Neutral Citation No. [2013] NIQB 64

Ref: **GIL8883**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **07/06/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

RESOURCE (NI) LTD

Plaintiff;

-and-

UNIVERSITY OF ULSTER

Defendant.

GILLEN J

Introduction

[1] This is an application by the defendant under Regulation 47H(1)(a) of the Public Contracts Regulations 2006 as amended by the Public Contracts (Amendment) Regulations 2009, SI2009/2992("the Regulations") which take effect for contract award procedures commencing after 20 December 2009. The application is to bring to an end the requirement under Regulation 47G (1) that the defendant refrain from entering into a contract with Noonan Services Group (NI) Ltd for the provision of Facilities Services pursuant to a procurement process initiated by OJEU CN2012/S190-312695 (hereinafter called "the contract").

[2] There is no material dispute as to the factual background to this procurement exercise forming the subject matter of these proceedings. This was set out in affidavits before me from Mr Ronan Rafferty (the University's Procurement Officer), Mr Patrick Donnelly (the University's Director of Physical Resources) on behalf of the defendant and Mr Ray Foran on behalf of the plaintiff.

[3] Mr Scoffield QC, who appeared on behalf of the defendant with Mr McLaughlin, accepted that Mr Bowsher QC, who appeared on behalf of the plaintiff with Mr Dunlop, had broadly summarised the factual background in the plaintiff's skeleton argument at paragraphs 1-15 subject to certain matters to which I shall advert in this summary. The background can therefore be summarised as follows.

[4] The plaintiff Resource (NI) Ltd is the incumbent provider of three facility service contracts for the University of Ulster ("UU") which it has been discharging from in or about 2004 currently employing approximately 120 staff. These contracts are for car park management, cleaning services and security services. It is the UU's case that this contract covers only three of the five services to which the procurement relates and, indeed, even within those areas, the plaintiff only provides a proportion of the services. Accordingly the defendant argues that the simple extension of the plaintiff's existing contract is not an adequate means alone of providing the service.

[5] By means of an OJEU notice dispatched on 1 October 2012, UU advertised its intention to procure a new Facilities Services Contract. The defendant established a Memorandum of Information for Tenderers ("MOI") providing information about the new services before submitting bids. The purpose of the MOI was to provide preliminary information to tenderers to enable them to complete their Pre-Qualification Questionnaire ("PQQ").

[6] The OJEU notice confirmed that UU intended to use the "Restricted Procedure" to award the contract. This meant that all prospective economic operators were required to complete a PQQ in order that UU might shortlist those tenderers who would be invited to submit a tender to provide the services.

[7] Detailed instructions were given in the MOI to ensure all economic operators fully understood the steps required of them to complete the PQQ. In particular, the MOI stated, inter alia:

> "Economic operators are directed to read carefully this MOI and the PQQ document before completing the PQQ.
>
> Economic operators should respond to all the questions in the PQQ and should provide all the supporting information requested.
>
> Failure to provide the required information, complete the satisfactory response to any question or supply documentation that is requested within the specified timescales may result in the PQQ being disqualified.
>
> It is therefore critical that the Economic Operator double checks that its PQQ is completed and submitted in full.
>
> Information as to economic and financial standing – this is an analysis and evaluation of the financial information provided by the Economic Operator to verify that the financial, economic and insurance requirements of the contracting authority are satisfied. The Economic

> Operator must be in a sound position to participate in a procurement of this size ..."

[8] At paragraph 5.4 of the MOI, UU specified certain minimum requirements of "Financial and Economic Standing" and mandated that unless the Economic Operator was bidding as a consortium – not applicable in this case – that:

> "The Economic Operator must have an annual turnover in the period specified greater than or equal to £5,000,000.
>
> If an Economic Operator has annual turnover less than the relevant minimum set by the contracting authority (£5M) the Economic Operator shall be eliminated from this competition".

The MOI further stated expressly that:

> "An Economic Operator which fails to meet the minimum standards for financial standing; fails to satisfactorily complete the compliance questions; or, for any reason is deemed ineligible in accordance with the Public Contracts Regulations 2006 (as amended) will be excluded from the competition and the remainder of its submission will not be assessed."

[9] The MOI advised the prospective tenderers that a financial check would be undertaken using credit reference agency n2check in the PQQ. The Economic Operators were also required to demonstrate an ability to obtain insurance set out in Part C of the PQQ notably, where a consortium was applying, each of the consortium member's insurance details had to be supplied.

[10] In the case of a consortium application, paragraph 5.14 of the MOI made clear that each member of the Consortium was required to submit a separate copy individually of Parts A, B, C and E of the PQQ. Failure by any member of the Consortium to pass a mandatory requirement within their Parts B, C and E assessment was intended to have the result of the entire consortium being eliminated from the competition. Part C of the PQQ included the turnover requirements.

[11] The MOI made clear that economic operators were required to structure themselves (if successful) so that certain legal and organisational requirements were met. These are set out at paragraph 9.1 of the MOI and required, in particular:

> "The legal obligations and liabilities of the Economic Operator are borne by an entity or entities which

> satisfy the financial and economic requirements referred to at Section 5.4 of this MOI (having regard, where the economic operator so proposes, to any parent or ultimate holding company which will provide a guarantee or guarantees for that purpose.)"

