**Neutral Citation no. [2007] NIQB 100** | *Ref:* **COGF5968**

*Judgment: approved by the Court for handing down* | *Delivered:* **23/11/07**
*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

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**BETWEEN:**

**PARTENAIRE LIMITED**

**Plaintiff;**

**-and-**

**DEPARTMENT OF FINANCE AND PERSONNEL**

**Defendant.**

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**COGHLIN J**

[1] This is an application on behalf of Partenaire Limited ("the applicant") seeking an order extending the interim injunction granted by order of Weatherup J on 1 August 2007 in accordance with the terms of which the procurement process conducted by the Department of Finance and Personnel ("the Department") and known as Workplace 2010 was stayed and the Department restrained from proceeding to the Best and Final Offer ("BAFO") stage.

**The background facts**

[2] Workplace 2010 ("WP 2010") is a major long-term programme aimed at transforming and rationalising the Northern Ireland Civil Service ("NICS") office estate. WP 2010 is a component of the long-term Investment Strategy for Northern Ireland the objective of which is to remedy the infrastructure deficit in Northern Ireland and to improve the quality of delivery of public services by introducing efficiency across the public sector. The first phase of WP 2010 is the refurbishment and rationalisation of a substantial part of the NICS office estate. A report known as the Strategic Development Plan in 2004 indicated that much of the office estate was in a poor state of repair, that the

estate was poorly utilised and inflexible and that lack of funding had led to a significant backlog of outstanding maintenance.

[3] In July 2005 the then Secretary of State approved a recommendation that the first phase of the Strategic Development Plan ("SDP") should be delivered by means of a Private Finance Initiative ("PFI") known as Workplace 2010. The original key features of WP 2010 were the transfer to a Private Sector Partner ("PSP") of approximately 77 buildings in the core NICS estate, the major refurbishment of a significant number of buildings within the estate to improve the workplaces and rationalise the estate into a smaller and more efficient portfolio, the construction of a new building on the Stormont Estate and the provision of a range of accommodation and facility management services. Some of these features have been subsequently refined during the course of the proceedings.

[4] On 30 November 2005 the Department published a Notice in the Official Journal of the European Union offering potential candidates the opportunity to register their interest in bidding for the WP 2010 contract. The competition was to be conducted by means of the negotiated procedure established by the Public Services Contracts Regulations 1993 ("the 1993 Regulations"). Sixty two potential candidates expressed an interest following the publication of the Notice and each was then supplied with a pre-qualification questionnaire ("PQQ"). By the deadline for returning the completed PQQs, 16 January 2006, six responses had been received including one from a consortium in respect of which the applicant is the special purpose company incorporated to be the contracting vehicle. Five of the six candidates met the pre-qualification requirement and, after their responses to the request for preliminary proposals had been considered in March 2006 the field was narrowed to four bidders who were identified as being qualified to proceed to the Invitation To Negotiate ("ITN") stage.

[5] On 30 June 2006 the ITN documentation setting out the requirements of the Department and the basis upon which bids would be evaluated was issued to the four bidders. The ITN was supplemented by a number of circulars subsequently published to all bidders and the bids in response to the ITN were received in early November 2006. The evaluation process took place between November 2006 and February 2007. Details of the complex ITN evaluation process have been set out at paragraphs 22-45 of the affidavit sworn herein by Mr Thomas James O'Reilly on 10 October 2007.

[6] The final decision as to the identity of the two bidders selected to proceed to the BAFO stage was made by the Programme Steering Committee ("PSC"), the body with overall responsibility for the WP 2010 programme. That decision was communicated to the two successful bidders on 19 April 2007. The applicant was not one of the successful bidders and it is that decision, resulting in its exclusion, that the applicant seeks to challenge.

[7] A debriefing meeting was held on 1 May 2007 for the purpose of providing the applicant with details of the reasons upon which the decision to exclude it from the BAFO stage had been taken. That meeting was followed by a lengthy exchange of correspondence between the parties and on 18 June 2007 the applicant's solicitors wrote to the Department enclosing a draft claim for judicial review. On 10 July 2007 the applicant formally applied for judicial review and this application was followed, on 11 July 2007, by the issue of the writ in these proceedings. Inter alia, the relief claimed on behalf of the applicant in the proceedings commenced by writ included an order setting aside the Department's decision of 19 April 2007 eliminating the plaintiff from the WP 2010 contract process as being contrary to Regulations 21 and 23 of the 1993 Regulations and an order staying the WP 2010 process pending the determination of these proceedings.

