalent standard;

(b) The award to McQuillans of a mark of 5 out of 5 for its response to question 2-01 and 2-03 of the Quality Submission did not amount to a

manifest error nor did the marking scheme set out in the IFT require a fail or a mark of zero. The mark allocated by the evaluation panel reflected its assessment of the level of quality and organisational structure of the personnel and other resources which McQuillans' submission proposed which would be made available for the performance of the Contract in question. The DRD denies that McQuillans' response contained any impermissible or inappropriate duplication of resources in the event that it was MEAT in multiple Competitions and therefore might be awarded more than one Contract.

(c) The DRD further denied that it was under any obligation to revisit or to revise its evaluation of the McQuillan tender responses or that the failure to do so amounted to a manifest error; and the decisions by McQuillans on 7 and 22 October 2015 to withdraw its tender offers for Contracts ARS1 and ARE1 were taken voluntarily by McQuillans in accordance with its rights under Clause 42 of the IFT. These withdrawals from the competitions did not give rise to any breach of duty to act transparently and of equal treatment to all operators. Any difference in treatment of the second ranked operators in those two competitions was objectively justified and transparent, since it was the result of the voluntary decision of McQuillans taken in accordance with the rules of the Competition published to all operators in the IFT.

F. DISCUSSION

The Competition

[76] It should have been obvious that the Competition might have to deal with the possible situation where firstly, a tenderer won multiple Contracts but did not have the Resources to carry them out; and secondly, what should happen when a tenderer who did not have the necessary Resources had to give up a Contract which it had won but which it could not perform.

[77] Ms Wilson of the DRD asserted that each of the Contracts were marked in isolation and she did not consider them to be multiple tender submissions. There was no cross-referencing and each contract stood on its own merits. She said that these were "silo assessments even if the resources were duplicated." She confirmed that there was "no discussion of multiple awards." The quality assessment for each Contract was locked down. It could not be re-opened. It was only after the quality assessment for all Contracts had been completed could the DRD panel proceed with its assessment of the prices that had been submitted for the work to be completed under each Contract. There was no reassessment. It became at that stage a matter for verification of the resources before the final award of the Contract was made. Thus, there could be no objection to McQuillans submitting identical tenders in respect of each Contract. It was at the verification stage that McQuillans needed to show that it had the necessary resources to complete each Contract it had won.

[78] Mr Telford gave evidence on behalf of the plaintiff. He was an impressive witness. He had been a Director of the plaintiff for 15 years. He gave his evidence in a straightforward manner and did not try to gloss over any difficulties. I noted there was no effective challenge on cross-examination to the approach the plaintiff had taken to a problem, which was not of its making, namely how to make sense of a competition in which the rules lack clarity as to how tenderers with limited resources should submit multiple tenders.

[79] Mr Telford stated as far as the plaintiff was concerned there were eight contracts for different areas in Northern Ireland. His aim was to win those contracts which were closer to the plaintiff's asphalt plants and therefore save costs. He had noted that Clause 10 provided that each of the contracts would be awarded separately and in a particular order. It was made clear that there would be a financial assessment to determine whether the bidder was able to carry out multiple contracts. Mr Telford understood that while each Contract was to be separately assessed, as soon as a resource was exhausted, the DRD would go to the next preferred bidder. Accordingly, the plaintiff put its key resources into the Contracts it hoped to win. Mr Telford said that if Contract Manager A had to devote 100% of his time to Contract 1, then if Contract 1 was secured, Contract Manager A could no longer be put forward as the Contract Manager for Contract 2. Obviously, if the plaintiff did not secure Contract 1, then Contract Manager A was available for Contract 2 etc.

[80] As I have already observed there was no effective challenge on cross-examination to the approach the plaintiff had taken to a problem, which was not of its making, namely how to make sense of a Competition in which the rules lacked clarity as to how tenderers with limited resources should submit multiple tenders. Ms Wilson and Mr McLean who gave evidence for the DRD seemed decent people but they were quite unable to explain to my satisfaction why a RWINDT would ever assume that under this Competition for Term Contracts, a tenderer would submit identical tenders for each of the Contracts on the basis that if it was successful in a number of those Contracts, but did not have the Resources to perform them all, then without any guidance or restraint it could cherry pick the Contract (or Contracts) it considered most attractive and which it had the Resources to perform and discard those Contracts it was unable to service and/or did not want. It was not an answer to say that they were separate Contracts. Of course they were, but they were Contracts in which the successful tenderer might not have the Resources to carry out all of the Contracts in which it had been ranked first. The plaintiff, for example, one of the largest operators, thought it could manage three Contracts at most.