[12]Following the publication of the MOI, UU received a number of PQQs from a variety of economic operators including the plaintiff and Noonan Services Group (NI) Ltd ("Noonan NI").

[13] The PQQ was accompanied by Guidance Notes and, where relevant, these stated as follows:

> "3. The PQQ submitted by the Economic Operator shall represent the Economic Operator's Consortium (if any). The Economic Operator's combined response must include all requested information relating to the Economic Operator and where requested Consortium members. It is the Economic Operator's responsibility to ensure that the PQQ, complete with the requisite supporting information, is fully completed and returned to the Contracting Authority by the due date and time.
>
> 4. Failure by an Economic Operator to complete all questionnaires fully and in accordance with all requirements therein and to return the PQQ by the submission date and time may result in the Economic Operator's submission being eliminated from the competition.
>
> 5. Where the role of an Economic Operator is to be fulfilled by a Consortium of two or more organisations, each of those organisations must complete a copy of the PQQ as if each organisation was a single Economic Operator. Only Part D should be submitted as a combined response."

[14] Both Resource(NI) Ltd and Noonan NI submitted PQQs and thereafter each was shortlisted and requested to submit a tender. Following evaluation of their respective tenders by letter dated 22 February 2013, UU informed all tenderers that the preferred bidder was Noonan NI.

[15] Resource has taken issue with the propriety of the award of the contract to Noonan NI and has issued proceedings challenging UU's decision. The effect of the

proceedings has been to automatically suspend the execution of any contract with UU pursuant to Regulation 47G(1).Accordingly, UU has brought the current application to set aside the automatic suspension pursuant to Regulation 47H(1)(a) and thus entitling UU to enter into the contract without prejudice to the Plaintiff's right to pursue damages.

[16]It is common case that the PQQ submitted by Noonan NI was inaccurate .Part A of the PQQ requested parties to identify the name of the economic operator who would perform the contract and some details about the relevant entity. If it was proposed to submit a tender on behalf of a "consortium" parties were required to provide details of all the members of the consortium. In the event that the economic operator was not a "consortium" but did propose to rely upon the resources of another entity to demonstrate that it satisfied the relevant selection criteria, it was required to identify that other entity and to provide some details about it.

[17]Noonan NI identified the relevant economic operator as "Noonan Services Group (NI) Ltd" and confirmed that it proposed to submit its tender on the basis that it was a single economic operator, not a consortium. It also stated that it did not propose to rely upon the resources of another entity in order to meet the requirements of the contract. Accordingly, it did not provide any evidence of its ability to rely upon another entity's resources.

[18]In Part C of the PQQ, questions were asked which related to the financial and economic standing of the economic operator. Operators were required to demonstrate their standing by way of turnover during each of the last three financial years and to demonstrate that they had a minimum turnover of £5m in each of the three preceding financial years. At Question C-03, Noonan NI indicated a turnover of respectively £147m, £154m and £131m thus comfortably exceeding the £5m requirement. This question was marked on a pass/fail basis. At the time of marking the PQQ responses UU commissioned a report on the credit worthiness of the proposed economic operator. This was known as an "n2 check". The results of this report revealed that Noonan NI had a turnover which did not match the figures stated in the response to Question C-03 and also that its turnover for the year 2009 was less than £5m. This disparity was not picked up at the time, as the n2 check was, according to the defendant, used only for the purposes of marking Question C-14 to which it specifically related, and not as verification for Question C-03.

[19]The n2 credit check also disclosed that Noonan NI was a subsidiary of Noonan Services Group (UK) Ltd which, itself, is a subsidiary of Crane Midco (Guernsey) Ltd.

[20]Noonan NI then progressed to the award stage and was invited to submit a tender. Following a valuation of tenders, an award decision was made in favour of Noonan NI on the basis that its tender was the most economically advantageous.

The plaintiff was the second ranked tenderer and was provided with feedback about how it had compared against the successful tenderer

[21]From the decision to award the contract to Noonan NI (but prior to the contract being concluded), the plaintiff made a complaint to UU about Noonan NI's financial standing and its ability to meet selection criteria (C-03) about turnover.

[22]By letter dated 28 February 2013 Messrs Tughans, acting on behalf of the plaintiff, wrote to UU raising a series of concerns dealing broadly with two challenges:

- That the Noonan NI PQQ was not compliant since Noonan NI did not meet the turnover requirements.

- That the Noonan NI bid was abnormally low.

[23]After seeking time to provide a substantive response to the plaintiff's allegations, on 14 March 2013 Arthur Cox, Solicitors, on behalf of UU wrote to Tughans indicating that Noonan NI is a subsidiary of Noonan Services Group Ltd upon whose resources Noonan NI can rely in the performance of the contract. The plaintiff was informed that the turnover figures presented were those of the Noonan Group. UU also rejected the arguments concerning the abnormally low nature of the bid as alleged.

[24] Noonan NI made clear that the turnover figures listed in its PQQ response related to Noonan Group and it also offered a parent company guarantee from Noonan Group to guarantee the performance of Noonan NI's obligations under the contract. Clearly therefore by implication Noonan NI did propose to rely upon the resources of another party in order to demonstrate its financial and economic standing and its response under the PQQ had been incorrect.