[8] The terms of the WP 2010 contract are intended to result in a best value for money solution for the Department. It is estimated that the direct running costs of that part of the NICS estate which is to be transferred to the PSP are currently in the region of £70m per annum. Upon commencement of the WP 2010 contract the estate will be transferred to the PSP and the Department will receive a capital sum ("the transfer payment"). In its turn, the Department will pay a Unitary Service Charge ("USC") to the PSP for the provision of properly maintained accommodation. It is envisaged that such maintenance will include refurbishment and new build costs, all property-related costs and standard facilities management services. Payment of the USC will vary according to the availability and standard of the accommodation and services. Subject to this application, the Department's intended timetable was to issue BAFO documents to the two remaining bidders on 29 October 2007, to identify a Preferred Bidder on 4 July 2008, to arrange for signature of the contract on 19 September 2008 and for the transfer payment to be made upon commencement of the contract on 27 October 2008. It is expected that the transfer payment is likely to be in the region of £200m.

**The legal principles**

[9] There is no real dispute between the parties as to the applicable legal principles;

(*i*) The general power afforded to the High Court under Section 91 of the Judicature (Northern Ireland) Act 1978 is specifically available in these proceedings by virtue of Regulation 32(5) of the 1993 Regulations which provides that:

> "(5) Subject to paragraph (6) below but otherwise without prejudice to any other powers of the Court, in

> proceedings brought under this Regulation the court may –
>
> (*a*) By interim order suspend the procedure leading to the award of the contract in relation to which the breach of the duty owed pursuant to paragraph (1) above is alleged, or suspend the implementation of any decision or action taken by the contracting authority in the course of following such procedure;"

(*ii*) The granting of such relief is discretionary and the court should exercise its discretion in accordance with the guidelines set out in American Cyanamid Company v Ethicon Limited [1975] AC 396.

Has the applicant established that there is a serious question to be tried?

[10] This is a case in which the facts are in dispute, particularly with regard to the evaluation of the applicant's bid, and both parties approached the matter in the context of the guidelines outlined by Lord Diplock in the American Cyanamid case. In my view such an approach now requires to be supplemented, in appropriate cases, by a consideration of the analysis provided by Laddie J in Series 5 Software v Clarke [1996] 1 All ER 853 at page 865.

[11] In the course of his affidavit sworn on 1 October 2007 Colum Joseph Scullion, who is a director of the applicant as well as a director of McAleer & Rushe Limited, one of the principal shareholders of the applicant stated that the applicant had identified 65 serious errors alleged to have been committed by the Department in its evaluation of the applicant's bid including technical and financial inaccuracies, incompetencies, inconsistencies and misrepresentations. However, for the purposes of these proceedings, he identified four representative examples of errors which included:

(*i*) Errors concerning Decant Issues

One of the requirements of WP 2010 was that bidders should provide temporary office space or "decant hubs" to be used at relevant locations while offices were being refurbished. In its bid documents the applicant specified proposals for both the Derry and Belfast decant hubs. The Department asked the applicant for clarification of its proposals and such clarification was provided on 7 February 2007. At the debriefing meeting on 1 May 2007 the applicant was informed by a representative of one of the external consultants who had been responsible for appraising, inter alia, the decant hub provisions on behalf of the Department, that the applicant had not made any proposals for a Derry decant hub. On 3 May 2007 the applicant wrote to the defendant

expressing its concern about a number of matters and drawing particular attention to this apparent error and on 25 May 2007 the Department confirmed that the statement of the representative at the meeting of 1 May 2007 had been mistaken. The Department's letter explained that the mistake had resulted from an erroneous quality report but that no error had actually been made by the evaluation team and the applicant's score had remained unchanged under the relevant sub-sub criterion. In support of this explanation Thomas James O'Reilly, Programme Director for WP 2010, swore an affidavit on 10 October 2007 referring to a memorandum which he claimed had been circulated to the Department's evaluators following receipt of clarification from the applicant before the scores were finalised. Mr O'Reilly also emphasised that the Derry recant hub was only relevant to two scores out of 38 for quality evaluation and pointed out that there were a substantial number of other considerations relevant to those two scores. In such circumstances he explained that the location of the Derry decant hub was neither the sole consideration nor was it the most important: it was but one of many, and there were others that were considered more significant. The applicant also complained that at the meeting of 1 May 2007 the Department seemed to be unaware of the alternative property put forward by the applicant to substitute for the applicant's Belfast decant hub which would not be ready within the timescale.

