Neutral Citation No. [2011] NIQB 25 | *Ref:* **WEA8075**

Judgment: approved by the Court for handing down | *Delivered:* **04/02/2011**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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BETWEEN:

TRAFFIC SIGNS AND EQUIPMENT LIMITED

Plaintiff;

-and-

DEPARTMENT FOR REGIONAL DEVELOPMENT

-and-

DEPARTMENT OF FINANCE AND PERSONNEL

Defendants.

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WEATHERUP J

The Public Contracts Regulations.

[1] The Public Contracts Regulations 2006 as amended in 2009 govern the award of public contracts. The plaintiff claims that a tender process described as "DRD – Supply and Delivery of Permanent and Temporary Road Traffic Signs and Sign Posts" was carried out by the defendants in breach of the Regulations. Mr O'Donoghue QC and Mr Aiken appeared for the plaintiff and Mr Hanna QC and Mr McMillen appeared for the defendants.

[2] Regulation 30(1) provides the criteria for the award of a public contract on the basis of the offer which –

(a) is the most economically advantageous from the point of view of the contracting authority; or
(b) offers the lowest price.

Regulation 30(2) provides that a contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion.

Regulation 30(3) provides that where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen.

[3] The principles underlying the approach to public procurement are expressed in Regulation 4(3), namely, a contracting authority shall (in accordance with Article 2 of the Public Sector Directive) treat economic operators equally and in a non-discriminatory way and act in a transparent way.

[4] To these three obligations, namely equal treatment, non discrimination and transparency, must be added a fourth, objectivity. The obligations find expression in the Public Sector Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Recital 46 reads as follows –

> "Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender".
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> To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation - established by case-law - to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities

may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.

Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.

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

[5] In Lion Apparel Systems v Firebuy Ltd [2007] EWHC 2179 (Ch) Morgan J considered the approach to a review by the Court of a decision taken in a public procurement process -

35. The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.

36. If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a "margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.

37. In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a "manifest error".

38. When referring to "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made.

Events prior to the 2010 Tender Process.

[6] David Connolly is a director and 50% shareholder of the plaintiff company. He was formerly a director and shareholder of Signs and Equipment Limited, a company involved in the manufacture and delivery of road traffic signs. Signs and Equipment Limited tendered for Road Service traffic sign contracts in 1999, 2002 and 2005. Signs and Equipment Limited went into liquidation in December 2005. The plaintiff company was formed in January 2006. Mr Connolly was aggrieved by the treatment of the predecessor company by the defendants. Complaints were made to the Northern Ireland Audit Office and an investigation was undertaken by Ronnie Balfour, Head of Internal Audit of the first defendant. The final Balfour Report was published in January 2010.

[7] While the Balfour investigation was still under way the defendants launched a 2009 tender process. The 2009 scheme included a mandatory requirement that a tenderer should establish an annual turnover of £400,000, a requirement which the plaintiff was unable to satisfy. The plaintiff objected to the mandatory requirement. Eventually the 2009 scheme was cancelled because of the decision of the European Court of Justice in case C-532/06 EMMG Lianakis v. Municipality of Alexandroupolis [2009] All ER (EC) 991. The ECJ held that a contracting authority could not take into account as "award criteria" rather than as "qualitative selection criteria", the tenderer's experience, manpower and equipment or their ability to perform a contract by the anticipated deadline. Criteria should be aimed at identifying the tender which was economically the most advantageous.

[8] Complaints by Mr Connolly through elected representatives led to the consideration of the tender process by the Minister of Finance and Personnel who directed that the rerun of the 2009 scheme (which was to become the 2010 scheme) should await the publication of the final Balfour Report.

[9] The Balfour review investigated a total of 22 allegations made by the plaintiff. Some of the allegations have been carried over into the present proceedings. These included the allegation that, whereas the evaluation of tenders was at one time based on price alone, on which basis the plaintiff

claimed that its predecessor company had an advantage over its rivals, the evaluation of tenders had changed to assessment of price and quality, so that, according to the plaintiff, a rival company, PWS, was placed at an advantage and the plaintiff's predecessor company at a disadvantage. The Balfour Report rejected this allegation. The Report did make a number of recommendations as a result of its findings. Among the recommendations was that, where further changes to the evaluation criteria or evaluation methods were being introduced, CPD in conjunction with Road Service should consider the merits of providing a pre briefing session for all the contractors invited to tender. The pre briefing was recommended for all the contractors simultaneously and would give staff the opportunity to explain the processes and for contractors to raise any queries with the objective of maximising the number of compliant tenders. This followed the acknowledgment that the transition from purely cost based evaluation to quality/price evaluation was stated to be "now embedded".

[10] Mr Connolly and his solicitor attended a meeting with CPD on 18 March 2010 to discuss the 2010 scheme. The CPD representatives were Mr R Bell, Divisional Director and Mr D Glover, Deputy Divisional Director. With regard to the 2010 competition Mr Connolly was advised that the turnover threshold would not be required. There would be a requirement that tenderers had attained Highway Sector Scheme 9A accreditation, being a national standard for quality management systems. The quality/cost split had not yet been decided but according to CPD the Highway Sector Scheme "effectively removed" the qualitative assessment and the balance of the evaluation would most likely come under the cost element. The pricing/ financial comparison of submitted tenders would be undertaken by CPD and the other elements of the evaluation would be undertaken by Road Service. As a result of the meeting Mr Connolly was confident that, with the introduction of the Sector 9A scheme, much of the subjectivity in the tendering process would be removed. However it remained for Road Service, with advice from CPD, to determine the quality /cost split.