[25]UU wishes to accept the proposal from Noonan NI subject to the provision of a parent company guarantee which guarantees performance of Noonan NI's obligations.

Principles governing this application

[26] It is common ground that the effect of regulation 47H(2) is that the issue has to be determined by the court in accordance with the principles applicable to the grant of an interim injunction as laid down in the seminal case of American Cyanamid v Ethicom Ltd [1975] AC 396. Thus three basic questions arise:

- Does the plaintiff raise a good arguable case to be tried? If the answer to that question is yes, then

- Would damages be an adequate remedy for a party (whether the plaintiff or the defendant) injured by the court's grant of, or by its failure to grant, an injunction?

- If not, where does the "balance of convenience" lie? In the context of litigation under the Regulation, it is common ground that in considering the last question the court is entitled to have regard to the interests not only of the immediate parties to the litigation, but also to the public interest where the interests of the public are or may be affected one way or the other (the Newcastle Upon Tyne Hospital NHS Foundation Trust v Newcastle Primary Care Trust and others [2012] EWHC G093 at (9).

[27] McCloskey J summarised the position in Lowry Brothers Ltd v Northern Ireland Water Limited [2013] NIQB 23 at paragraph 27 as follows:

> "The court must decide at this stage whether either plaintiff has a good arguable case or, in the language employed in some of the reported cases, has raised a serious issue to be tried. This is the first of the main criteria to be applied. The second concerns the balance of convenience. In applying this latter criterion, the court is empowered to take into account the adequacy of damages as a remedy; the availability, terms and apparent efficacy of any cross undertaking in damages offered by the plaintiff; the possibility of irremediable prejudice to third parties; and the demands of the public interest. The court also falls within the embrace of the general obligation enshrined in Article 10 TEU to secure that all appropriate measures are taken to ensure the fulfilment of community law obligations."

A good arguable case

The plaintiff's case

[28]In essence the plaintiff submits that Noonan NI has failed to comply with the requirements of a complete and accurate PQQ. It has unequivocally stated therein that it was not relying on the resources of any other entity, was not a member of a group of companies or a consortium and in effect has submitted the accounts for a different company, namely the Noonan Group.

[29]Thus, the plaintiff argues, the economic entity that completed the PQQ, namely Noonan NI, has not met the turnover requirements as set out in the MOI. In overlooking this and characterising it as a simple error which it was entitled to

clarify, the plaintiff contends that UU has ignored the rules of the competition and adapted these unilaterally for the benefit of Noonan NI in a discriminatory fashion, thus undermining the objectivity and transparency of the process. Allowing the PQQ to be amended after the contract bid is allegedly a serious breach of the principle of equal treatment.

[30]Mr Bowsher in the course of a well-pitched exposition of the law , inter alia, has invoked the following authorities which repay study and which can be recited with reasonable brevity :

1. Lion Apparel Systems Ltd v Firebuy [2008] EULR 191 as authority for the proposition that the UU must comply with its obligations as to equality, transparency and objectivity with no scope for a "margin of appreciation" as to the extent to which it will or will not comply with its obligations.

2. Clinton (t/a) Oriel Training Services v Department of Employment and Learning [2012] NICA 48 as authority for the proposition that once tenders had been submitted those tenders in principle can no longer be amended either at the request of the contracting authority or of the tenderers. Correction or amplification of a tender is only permissible on an exceptional basis when it is clear that they require mere clarification or to correct obvious material errors provided that such an amendment does not in reality lead to the submission of a new tender.

3. SAG ELV v Slovensko and Others [2012] EUECJC-599/10 as authority for the proposition that the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom precludes any negotiation between the contracting authority and one or other of the tenderers.

4. R (On the Application of Harrow Solicitors and Advocates) v Legal Services Commission [2011] EWHC as authority for the propositions that:

    - It would violate the principle that all must be treated equally if any tenderer were permitted to change its bid after bidding had closed.
    - Where the awarding authority has a discretion to seek clarification about a bid from the tenderer, that discretion will not normally be interfered with unless:
    - (a)It was exercised unequally or unfairly across the relevant bidders, or

- (b)-It was not exercised, yet it appeared to the awarding authority that there was an ambiguity or obvious error which probably had a simple explanation and could be easily resolved.
- The duty to seek clarification is where the tender as it stands cannot be properly considered because it is ambiguous or incomplete or contains an obvious clerical error. If there is in place an error or ambiguity, clarifying it does not change the bid because objectively the bid never positively said otherwise.
- It is not right to say that a tenderer, which has made a mistake which does not render the tender in any manner ambiguous or defective but which is objectively verifiable, is entitled to have it rectified. If on occasion this may work against a tenderer which has not taken care with its tenderer that is unfortunate but it is a function of the overriding need to have properly prepared, timely and accurate tenders as a matter of good administration.

5. Easycoach Limited v Department for Regional Development [2012] NIQB 10 at [70] as authority for the proposition that whilst the selection criterion in a given competition is a matter of choice of the contracting authority concerned, the specific legal rules in play are properly viewed as a reflection of the overarching principles of equality of treatment of all bidders and transparency.