(*ii*) Errors in the evaluation of the financial proposal

It appears that the Department adjusted the price of the applicant's bid upwards to take account of four critical areas, namely, TUPE risk, corporation tax and stamp duty assumptions, compliance with Required Accommodation Standards and provision for Regional Jobs and Benefits Offices. The applicant claims that such adjustment led to the bid submitted on behalf of the applicant being wrongly inflated by a figure in excess of £90m in net present cost terms equating to around £140m in real terms. The applicant claims that it had undertaken to assume the risk for each of these items but that the Department did not appear to have accepted such an undertaking in respect of at least the first three items. By way of response it appears that the Department does not accept that the applicant confirmed either verbally or in writing that it would accept the tax risk and that the Financial Evaluation Team advising the Department "applying its substantial expertise and experience to the information before it" concluded that there was a real risk that the applicant's bid price did not fully reflect the assumptions in relation to the TUPE risk. The Department further maintains that similar adjustments were applied consistently across the bids of all four bidders.

(*iii*) The applicant also alleges that, contrary to the Department's claims, the applicant did provide a fully comprehensive table setting out a timeline in the bid documents.

(*iv*) The applicant claims that, contrary to the Department's assertion, the regional decant was fully detailed and properly explained in the applicant's bid.

[12] I remind myself of the words of Lord Diplock in the American Cyanamid case at page 407 when he said:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

In the course of his affidavit Mr O'Reilly identified as the memorandum said to have been circulated to the evaluators following receipt of clarification from the applicant in relation to the Derry decant hub a document which is headed "Appendix 3 – Extract from Note of Team Leader for Moving to the New Environment Dealing with Clarification Matters". No evidence has been forthcoming as to how or when it is claimed that this document was placed before the evaluators or of the evaluators reaction thereto whether by way of reassessing the scoring or otherwise. At this stage the basis upon which the principles of equality and non-discrimination in relation to pricing led the Department to make adjustments to the applicant's financial proposals remains to be clarified as does the basis upon which the expertise and experience of the Financial Evaluation Team led it to conclude that there was a real risk that the bid-price submitted by the applicant did not fully reflect the assumptions of risk that the applicant had undertaken. In addition, the applicant has questioned as to how the Department's conclusion that the applicant's proposal for the regional decant was not fully detailed can be a matter of judgment as opposed to a matter for specific reasons. The applicant has raised similar questions with regard to the assertion by the Department that the timeline proposed by the applicant for the decant moves was not comprehensive. The applicant also questions how a lack of detail in the regional decant programme and/or in the timeline could be within the Department's "margin of discretion". On behalf of the Department, Kenneth Swarbrick, currently Finance Director of WP2010, has produced a calculation which purports to demonstrate that the applicant would have been excluded even if its claims had been established. However this exercise, subsequently amended, was carried out upon the instructions of and after discussion with the Department's solicitors in September 2007. Mr Swarbrick's original document indicated that detailed workings were available to support his conclusions but the Department's solicitors subsequently refused to disclose any correspondence relating to it on the ground of privilege. Regulation 23(1) places an obligation on the Department to inform an unsuccessful

service provider of the reasons for the lack of success and it seems to me arguable that the general EC obligations of objectivity, transparency and non-discrimination should ensure that such reasons include such information about the successful bid or bids as would permit a well informed and diligent tenderer to understand the relative advantages and disadvantages of the respective bids In the circumstances, after careful consideration, I am satisfied that the applicant's claim is neither frivolous nor vexatious and that there is a serious question to be tried.

Would damages be an adequate remedy?