[81] Accordingly, there was a fundamental difference between DRD and the plaintiff as to how the tendering process would work. This difficulty in interpretation has been somewhat alleviated for the next Competition by the circular issued by the DRD following this Competition on 20 January 2016 expressly stating:

"NOTIFICATION TO TERM CONTRACTORS

RESTRICTION ON MULTIPLE CONTRACT AWARDS

> In order to ensure security of services, preserve competition and encourage participation of SMEs TransportNI has decided to limit the number of Term Contracts that can be allocated to any single Contractor. In future tender competitions, the maximum number of contracts to be awarded to any single contractor will generally not exceed 50% of contracts released for tender.
>
> **The allocation of multiple contracts will be completed in a pre-determined order** and will incorporate a review of the contractor's financial standing." (Emphasis added)

So under this new regime the present problems which beset this Competition should not arise.

[82] There was a dispute about how the rules of the Competition in general were to work and, in particular, how the Contracts were to be allocated. DRD submitted that the rules of the Competition required the evaluation of all Quality Submissions in each Competition to be completed before the price submissions were opened and that any other process would be inconsistent with the IFT. It relied on paragraph 51 of the IFT which states that on completion of the Quality Assessment the Commercial Envelope (Price Submission) is opened. Further, Clause 55 requires that:

> "Where the award of multiple contracts to an individual economic operator is being assessed, the Contracting Authority shall do so in the order shown in the table above."

[83] DRD claims that if it had conducted discrete assessments of both quality and price sequentially and then awarded each Contract before moving on the next one, this would not accord with the IFT's wording and proposed arrangement. It can only make sense, the DRD claims, if the assessment of the tenderers and the subsequent awards are being considered concurrently as the reference to "the award of multiple Contracts … being assessed" would not make sense if the awards were discrete and separate.

[84] The plaintiff disagreed and said there was nothing in the IFT or elsewhere that would have prevented the DRD from assessing each contract separately for quality and then for price and then making an award before moving on to the assessment of the next contract in the order shown in the table per paragraph 10 of the IFT. If necessary, marks awarded for the Quality Submission could be revised if it turned out that the tenderer no longer had the Resources to satisfy the Contract.

[85] The rules are by no means clear but I am satisfied that a RWINDT would have construed the rules in general and Paragraph 55 in particular as permitting each Contract to be assessed separately. In those circumstances the DRD will then have a provisional list of winners for each Contract. It can then:

(a) Assess whether a contractor is economically and financially suitable to undertake more than one Contract; and

(b) Also assess whether the contractor has the Resources to carry out more than one Contract.

It must do so in the order shown in the table, ARN1 first etc. The phrase "**is being assessed**" in Paragraph 55 makes it clear that the award of multiple Contracts is not a "done deal" but a matter which is under active consideration. Indeed, it would be a strange competition if the DRD was required to take into account the financial resources of a tenderer in assessing whether it was able to award multiple Contracts to that tenderer but had to ignore whether the self same tenderer had the plant and/or personnel Resources to perform those very Contracts.

[86] Having carefully considered the position taken by each side, I have no doubt that the RWINDT would have approached the Competition in the same way that Mr Telford and the plaintiff did and moreover that it made sense to do so for a number of different reasons:

(i) Table 1 of paragraph 10 of the IFT requires separate awards and in a set order. It does not require concurrent awards.

(ii) The phrase "the award of multiple Contracts to an individual Economic Operator is being assessed" has to be read in context and should make commercial sense. There is force in the plaintiff's submissions that the interpretation of the rules put forward by the DRD "lacked the sufficient connection to the subject matter of what was a real contract to be awarded to a real bidder embedded to commercial realities." In other words, the rules should not be interpreted to allow the DRD to award a contract to a tenderer which does not have the Resources to perform that contract.

(iii) Indeed, this would have been further reinforced by the answer to query 32 which was meant to assist tenderers and which stated clearly that tenderers could not provide "a priority order for the award of contracts they consider" and that "the Order of Award" of Contracts would as shown in the Table.

(iv) The rules of the Competition prohibit qualified tenders at paragraph 32. A RWINDT would understand that submitting tenders for seven Contracts when the contractor only had resources to perform four Contracts could give rise to problems under paragraph 32. At the very least it could be argued cogently that three of the tenders were impliedly qualified. The qualification

was that the tenderer could only accept four Contracts and that it would have to give up any Contract after that because it did not have the necessary resources. Indeed, there is also an argument that a tenderer submitting seven tenders for seven Contracts is representing that it can perform all seven Contracts, if awarded. The penalty for providing false information is disqualification from the Competition as a whole and therefore any RWINDT will be careful not to risk an infringement at paragraph 39 of the IFT.