6. Wall A G v La Ville de Francort Sur-Le-Maine and Frankfurter Entsorgungs -EU: Case C-91/08 in the Court of Justice as authority for the proposition that an amendment to a service concession contract during its currency may be regarded as substantial if it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted.Thus a change of sub-contractor, even if the possibility of a change is provided for in the contract, may in exceptional circumstances constitute such an amendment to one of the essential provisions of a concession.The use of one sub-contractor rather than another was a decisive factor in concluding the contract.In such circumstances it is necessary to restore the transparency of the procedure which might extend to a new award procedure and a similar approach should be adopted in the instant case.

7. Tideland Signal v Commission T-211/02 at (34) as the authority for the proposition that it is in the interests of legal certainty to be able to ascertain precisely what a tender offer means and in particular whether it complies with the conditions set out in the call for tenderers. Thus where a tender is ambiguous and the Commission did not have the

possibility to establish what it actually meant quickly and efficiently, the institution had no choice but to reject that tender. That should have been done in this instance.

8. Ballast Nedam Groep v Belgium State C-5/97 at (11) as authority for the proposition that Member States must not only honour the principle of non-discrimination but also show particular diligence in laying down and applying objective and transparent rules as to ensure actual observance of the conditions such as in the instant case that the company in question actually has available to it the means which are necessary for carrying out the contracts.Where such proof is not provided competition would be distorted because one would be allowing groups of companies without the proper means, from both legal and technical and economic points of view, to participate on an equal footing in the award procedure alongside candidates which for their part fully satisfied those criteria. That is the mischief in the present case.

[31] In short, Mr Bowsher contended that the concept to be addressed in this matter is fairness in the competition and not fair value for money. The goal to be achieved is transparency and fairness and not best value. The concept of transparency is to be read equally at the selection and tender stages. The instant case is an attempt by one party to change the composition of the bid and to invoke a differently composed bidding arrangement from that which was originally set out. It is nothing less than an attempt to change the identity of the bidder.

The defendant's case

[32] The essential point made by Mr Scoffield in the course of a clear and skilfully presented argument on behalf the plaintiff is that whilst the procurement process requires overall the need for equality and transparency, it is a two stage process where different principles govern each stage. The defendant has failed to distinguish between the first stage, namely the selection process to select suitable economic operators to perform the contract under the terms of Regulations 23-29 of the 2006 Regulations, from the second stage, namely the tender stage, which is to evaluate the tenders and is governed by Regulations 30-32 of the Regulations.

[33] The selection stage is governed by the following principles:

- It must reflect the purpose of the Procurement Rules recorded at Recital 2 of the Directive 2008/18 which is to guarantee the opening up of public procurement to competition. Not only does this ensure equality of opportunity among operators to participate in procurement procedures, but open competition also helps deliver best value for money for public authorities. The greater the number of suitable operators who participate in

the tender process, the better the competition and the more likely that best value will be achieved. There would be a dead hand on the creative impulse of the Directive and this objective would be fundamentally undermined if the selection process was used as a method to trip up potential tenderers and exclude them from the competition when in fact they are eligible to bid and may present the most economically advantageous bid as it is alleged occurred in the instant case.

- The requirement of equality and transparency in the selection process is achieved by ensuring objectivity and uniformity in the identification and application of the selection criteria. Equality among operators is ensured not by preventing additions to selection stage submissions but by preventing alterations to the selection criteria themselves. (See Recital (39) to the Directive).The words of the Directive and the Regulations need to be set in the landscape of the instruments as a whole.
- It is permissible under the 2006 Regulations and the Directive for contracting authorities to request parties to provide "additional or supplementary" information at the selection stage. Thus Article 51 of the Directive(which is transposed by Regulation 26) declares:

> "**Additional documentation and information**.
> The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45-50."

- This contrasts sharply with the lack of a similarly wide power available to seek clarification during the tender stage.

- The right to seek *additional* documentation and information(contained in the Directive and Regulations 26) at the selection stage is not triggered by identifying "obvious material errors" or "ambiguity" in the tenders as may be the position at tender stage. The action by the contracting authority at the selection stage can be on its own initiative at any time(see Easycoach supra at [101-102]).It should primarily be a matter for the contracting authority to determine whether it has sufficient information about the operator's financial standing or the veracity of the materials it has put forward.

- The authorities relied on by the plaintiff are confined to the exigencies of the *tender* stage and not the selection stage.

- SAG ELV and Others is authority for the proposition that the contracting authority may seek clarification of the content of a *tender* "to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender". The application of this principle applies "once the tenderers have been selected". Counsel argued that this contrasted with

the selection stage where the same requirements did not apply. In short the scope for allowing operators "to supplement or clarify" selection stage submissions are broader than a process of "mere clarification" advocated in SAG.

[34]It is contended by Mr Scoffield that in the instant case the defendant did no more than request Noonan NI to provide clarification about the identity of the relevant economic operator and the fact it was relying upon the resources of another party. It is the defendant's case that these requests come within the process permitted by Article 51 and Regulation 26. In response Noonan NI provided such supplementary or clarificatory information making clear that the turnover stated in its response is not available from its own resources but from Noonan Group by means of guarantee.