[13] WP 2010 is a very substantial contract intended to run for a period of some 20 years. The applicant might succeed in showing that it should have been awarded Preferred Bidder status or simply that it should have been included in the BAFO stage. In the latter event damages would have to involve assessment of a lost chance. However, while it might well be a difficult exercise, I am not persuaded that it would be impossible to calculate damages upon, inter alia, past expenditure and future loss of profits. However, the applicant's principal claim for relief is for an order setting aside the decision to exclude it from participating further in the procurement process and, in his affidavit sworn on 1 October 2007, Mr Scullion referred to Regulation 32(6) of the 1993 Regulations the effect of which is to limit the court solely to an award of damages in respect of a breach of duty owed under the Regulations once the contract in relation to which the breach is alleged has been awarded. Having regard to the expedited timetable for the trial of this litigation, which has now been listed to commence on 21st January 2008, I am not persuaded that the contract is likely to be awarded before judgment. On the other hand, it is important to bear in mind that the primary objective that the 1993 Regulations and Council Directive 92/50/EEC are intended to implement is the open and transparent award of public service contracts. Such open and transparent competition is not only in the interests of the applicant but also that of the general public. Indeed it seems to me that it might well be argued that the European jurisprudence reflected in the Remedies Directive as interpreted by decisions such as Alcatel [1999] ECR 1-7671 intended injunctive relief to be the primary remedy. After giving the matter careful consideration I am not persuaded, given the particular circumstances of this case, that damages would be an adequate remedy.

The balance of convenience

[14] This part of the exercise has also been referred to as "the balance of the risk of doing an injustice" (per May LJ in Cayne v Global Natural Resources plc [1984] 1 All ER 225 at 237) and "a balance of justice" (per Sir John Donaldson MR in Francome v Mirror Group Newspapers Limited [1984] 1 WLR 892). The public interest, and the interest of the public in general are factors that may be taken into account and Mr Thompson, the Director of

Corporate Services Group of the Department, has set out in some detail the interest of the public in Northern Ireland in completing the 2010 procurement process within the desired timescale at paragraphs 26-51 of his affidavit sworn on 10 October 2007. In the course of so doing Mr Thompson has suggested that the most significant direct impact of a delay to the WP 2010 procurement would be a consequential delay in the receipt of the transfer payment which, according to the Department's intended timetable, is currently scheduled for 27 October 2008. According to Mr Thompson's affidavit if the BAFO stage is delayed until the end of April 2008 which he has suggested as the likely date when judgment might be anticipated in these proceedings, the transfer payment would not be received by the Department in the financial year 2008/2009. Such a delay, according to Mr Thompson, would have serious implications for the capital budget of the Northern Ireland Executive.

[15] In an affidavit sworn on 15 October 2007 Mr Thompson has also provided details of the BAFO process which is similar to the ITN process in that it involves a process of initial evaluation, clarification and final evaluation on the basis of a weighted price-quality matrix supplemented by legal and financial evaluations. According to Mr Thompson, the only significant difference is that there would be a negotiation phase, in which the Department will negotiate with each of the BAFO bidders separately specific points of detail arising from their respective bids. In the same document Mr Thompson expressed the opinion that if the applicant was to be successful in this litigation and a subsequent re-evaluation of the applicant's ITN bid was ordered with such revaluation resulting in the applicant being selected to take part in the BAFO stage the same process would take place. According to Mr Thompson pending a final decision as to the selection of a Preferred Bidder it would be entirely possible for the applicant, assuming that it was successful in its ITN re-evaluation, to pass through the BAFO evaluation in the same way as the other BAFO bidders with no prejudice to its position.

[16] At the conclusion of the initial hearing on 11 October 2007 I asked Mr Straker QC to provide the court with a skeleton argument identifying the specific prejudice which it was alleged that the applicant would suffer in the event that that BAFO process was permitted to proceed and the applicant succeeded at the trial in establishing that the decision by the Department on 19 April 2007 to eliminate the applicant from the Workplace 2010 contract process should be set aside. I am grateful to Mr Straker QC and his junior, Mr Michael Humphries, for the helpful and clear written and oral submissions that they subsequently advanced on behalf of the applicant. In the course of those submissions the following elements of potential prejudice were identified:

(*i*) The applicant would be improperly deprived of its right to be fairly considered for selection as a Preferred Bidder.

(*ii)* A BAFO stage that involved three bidders would infringe the defendant's rule limiting such a stage to two bidders.

(*iii*) The applicant would run the risk of losing one of its preferred advisors, some of its decant options and would suffer the disadvantage of not having enjoyed an equal and timeous access to the Department's procurement team with the unavoidable stigma of being considered "an also-ran".

[17] Paragraph 1.3 of the Instruction to Bidders issued on behalf of the Department on 30 June 2006 set out the objective of the ITN process in the following terms:

> "The objective of the ITN process is to provide Bidders with sufficient information to enable fully costed proposals to be submitted such that the Authority will be able to select a Preferred Bidder whose submission represents the most economically advantageous offer which is not subject to material uncertainty in either price or risk allocation.
>
> If the Authority considers the offers from the Bidders do not achieve best value for money or are subject to material uncertainty in either price or risk allocation a Best and Final Offer ('BAFO') stage will be undertaken. If a BAFO stage is undertaken, no more than two bidders will be taken through. The documentation and the timeline for the BAFO stage will be issued as soon as practicable after the evaluation of the bidders ITN's submissions."

