

Public law – whether tendering process by government department raised issues of public law

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Ref: **GIRC5414**

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

Delivered: **16/12/05**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY TSI (IRELAND) LIMITED
T/A RAINBOW TELECOM FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF
FINANCE AND PERSONNEL MADE ON IN OR ABOUT AUGUST 2005**

GIRVAN J

[1] The applicant is TSI (Ireland) Limited trading as Rainbow Telecom which claims to be one of Northern Ireland’s leading providers of telecommunication services carrying over 8 million units a month with almost 3,000 customers. On 23 June 2005 it obtained an invitation to tender for the Northern Ireland Civil Service Public Switch Telephone Network Services Framework from the Central Procurement Directorate of the Department of Finance and Personnel. The purpose of the tender process was to establish a framework of a number of tenderers for the supply of PSTN services to the Northern Ireland Civil Service departments, their agencies, the Northern Ireland Office and other public sector bodies. The stated purpose of the exercise was to include a number of tenderers to encourage best value for money at all times. While no level of business was guaranteed to any tenderer inclusion on the framework nevertheless offered a significant commercial opportunity. The term of the contract was to be for an initial two year period with two further options to extend. It is important to note that the tendering process related to the *private* telephone network of the Northern Ireland Civil Service known as DIAL. DIAL seeks to take advantage of the best value for money services in the sector.

[2] On 6 July 2005 the applicant submitted its tender. It was advised on 10 August 2005 that its tender was unsuccessful. The applicant complains that

the Department caused to permit Mr Michael Kirkham who was clearly named by one of the tenderers (which was subsequently successful) as its referee to be included in the evaluation panel and for the evaluation panel to consider the tenders and to determine the successful candidate. It also complained that the Department caused or permitted the evaluation panel to conclude that as the result of the applicant's size it would not have sufficient expertise to deliver and manage the service required without permitting the applicant to address that conclusion and demonstrate (if it could) that that was an incorrect conclusion. The Department failed to make properly transparent the basis for evaluating the criteria for selection.

[3] Mr Maguire on behalf of the respondent raised a point which is really a preliminary issue namely whether the dispute was one of public law. He contended that the exercise conducted by the Department, the procurement of telephone services for its own internal private network, was functionally no different from a large private sector organisation procuring the same sort of services. The Department was in no different position from some commercial private organisation making arrangements and selections for its own internal telephone system. The Department, he argued, was not exercising any statutory power and that the procurement process was not subject to any formal statutory control. The process was not subject to any European or other regulations which apply to other types of procurement competition.

[4] Ms Danes on behalf of TSI argued that the Department of Finance and Personnel was a Government entity. The tenders were made subject to the Fair Employment and Treatment (Northern Ireland) Order 1998 and the Official Secrets Act. The purpose of the tender was to establish a framework of a number of tenderers for the provision to the NICS and the wider public sector. It covered a substantial amount of telecommunication business. The Government had sought to conduct a tender as if the arrangements were governed by the EU Directives but the Government could not in law make those regulations applicable to the tender process. Framework agreements were subject to governmental guidelines which reflected the explicit provision for framework agreements in the new consolidated procurement directive 2004-18EC.

[5] In R v Lord Chancellor ex parte Hibbit & Saunders [1993] COD 326 the dispute related to a tendering process for court reporting. It was alleged that there was unfairness in the tendering process and a failure by the relevant department to comply with its own conditions. The Divisional Court concluded that in fact there was unfairness but the matter was not one that fell to be determined under public law. Rose LJ at page 17 of the judgment states:

“It is correct that the decision challenged affects many others apart from the applicants, though the

same can be said of any large tendering exercise by any Government department or local authority. The fact that a commercial function is being performed does not take the case outside the ambit of public law (see R v British Coal Cooperation ex parte Price, Verde & Ors (Divisional Court Transcript 21 December 1992). But in my judgment it is not appropriate to equate tendering conditions attendant on a common law right to contract with the statement of policy or practice or policy decisions in the spheres of Inland Revenue, Immigration and the like control of which is the special province of the state and where in consequence a sufficient public law element is apparent.”