[35]In short the defendant's submission is that it is wholly permissible to rely upon the resources of another and the only additional information required was the name of that entity and a letter of undertaking to provide a guarantee. This is what was received upon request and the response involved no "change in the bid". Moreover the relevant figures (relating to the parent company) were those which were relied upon in the PQQ at the material time.

[36] I pause to observe that Mr Scoffield,perhaps with his eye more on the margins of the case than at its centre, made three further points which I have found somewhat less impressive than the gravamen of his main thrust. First, that "it was clearly obvious to the UU that there was an inconsistency between the turnover figures contained in the PQQ response, Noonan NI's actual turnover figures and the response that was not relying upon the resources of another entity." On the face of the PQQ I am not at all persuaded that this was an "obvious material error" in formulating the response thus bringing the clarification request within the SAG principles. I am not at all clear that merely by reading the PQQ it would have been obvious that such a mistake had been made. Indeed until the apparent error was drawn to the attention of the UU by the plaintiff, the defendant had been totally unaware of the mistake and therefore it can scarcely be termed "obvious".

[37]Secondly, at this preliminary stage I am unpersuaded that Article 47(1)(c) ,which is the source of the request for overall turnover for a maximum of the last three financial years available depending on the date on which the undertaking was set up or the economic operator starting trading as far as the information on these turnovers is available, is met by extrapolating Noonan NI's turnover figures for 2009 over the entire year on a pro rata basis in order to meet the £5m threshold. In any event this is not what Noonan rely on since it is clear that they are relying upon the figures of the Noonan Group

[38]Thirdly that the impugned answer by Noonan NI at "-07 in the PQQ may have been in response to an ambiguously phrased question. I find nothing ambiguous about the question at this stage.

Conclusion on the arguable case

[39] Any view which I now express must by its very nature be preliminary in the context of the overall hearing of this case once it comes to trial. I remind myself that it is not the function of this court to determine the issues in the litigation at this stage. My concern solely is whether the plaintiff's challenges overcome the good arguable case threshold. That principle finds a valuable illustration in the judgment of McCloskey J in Lowry's case at [32] where he indicated the court should take into account that its determination at this stage of the proceedings is made in the absence of the elements of full blown adversarial litigation – in particular discovery of documents, interrogatories and responses thereto and, perhaps most importantly, the cross-examination of deponents notwithstanding that the essence of the critical documentary evidence is available to me.

[40] I share the view expressed by Tugendhat J in the Newcastle Upon Tyne Hospital case at [31] that the threshold in the first of the three questions to be asked according to Cyanamid is a low one. I consider that the competing arguments at this stage contain strong points of merit on each side. One has only to set them out as I have done to see the strength of the competing arguments. In those circumstances I am persuaded by Mr Bowsher that there is a seriously triable issue or a good arguable case on behalf of the plaintiff. Absent a conclusion by me that one or other side contains such frailties that it fails to raise a serious triable issue, it is inappropriate that I should express any view that might betray an indication of where I think the final decision in favour of one or other of the parties may fall. Suffice to say I am content that the plaintiff has crossed the first Cyanamid hurdle.

Abnormally low bid

[41] I pause to observe however, that in coming to this conclusion, I have not taken into account the additional argument made by Mr Bowsher that the offer made by Noonan NI is abnormally low and, that being so, UU had come under a duty to investigate it to see whether it was a properly sustainable bid. It had allegedly failed to carry out the requisite investigations.

[42] Regulation 30(6) of the 2006 Regulations(which in effect is the implementation of Article 55(1) of the Directive) provides:

> "If an offer for a public contract is abnormally low the contracting authority may reject that offer but only if it has –

(a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;

(b) taken account of the evidence provided in response to a request in writing; and

(c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator."

[43] In Case T-4/01 Renco SpA v Council of the European Union [2003] ECR II-171, the court said of the current Directive's similarly worded predecessor at (75):

> "The Council is under a duty first to identify suspect tenderers; secondly, to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate; thirdly, to assess the merits of the explanations provided by the parties concerned and, fourthly to take a decision as to whether to admit or reject those tenders."

[44]Mr Bowsher contended that there is an imperative duty imposed on UU to examine whether the Noonan NI bid is "suspect" or alternatively to conclude that the UU refusal to regard the bid as "appearing" abnormally low amounts to a manifest error.

[45]Mr Scoffield properly drew my attention to J.Varney v Hertfordshire County Council [2010] EWHC 1404. Having reread both the Regulation and the Directive, I respectfully share the view expressed therein by Flaux J at (157) where, having considered all the authorities including Renco and Morrison Facility Services Limited v Norwich City Council [2010] EWHC 487, he concluded:

> "… There is nothing in either provision to support the contention that there is a general duty owed by the authority to investigate so called 'suspect' tenderers which appear abnormally low. … I am quite satisfied that neither the Directive nor the Regulation imposes a duty to investigate so called suspect tenderers generally."