[18] By way of response Mr McCloskey QC on behalf of the Department has accepted that, in the event of the applicant succeeding at trial and qualifying for the ITN stage the procurement process would require the Department to consider whether, at that time, the applicant should be selected as a Preferred Bidder. With regard to the submission that the Department's rules limited the BAFO stage to two bidders Mr McCloskey QC relied upon paragraph 1.10 of the instructions to bidders which provided that:

> "The Authority reserves the right to change, without notice, the procedures for the ITN process, or any of the ITN documentation, or any information in relation to or in respect of the Workplace 2010 Project, at its discretion."

According to Mr McCloskey QC, this power would entitle the Department, if it was appropriate to do so, to vary the BAFO stage from two to three bidders. He submitted that even if, by the date of trial, the two other bidders had completed or almost completed the BAFO stage they could have no complaint about the stage being expanded to three bidders since they would have been aware from the ITN documentation that they had been participating in an exercise which afforded the Department the power to change the procedure. During the hearing on the 22 October 2007 it was my impression that he was advancing this submission on the basis that BAFO was an optional stage within the ITN procedure which might or might not be needed depending upon the circumstances. However he subsequently furnished a helpful supplemental skeleton which somewhat clarified and refined his submission. In this document Mr McCloskey QC re-emphasised his reliance upon the power of the Department to amend the ITN documentation so as to permit three, as opposed to two, BAFO participants but also confirmed that the approach of the Department was that BAFO and ITN were two separate stages of a composite procurement process.

[19] Apart from its concern as to whether the Department could utilise paragraph 1.10 of the instructions to bidders to amend the BAFO stage to include three rather than two bidders, the main thrust of the applicant's submissions with regard to prejudice related to the severe strain upon the objectivity of the Department's judgment in any revaluation of the plaintiff's bid to be selected as a Preferred Bidder at a time when the Department had already instigated and substantially advanced a BAFO stage from which the plaintiff had been expressly excluded. The applicant pointed out that such a re-evaluation would have to be conducted against a background in which the Department had announced publicly that it had decided to invite two other bidders to participate in the BAFO stage and that both the Department and the bidders had been involved in lengthy dialogue and negotiations as well as having incurred significant expense. The applicant maintains that such a situation would not only prejudice its own rights but would also have a public interest dimension insofar it would adversely impact upon the guarantees of transparency and non-discrimination required by the recitals and articles of Council Directive 89/665/EEC – The Remedies Directive.

Variation in the dispersal policy and re-evaluation of the transferred estate

[20] The applicant has referred to a statement by the Minister of Finance and Personnel made to the Assembly on 24 September 2007 as indicating a potential for significant changes to be made in the contractual arrangements. After observing that the public sector was too large, given the overall size of the economy in Northern Ireland, the Minister recognised that decisions about the future location of public-sector jobs could have important implications for communities throughout Northern Ireland and observed that

decisions would have to be taken about where the new bodies created as a result of the Review of Public Administration (RPA) would be based. He then announced that the Executive had agreed to undertake a time-bound review of policy on the location of public-sector jobs in Northern Ireland. The Department has pointed out that the possibility of some change to the scope of the contract was foreshadowed by the press release of 1 May 2007 and also the subject of extensive correspondence. In addition the Department has drawn attention to the fact that the applicant's bid incorporated a specific recognition and acknowledgement of the fact that there might well be significant changes to the Authority's requirements. At the same time the Department has confirmed that it does not intend to make any changes that would be material for the purposes of procurement law and, alternatively, if and to the extent it should become necessary, the Department is prepared to commence a new competition for any new contract in accordance with the requirements of procurement law. In any event, no such changes have as yet been identified.