[87] In the circumstances for the reasons given I have no doubt that a RWINDT would expect to be penalised if it tendered for Contracts for which it did not have the Resources. I consider that the decision to award McQuillans a mark of excellence for its answers to 2-01 and 2-03 in the three Contracts it was unable to perform and/or its failure to revise the marks awarded to 2-01 and 2-03 on those Contracts was an obvious error. The DRD should have become alert to McQuillans inability to perform more than four Contracts. Its failure to reflect this in the marking of 2-01 and 2-03 in three of the seven Contracts was a manifest error.

[88] Verification of Resources before any award was put forward as the answer to this obvious lacuna in the rules – what was to happen if a tenderer was successful in more tenders than it could perform? If the successful tenderer was given a free hand on what Contracts to accept and to reject, that would inevitably mean that second ranked tenderers would be treated unequally without there being an objective basis for such treatment. I will discuss this issue more fully in the next section. However, verification of Resources rather than solving the problem of the duplication of Resources merely highlighted its presence and the unfair, unequal and discriminatory nature of the ad hoc solution which was devised to deal with it.

Transparency, Equal Treatment and Breach of the Principle of Non-Discrimination

[89] The Competition rules have to be "clear, precise and unequivocal." There can be no doubt that the Competition rules in the instant case were opaque, imprecise, equivocal and lacking in detail. There have been many disputes as to what they mean for this very reason. The position here, as I have noted, is that McQuillans won six out of the seven Contracts it bid for with identical tenders. But it only had the Resources for four contracts. The DRD permitted McQuillans at the very least to withdraw from two of these contracts before the awards were made. The choice of which contracts to accept was entirely that of McQuillans. It was not restricted by any of the Competition rules as to what contracts it should discard. In the absence of any rules, McQuillans was given an untrammelled discretion which necessarily meant that runners-up were not treated equally and transparently.

[90] In this case the rules were neither clear, precise nor unequivocal. There were no rules. In ARE1 and ARS1, the two competitions from which McQuillans withdrew, the runners-up became the successful tenderers. In the other four Contracts ARE2, ARN3, ARS3 and ARN2 the runners-up were unsuccessful. There

was no objective basis or criteria for how these selections were made, or certainly none that has been shared with the court. The runners-up in ARE2, ARN3, ARS3 and ARN2 were treated different and in an unequal way to the runners-up in ARE1 and ARS1. The process was opaque and most certainly not transparent. The treatment of the unsuccessful runners-up was unequal and discriminatory. Further no satisfactory explanation has been provided by the DRD as to why McQuillans should have been invested with an unlimited discretion in six Contracts to advantage some runners-up and disadvantage others. The principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated the same unless such treatment is objectively justified, was obviously infringed. No objective justification has been provided as to why McQuillans should have been invested with the discretion to prefer one runner-up in one Contract over another runner-up in another Contract.

[91] Further the failure to record what happened at the meeting of 24 September 2015 deprived the tenderers in general, and the plaintiff in particular, of any understanding of how the DRD went about deciding why one runner-up should be preferred over another runner-up. No explanation has been offered as to why the DRD should apparently have given McQuillans the exclusive power to determine which runner-up succeeded and which runner-up failed in the six Contracts it had been assessed as winning. Each second ranked tenderer was entitled to be able to verify that it had been treated equally to other second ranked tenderers in the DRD's attempt to resolve the eminently foreseeable problem of duplicated resources. This palpably did not happen.

[92] The unfairness, inequality, lack of transparency and discriminatory nature of the interpretation of the rules put forward by the DRD is best illustrated perhaps by what would happen should tenderer A, with only the Resources for one Contract submit eight identical bids and win all eight Contracts. Tenderer A can then select which Contract it will accept and which seven Contracts it will reject without any restriction or guidance. The contractor ranked second in the Contract which A decides to accept has every right to feel aggrieved being treated differently to the runners up in the other seven Contracts. Its treatment is unfair, unequal, not transparent and not based on any objective criteria other than what Contractor A perceives to be its best interests. Such an interpretation is also divorced from commercial reality.

G. CONCLUSION

[93] Having heard and considered all the evidence and taken into account the detailed submissions I am satisfied that:

(a) There was a manifest error made by the DRD in giving McQuillans a mark of excellence in two answers, namely 2-01 and 2-03 in three tenders when McQuillans did not have the Resources to perform those Contracts.

(b) There was a lack of transparency, unequal treatment and breach of the principle of non-discrimination in the circumstances whereby McQuillans was able to select which of the Contracts it would perform and those it would not perform and a lack of transparency in failing to make a record of the meeting on 24 September 2015 thereby preventing the plaintiff from understanding or verifying the nature of the mechanism which the DRD used to permit one runner-up to be preferred over another runner-up.

[94] I will hear the parties about the directions that I should give to ensure that arguments on the issues of causation, the availability of damages and quantification of those damages are properly determined. I will also hear the parties on what is the appropriate order to make in respect of costs. However, I propose first of all to give the parties some time to digest the contents of this judgment before I hear further submissions on these issues.