[46]In the instant case the plaintiff, relying on the affidavit of Mr Foran at paragraph 24 et seq ,contend that the figures put forward by Noonan NI are such that "it seems

likely that Noonan NI either intends to run the contract making a significant loss … or it must intend to reduce the terms and conditions of the University staff who will transfer under TUPE on the day of the contract."

[47]Mr Bowsher conceded that the plaintiff did have a paucity of information on this aspect of the case at this stage. I consider that Mr Foran's thoughts are currently based on no more than suspicion.

[48] Any duty to investigate only arises where the authority opines that the tender is suspect and considers rejecting it as a result thereof. The UU must have an element of discretion in this area as to whether it considers such a bid to be suspect. The plaintiff's suspicions are not founded on any detailed knowledge of the content of the Noonan NI bid (which it currently does not have). Only the UU is in a position to make an appropriate assessment having seen the bid itself. At this stage of the proceedings I find no evidence before me which would illustrate that the UU either knew or suspected that the tender was abnormally low. In short I believe there is much to be said for the view of Flaux J at (160) where he indicated that the duty to investigate arises only where the relevant authority actually knows or suspects that a tender is abnormally low.Having reread the affidavits of Mr Donnelly and Mr Rafferty on behalf of UU, and their analysis of the terms of the bid by Noonan NI, I find nothing to ground such knowledge or suspicion at this stage of the proceedings. That may of course change on trial in the course of disclosure and of cross-examination etc.

[49] In the circumstances therefore I find this submission of the plaintiff to be all too speculative and I find no serious arguable issue on the question of an abnormally low bid.

Balance of convenience

Adequacy of damages

[50] The second Cyanamid principle – assessing the balance of convenience – will involve considering the adequacy of a remedy in damages for both the plaintiff and the defendant. The words of Lord Diplock in American Cyanamid on this topic repay study:

> "As to (*the balance of convenience*), the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the

> application and the time of trial. If damages and the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both that the question of balance of convenience arises. It would be unwise even to list all the various matters which may indeed be taken into consideration in deciding where the balance lies, let alone to suggest the relevant weight to be attached to them. These will vary from case to case."

[51] I also bear in mind the cautionary words of Lord Hoffmann in National Commercial Bank Jamaica Limited v Olint Corp Ltd [2009] 1 WLR where he said at (17):

> "In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to

> cause the least irremediable prejudice to one party or the other."

[52]I recognise that there have been contrasting views expressed in certain cases in England as to the adequacy of a damages remedy for a claimant tenderer in procurement cases.

[53] In Exel Europe Limited v University Hospital Coventry and Warwickshire NHS Trust [2010] EWHC 332 at (48) Akenhead J dealt with proceedings arising from a tender process carried out by a Hospital Trust concerning the managing and operating of a healthcare purchasing consortium involving medical services, equipment, medications and other medical related items. At paragraph 48 he said:

> "I am wholly satisfied that the damages would be an adequate remedy in this case. It is now fairly well established that a claimant who successfully challenges a procurement exercise will be entitled to damages, usually calculable on a lost opportunity or chance basis … The court will have to determine the percentage chance which it would have had in securing the contract. That may be anything between, say, 10% and 90%. One then applies the percentage to whatever would have been earned by way of profit over either the 5 or 10 year period which this agreement would or may have run for. There may have to be some credits to be given, for instance to reflect the additional work Exel has taken on or is likely to take on because it has not succeed in securing this particular contract and a financing credit to reflect the receipt of damages for loss of profit earlier than the profit would have been earned. However this is all readily assessable by forensic accountant experts."

[54]Akenhead J expressed similarly positive views about the adequacy of a remedy in damages for the claimant tenderer in Halo Trust v Secretary of State for International Development [2011] EWHC 87 (TCC) at (61(h)).

[55]These comments on the adequacy of damages in such cases can be contrasted with the more pessimistic views of the Court of Appeal in Lettings International Limited v London Borough of Newham [2007] EWCA Civ. 1522 at (33-39) per Moore-Bick LJ.

[56]In Alstom Transport v Eurostar International Limited, Siemens Plc [2010] EWHC 2747 (Ch) Vos J dealt with an injunction brought by Alstom Transport in

order to restrain Eurostar International Limited from entering into an agreement with Siemens for the design, supply and maintenance of ten high speed train sets with an option for a further 13 train sets. At paragraph 129 Vos J said:

> "In my judgement, damages could not properly compensate Alstom for the loss of this contract. It is a highly prestigious contract which would undoubtedly enhance Alstom's international reputation. Whilst it is only ten trains … the Eurostar service is well known internationally and runs Alstom's trains at the moment. … I also accept that the assessment of Alstom's loss would be a complex process requiring the valuation of a lost chance which is always a somewhat difficult process. The evaluation of its reputational and market position losses would be very difficult indeed."

[57]In the instant case, the affidavit of Mr Foran on behalf of the plaintiff outlines the following difficulties confronting the adequacy of damages:

- It will be required to transfer the employment of a substantial number of long term employees and will lose the experience of this staff.

- The UU contract is highly prestigious and highly beneficial to any contractor seeking to bid for other similar schemes.

- The UU contract is likely to be highly beneficial in showing relevant experience and bidding for similar schemes.