[21] During the course of the same Ministerial statement the Minister referred to the need to be assured that the WP 2010 contract represented value for money and noted concern that the government could have its "eye wiped" by a private-sector partner intent on making excessive profits at the Government's expense. For the purpose of allaying such a concern the Minister confirmed that an independent valuation exercise would be taken into account in the final contract. The applicant makes the case that such a revaluation might possibly involve very significant adjustments to the financial obligations of the parties which, in turn, could have a significant bearing on the respective bids. In his affidavit sworn on 15 October 2007 Christopher Thompson has confirmed that the Department has agreed to obtain an up-to-date independent valuation of sixteen of the key properties in the transferred estate which was being carried out by a firm of property consultants and anticipated to be available around the end of October 2007. However, according to the affidavit sworn by Mr Thompson on 15 October 2007 the independent valuation of the transferred estate is not in any way related to the transfer payment but primarily for "Government accounting purposes". The essence of Mr Thompson's somewhat Delphic explanation seems to be that the primary, if not the sole, purpose of the independent valuation is to ensure that the Department's accounts are in order. Ultimately, this may become a topic for submission and evidence but, for the present, it is not altogether easy to reconcile the assertions made by Mr Thompson with the assurance given by the Minister to the Public Accounts Committee that the "outcome of an independent valuation exercise will be taken into account in the final contract".

[22] In its initial skeleton argument submitted prior to the hearing on 11 October 2007 the applicant relied upon the review of dispersal policy and the proposed independent revaluation referred to in the Minister's statement of

24 September 2007 in support of its submission that the finalisation of WP 2010 was likely to be more protracted than anticipated by the defendant and that, consequently, the balance of convenience favoured the applicant, bearing in mind that the trial has now been fixed for 21 January 2008. At that time the primary concern of the applicant appears to have been the risk that, without a continuing stay, the WP 2010 contract might be awarded prior to judgment in the action thereby, as a consequence of Regulation 32(6) of the 1993 Regulations, precluding the applicant from seeking an order setting aside the decision of the 19 April 2007. Prior to the hearing on 22 October 2007 the applicant lodged a further skeleton argument in the course of which it was argued that any material contractual changes arising as a consequence of the policy review and/or revaluation referred to by the Minister would be adverse to the public interest in so far as the bidder eventually selected to be the Preferred Bidder would be able to negotiate the terms of any such changed contract in the absence of any competition thus leading to the possibility that the contract might not be awarded to the most economically advantageous bid contrary to the 1993 Regulations. While such an outcome might well attract criticism as not being in the public interest, it seems to me that this submission relates more to the overall management of the procurement process by the defendant than to be relevant to any specific prejudice likely to be suffered by the applicant in the absence of a stay.

[23] The applicant has also raised the possibility that, in the absence of a continuing stay, one of its professional advisors may defect to one of the other bidders and that it is also at risk of losing some of its decant options in Belfast and Derry. It is difficult to assess the weight, if any, to place on the possibility that an advisor, who has presumably been with the applicant throughout the preparation process to date, would defect to one of the other bidders prior to the applicant being given an opportunity to vindicate its case on 21 January 2008. No evidence was forthcoming as to the nature and extent of the options, the manner by which they had been secured or the manner in which they might be rested from the applicant by one of the alternatively bidders.

Conclusion

[24] In deciding whether to exercise its discretion to accede to the application to extend the stay both parties agree that the court may have regard to the guidelines contained in American Cyanamid. It is also accepted that the public law element may be one of the "special factors" referred to by Lord Diplock that may be taken into consideration in the particular circumstances of the individual case. This is not a case in which the order sought by the applicant will have the effect of restraining a public authority from enforcing an apparently authentic law as in R v Secretary of State for Transport Ex Parte Factortame Limited (No. 2) 1 AC 603 but, as I have recorded above, WP 2010 is a substantial project the satisfactory completion

of which is a matter of considerable importance to the Northern Ireland Executive. Furthermore there has been a significant shift in the degree of prejudice upon which the applicant seeks to rely insofar as there no longer seems to be a realistic threat that the contract will be awarded before judgement. However, I must also take into account the public interest in ensuring that such a project is lawfully conducted according to objective principles of fairness, openness and transparency as required by the relevant EU directives and domestic regulations. Another important factor is the relatively short period of time that is likely to elapse before the expedited date of trial. As Lord Walker observed in Belize Alliance of Conservation NGOS v Department of the Environment of Belize [2003] 1 WLR 2839 at paragraph 39:

> "Both sides rightly submitted that (because the range of public law cases is so wide) the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimise the risk of unjust result). …. The court is never exempted from the duty to do its best, on interlocutory applications with far-reaching financial implications to minimise the risk of injustice."