[6] Waller LJ at page 19-20 of his judgment stated:

“It is not sufficient in order to create a public law obligation simply to say that the Lord Chancellor’s Department is a governmental body carrying out governmental functions and appointing persons to public office. If a governmental body carrying out its governmental functions enters into a contract with a third party including someone occupying a public office the obligations that it owes will be under the contract unless there also exists some other element that gives rise in addition to a public law obligation. That follows from Ex parte Walsh (1985) 1 QB 152.”

Waller LJ went on to point out that a government body is free to negotiate contracts and something additional to the simple fact that the government body was negotiating the contract was necessary to impose on that authority any public law obligations in addition to any private law obligations or duties there might be. At page 25 he stated:

“Even if there is some distinction between a Government department and an ordinary businessman in their approach to tendering it does not alter the nature of the tendering procedure once it is in place. That procedure itself was no different from any other procedure adopted in ordinary commercial contract situations. It is wrong, as I see it, to characterise the terms of the invitation to tender as a statement of policy. The

attack here is on a failure to comply with the terms expressed or implied of the negotiating procedure.”

[7] In Mass Energy v Birmingham City Council (Court of Appeal 3-Sept-1993) the applicants sought judicial review of decisions by the Council to accept a revised tender for a contract for waste disposal. The court concluded that that was really a commercial dispute between a successful and an unsuccessful tenderer. If there were no statutory requirement that the City Council should enter into a contract for its waste disposal operations in particular the construction of the incinerator to be the subject of a contract entered into by tender but if the Council had sought voluntarily to enter into a contract by tender deciding to adopt that process of its volition then in the court’s view there would be no public law element in such a dispute at all. At page 20 of his judgment Glidewell LJ stated:

“Any process of contracting, any process of tendering by a waste disposal authority or by any private citizen or company is apt to produce private rights. It is, I can see, possible that the terms of an invitation to tender issued by a waste disposal authority may vest in the invitees who accept the invitation private rights for contractual character. An individual who invites tenders may by the terms of his tender bind himself to those who accept the invitation not to entertain tenders made after a specified date or not to permit any substantial alteration in tenders after that date or to accept the tender containing the highest price and so on.”

The court concluded that the Council was entitled to “act as a commercial animal at the stage when it was considering the tenders they had received.” The court concluded that it is impossible to say more than that the Council were bound to act commercially. That did not guarantee complete fairness.

[8] Ms Danes in a supplementary argument sought to distinguish those authorities and argued that in any event the court is free not to follow Hibbit & Saunders. She referred to R v Lewisham London Borough Council ex parte Shell (1988) 1 All ER 938, R v Enfield London Borough Council ex parte Unwan (Roydon) (1988) COD 466, R v Legal Aid Board ex parte Donn & Co (1966) 3 All ER 1, R v National Lottery Commission ex parte Camelot (2000) All ER D 1205, R v Bristol City Council ex parte D L Barrett & Sons (2001) 3 LGLR 11 and Cookson & Clegg v Ministry of Defence (2005) EWCA Civ 811.

[9] It is true that the cases do not all speak with an entirely identical voice and it is clear that the question of whether there is a sufficient public law element to justify public law remedies does not admit of a universal test. Nevertheless I find the reasoning in Hibbit & Saunders and Mass Energy Limited v Bridgend City Council (which were followed and applied in R v Bridgend County Borough Council ex parte Alison Jones (2000) LGLR 861) to be compelling. I conclude that the applicant's case does not raise public law issues. The applicant may have private law remedies and these were touched on in the course of the hearing. Whether the applicant has a remedy in such a private law dispute is not a question that I need to address in this application.

[10] Accordingly I dismiss the application. I shall hear counsel on the issue of costs.