- The calculation of the chance of having won the contract combined with the complexities of calculating loss of net profit on a 'new profit' (particularly where future regulatory influences may be a factor) 'cannot be understated'.

- This is a new breed of integrated contract and its loss will be incalculable.

[58]Each case must turn on its own facts. In this case I have come to the conclusion that if the plaintiff is successful at trial but there is no interim injunction, damages would be an adequate remedy. I have come to this conclusion for the following reasons.

[59]First, as it was pointed out, albeit in a different context, in Case T-511/08 Unity OSG FSE v Council of the European Union (23 January 2009), potential damage to reputation is a normal commercial risk which a tenderer in these circumstances must accept.

[60]Secondly, the difficulties of estimating the value of a chance are reduced in this case in that it is clear that the plaintiff came second in the competition and presumably would have been awarded the contract if Noonan NI had been eliminated.

[61]Thirdly, I recognise that the plaintiff currently engages staff in delivering the relevant services to UU. However these staff will have the right to transfer to the new contractor or, alternatively, the plaintiff could offer these individuals positions elsewhere in its business given that it is a substantial undertaking .As I understand the evidence, it continues to engage in other enterprises in addition to the present matter.

[62]Fourthly the case is not made that this will provide a killer blow to the plaintiff's business. There is no evidence that the plaintiff will not be able to seek or obtain other works to replace what it might have secured if it had been successful here. There is no obvious or clear evidence that the plaintiff will lose market share. I see no reason why, given the estimated length of the contract and the nature of the contract, a forensic accountant could not calculate the profit which the plaintiff would have made had this contract been successful. I find it difficult to accept that an enterprise as large as the plaintiff has not made an economic assessment in fairly concrete terms of the estimated profit it will make on this contract. Conventionally the profit elements are always built into any tendered contract price and I would be surprised if this tender was any different.

[63]In contrast, I consider that the difficulties in compensating the UU may potentially be much more difficult if it turns out that it was wrongly injuncted. I am of this view for the following reasons.

[64]First, the plaintiff has not offered the usual cross-undertaking in damages. The automatic stay which arises under Regulation 47G(1) does not of itself provide any specific financial protection for a contracting authority found in the event to have been unnecessarily restrained from proceeding with a perfectly reasonable procurement.

[65]Regulation 47H(3) provides:

> "If the court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertaking or conditions, it may require or impose such undertakings or conditions in relation to the requirement in Regulation 47G(1)."

[66]That provision provides a route by which a contracting authority may seek to require the claimant tenderer to provide a cross-undertaking in damages whilst any

automatic stay continues. For my own part I consider it is difficult to imagine a case where the court would refuse to provide at least this minimal protection for the defendant contracting authority. Thus, even if a contracting authority decides against applying to lift the automatic stay that body will seek to secure a cross-undertaking from the claimant tenderer if it intends to defend the claim.

[67]That cross undertaking has not been given in this case by the plaintiff save to a very limited extent.

[68]It is the plaintiff's submission that the measure of damages in the case would exceed the on-going costs of providing the services until they are provided to Noonan NI if Resource was unsuccessful in its claim ie. the disparity in price put forward on behalf of Noonan NI against that of Resource is such that the imposition of an undertaking in damages would have the consequence of inevitably depriving Resource of an effective remedy.

[69]The plaintiff contends that the imposition of a substantial undertaking in damages upon Resource would be contrary to the intention of the Remedies Directive because it would have the consequence of denying Resource an effective remedy to prevent the contract being awarded in breach of the Regulations and EC law notwithstanding the possibility that Resource can still achieve an award of damages.

[70]Accordingly, relying upon the viability of an early trial which would ipso facto substantially restrict any losses, Resource was prepared to give some form of undertaking, as yet unarticulated but to be discussed between the parties,confined to this limited period of time between now and an early speedy trial.

[71]I find this undertaking to be inadequate. As I will indicate below, there is no certainty of an early resolution of this matter whether by way of early trial or final determination by the courts. In my view it would be unfair for any court to permit the plaintiff in this case to engage upon this exercise without the conventional open-ended benefit of a cross-undertaking.

[72]I have also concluded that the difficulties of the defendant being adequately compensated by damages in the event of it being wrongly injuncted are much greater than in the case of the plaintiff. I am of this view for the following reasons.

[73]Common sense and practical experience lends weight to the propositions put forward by Patrick Donnelly as to the substantial logistical difficulties of a delay in the implementation of the contract with a view to it commencing in August 2013. The documents before me indicate that the five services to which the procurement relates are spread over a very substantial area of four campuses. The change over involving training and re-organisation during term time in the presence of thousands of students is an obvious impediment to the mobilisation process. The

University has estimated that such mobilisation could take up to three months and despite the exhortations to acceleration set out in the plaintiff rejoinder of 21 May 2013, I believe there is strength in the defendant's suggestion that the mobilisation exercise could founder if not completed during the vacation before students start to return in September. Managers of University staff, campus managers, security officers, cleaners, porters etc. all require to be recruited and trained. The use of quality, safety, health and environmental systems need allocation and familiarisation with software requires attention. I have difficulty envisaging how such a process could be conducted in the time available. The consequence of this could be that the contract was delayed until the academic year was completed. There may well be justification in the defendant's submission that it could result in abandonment of the entire process given how stale the procurement would have become by the time the contract became operational.