In the circumstances I propose to extend the stay in respect of the Phase 111 Evaluation stage of the BAFO process which is due to commence on the 11 February 2008 according to exhibit CT/1 to Mr Thompson's affidavit. In other words that stage will not commence until after judgment. As always the terms of the order may be reviewed upon application to the court should appropriate circumstances arise.

[25] The plaintiff has proffered an undertaking in the following terms:

> "The plaintiff undertakes that in the event this Honourable Court finds that the stay ('the stay') ordered on 22 October 2007 should not have been ordered the plaintiff will pay the defendant such extra costs as the defendant itself incurs in the Workplace 2010 tender process that is the subject of action 2007 No. 074919 and which is solely attributable to the delay occasioned by the stay."

While there is no strict rule of law or practice that requires a party to provide an undertaking in damages as a condition of granting an interlocutory injunction, it does seem to me that a general consideration of the authorities indicates that, unless some special feature is present, such a condition should be expected to be imposed. There are of course exceptions to this general

approach and each case requires to be considered in the context of its own individual circumstances eg. in Allen v Jambo Holdings Limited [1980] 1 WLR 1252 the Court of Appeal held that legally assisted persons are as a matter of course excepted from the need to give a cross-undertaking in damages. In R v Servite Houses Ex Party Goldsmith (2000) 3 CCLR 354, a public law case relating to the closure of a residential care home, Swinton Thomas LJ considered that an injunction might be granted to a citizen without any undertaking and damages if justice required that course. In In Re DPR Futures Limited [1999] 1 WLR 778 joint liquidators, in the course of the performance of their statutory duties, sought a Mareva injunction against the former directors and shareholders but sought to limit the cross-undertaking in damages. On behalf of the respondents it was argued that acceptance of a limited cross undertaking was both unprecedented and contrary to principle and if there was any risk of under-estimating a potential loss which might result from granting an injunction which ought not to have been granted that risk should been borne by the party seeking the order. They went on to argue that by accepting a limit on the cross-undertaking in damages the court would be denying itself in advance the power to do the fullest justice between the parties. While recognising that there was force in such submissions, Millett J observed that the court could not avoid the need to make an intelligent estimate of the likely amount of any loss which might result from the grant of an injunction. He went on to say at page 786:

> "There is nothing unusual in this. It is so in every case where the balance of convenience has to be considered. A plaintiff's resources are not infinite. But any such estimate can be reviewed from time to time and further fortification required if necessary. If fortification cannot be obtained this will affect the balance of convenience between granting or refusing the injunction. But the court cannot abrogate its responsibility for deciding where the balance of convenience lies."

In this case the applicant is a consortium of commercial undertakings with access to substantial assets as opposed to an individual citizen, whether legally assisted or otherwise, or a liquidator seeking to perform his statutory obligations to preserve what might be salvaged for the shareholders and creditors of an insolvent company. As I have indicated above at paragraphs 26-48 of his affidavit sworn on 10 October 2007 Mr Thompson has set out details of the impact that it is alleged that any delay will have upon the procurement process, the Northern Ireland Executive budget, achieving WP 2010 efficiency gains and future PFI projects in Northern Ireland. No attempt has been made to quantify in monetary terms the damages to which the applicant might be exposed should one or more of the developments apprehended by Mr Thompson occur, but the clear inference seems to be that

the financial consequences could be so overwhelming as to effectively inhibit any would be private sector partner from seeking to obtain an interlocutory injunction in such circumstances. Accordingly I propose to make the order subject to the undertaking proffered by the applicant. As with the order itself this undertaking may always be reviewed on application to the court should appropriate circumstances arise.

[26] The Department has brought a summons seeking security for costs and requiring the applicant to provide such security by way of formal guarantee. Mr Straker QC has given the court a formal undertaking on behalf of the applicant that McAleer & Rushe is prepared to discharge any Order in respect of taxed costs incurred by the Department resulting from this litigation. He advanced the submission that an undertaking could be efficiently enforced by the court and that, if it was felt necessary, McAleer & Rushe could be formally joined as a party for the purpose of so doing. Mr Dacam of Lovells LLP, the solicitors acting on behalf of the Department, has accepted in the course of the affidavit sworn in support of the summons that McAleer & Rushe has sufficient resources to honour a costs order in favour of the Department should the litigation be unsuccessful. The department has not advanced any submission as to why a formal guarantee is required. In the circumstances I propose to direct that the undertaking proffered on behalf of McAleer & Rushe constitutes adequate security. As with the other components of this order this aspect may be the subject of a further application should appropriate circumstances arise.