[74]There are also consequences in human and personnel terms in the event of this injunction continuing. The defendant contends that some staff have already been allowed to take a voluntary redundancy package on the basis that a new contractor will be in place in August. Other staff who would otherwise be entitled to the same benefit as of August will be denied such benefit and treated differently. Existing staff have made arrangements (including leave arrangements) based upon a new contractor commencing in August.

[75]These are human problems that may not lend themselves easily to a remedy in damages. They lend further weight to the proposition that damages may not be an adequate remedy for the defendants in the event of them being found to have been wrongly injuncted.

An early trial

[76]On 17 May 2013, the day of hearing, the plaintiff's solicitors provided to the defendant's solicitors written proposals to deal with the absence of an express undertaking in damages, a copy of which was furnished to the court. The following points were adumbrated:

- An accelerated trial could be convened. The requirement that formal discovery take place would be conceded subject only to the requirement that the Noonan NI tender be disclosed on a confidential basis upon the undertaking that the same would not be provided to or discussed with the client.

- The plaintiff would provide the Noonan NI tender to an accountant to assess the proposition that significant savings can be delivered by Noonan NI in the life of the contract. That report would be sufficient evidence upon which Resource would rely to demonstrate its argument that an abnormally low offer exists in the case.

- Resource was prepared to undertake that it would provide sufficient staff "at cost" to enable the redundancies to proceed and therefore allow the University to achieve the savings it desires.

- A timetable of pleadings was set out giving the UU one week to deliver its defence i.e. by 31 May, the statement of claim having been served by 24 May.

- The plaintiff would have served any accountant's report by 5 June and the UU could elect to serve any expert report by a similar date dealing solely with the abnormally low offer issue.

- The court could fix a two day trial in the week commencing 17 or 24 June with judgment delivered probably by 7 July.

[77]In a rejoinder to the defendant's response dated 21 May 2013, the plaintiff further undertook "not to pursue any appeal against the decision at an accelerated trial" although of course that offer would not apply if the case did not proceed to trial until after the summer vacation.

[78]There are cases in which issues under the Regulations might be capable of resolution at a speedy trial. In the present case I am not convinced that that is so. A statement of claim has not even been served and I consider that confining the defendant to a one week period for a defence instead of the conventional six week instance is much too short in the circumstances of the issues that have arisen in this case. Moreover it seems to me that a notice of further and better particulars may well be issued by the defendant arising out of that statement of claim in the conventional manner which again may require some considered thought. The long vacation is nearly upon us. It is difficult to predict how the issues will unfold in trial. It might be tried substantially on the documents before me or it might give rise to lengthy cross-examination of the deponents. Both parties will require the assistance of forensic accountants having seen the Noonan bid documentation together with the panel's assessments (which experience tells me may well be voluminous).Not only may there be an issue as to which documents are discoverable in this context- even on the basis of exposure only to lawyers but also I do not underestimate the difficulties in obtaining early reports from such experts at this time of year in light of my experience of past litigation. Even on the limited issue of whether this was an abnormally low bid, expert evidence may take some time to prepare.

[79]In short I do not believe that an accelerated trial along the lines suggested by the plaintiff is plausible in this instance.

The public interest

[80]There is a general public interest in one of our distinguished Universities engaging the procurement route for services such as are on offer in this instance.

[81]The plaintiff has argued that it is not in the public interest that one of the two main Universities in Northern Ireland might be exposed to having to pay for the same contract in effect twice. In essence it is argued that Resource will be entitled to pursue its claim for damages irrespective of the outcome of the present contract award and that these damages are likely to be significant. It is further contended that there is an inherent public interest in having a proper review system to ensure contracts awarded to those entities that are objectively "correct" parties as determined by the award procedure.

[82]Mr Bowsher invoked Recital 4 of the new Remedies Directive which records:

> "The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and a conclusion of the contract in question."

[83]In short the court must ensure that the contracting authority's decision as to the successful bidder, prior to the conclusion of the contract, is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages (see Alcatel Austria AG and others v Bundesministerium Fur Wissenschaft and others C-81/98 at 29).

[84]Mr Scoffield contended that in times of shortage in public resources, UU should be entitled to realise efficiencies and improve service provision which it has set out to achieve through this procurement exercise. It is in the public interest that the UU is entitled to make an assessment of risk in the context of its desire to proceed with its plans for reform. It is thus in the public interest that the University have some measure of commercial discretion and be permitted to make such an assessment as part of a wider package of streamlining and cost saving measures.

[85]It is my view that Mr Scoffield's is the stronger argument on this aspect of public interest in circumstances where I have determined that the plaintiff can be adequately compensated whereas the defendant will have difficulties in obtaining adequate damages. In my view the public interest is better served by lifting this injunction and permitting the UU to proceed in the interim as it determines commercially appropriate.

[86]I have determined that the balance of convenience comes down in favour of the defendant in this matter, in light of these circumstances that I have set out above.

Conclusion

[87]For the reasons set out above this application succeeds and the suspension will be lifted.