The 2010 Tender Process.

[11] In April 2010 the Central Procurement Directive of the second defendant issued instructions to tenderers in respect of the supply and delivery of permanent and temporary road traffic signs and signposts under 21 contracts. The 21 contracts were described as schedules and tenderers were entitled to bid for one or more or all schedules but each schedule tendered for had to be complete.

[12] The evaluation criteria specified price with a weighting of 60% and service delivery with a weighting of 40%. Assessment of price was based on the lowest tender price being awarded the maximum score and the other

tender prices being scored as a proportion of the maximum. Service delivery was divided into 'delivery methods' with a weighting of 15%, 'environmental – packing, waste disposal and recycling' with a weighting of 15% and 'complaints system' with a weighting of 10%. An evaluation scoring matrix indicated that assessment of service delivery would be scored from 0-5 with 0 unacceptable/nil response, 1 serious reservations, 2 acceptable with minor reservations, 3 acceptable, 4 good and 5 very good.

[13] The service delivery criteria were defined as follows:-

> Delivery methods - Tenderers **must** give details of how they propose to prioritise and organise their operations to ensure the supply of items to Road Service meet **the 10 or 15 day guaranteed delivery times**. This shall include details of delivery vehicles and any requirements and/or procedures to be followed to ensure the safe and effective delivery of the items to the end user. Details of any sub contractors proposed **must** be included.
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> Environmental – Tenderers should reduce their package to a minimum by the use of returnable packaging where possible. Tenderers **must** give details of any proposals they have to reduce the packaging waste generated by their deliveries. Note the Department accepts no liability in respect of the non arrival at the supplier's premises of returnable packaging returned by the Department. Tenderers should propose to collect packaging waste or items for reconditioning/ recycling **must** give details of how they propose to operate the collection system. Tenderers who propose to collect packaging, waste or items for reconditioning/recycling **must** provide copies of the current Northern Ireland Environment Agency and/or Scottish Environmental Protection Agency and/or Environmental Agency "Registration of Carriage" certificate(s) for the companies they propose to use to collect these items.
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> The Department currently operates a waste segregation policy in its depots for end of life production/material. To enable the Department's waste disposal contractors to send suitable material for recycling, suppliers should where possible indicate on all materials (especially plastics) with a conspicuous mark the type of material the item is manufactured from. Tenderers in their submission **must** give details of how they propose to carry out this requirement.
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> Complaints – Tenderers **must** give details of how they deal with complaints relating to product and service delivery.

[14] Road Service established an evaluation Panel comprising 7 members of Road Service under the chairmanship of Brian Maxwell. The Panel included

David Compston and Michael McKendry. The CPD representatives at the Panel meetings were Sean Doran and Jim Morgan. Each member of the Panel completed a score for each tender in respect of each of the three service criteria. A moderated score was then reached by the Panel in respect of each of the three service criteria. Each tenderer had a potential maximum score of 500 points. With price at 60% the maximum score on price was 300. The lowest price was awarded 300 points. The price of other tenderers was scored as a proportion of the lowest price. The total points for quality were 200. The weightings were 75 for delivery methods, 75 for environmental and 50 for complaints, reflecting 15%, 15% and 10% respectively for the three quality criteria.

[15] The moderated scores for the plaintiff were 2 for delivery methods, 2 for environment and 2 for complaints. The moderated scores for PWS were 5 for delivery methods, 4 for environment and 5 for complaints. Thus, with the weightings applied, the plaintiff obtained 30, 30 and 20, a total of 80 points for quality on each contract. PWS who were rated at 5, 4 and 5 scored 75, 60 and 50, a total of 185 for quality on each contract.

[16] The plaintiff submitted the lowest price on 9 of the schedules and therefore scored 300 points for price on each of those schedules. By way of example, on schedule 2 'Triangular Signs' the plaintiff had the lowest price and scored 300 points and with 80 points for quality had a total of 380 points. PWS, who had a higher price, gained a weighted score for price of 283.75 and with the score of 185 points for quality had a total score of 468.75. PWS was awarded the contract. Applying the above approach to the 21 contracts, the plaintiff was awarded two contracts, Hirsts one contract and PWS eighteen contracts.

The Plaintiff's Grounds of Challenge.

[17] The plaintiff's grounds of challenge are as follows:-

(a) The DRD discriminated against the plaintiff and/or including engaging in bias actual or apparent against the plaintiff by –

(i) Having on its 2010 evaluation panel two individuals from within the DRD, David Compston and Michael McKendry, who should not have sat on the 2010 evaluation panel on the grounds of bias or apparent bias because –

(1) They had in the course of the 2005 procurement process marked down the predecessor company on the basis of a purported inspection of their

premises not actually undertaken by David Compston and Michael McKendry.

(2) They had wrongly represented in the course of the 2005 procurement process (along with Jackson Minford) to the Central Procurement Directorate that the predecessor company had failed to complete satisfactorily the tender relating to schedules OPQ and R in the 2005 process thereby obtaining an advice from the Central Procurement Directorate which permitted the DRD to sub divide each of the schedules to the material detriment of the predecessor company and to the material advantage of PWS Ireland Limited.

(3) They had a professional and collegiate association with Jackson Minford who had an inappropriate and undisclosed relationship with PWS Ireland Limited during and subsequent to the 2005 and 2009 procurement processes and who as a consequence of that relationship was removed from 2010 procurement process.

(4) They were aware of being complained about by the plaintiff and David Connolly and of being the subject of an internal and external investigation on foot of a series of serious complaints that struck at the heart of their professional integrities. In those circumstances even if there was no substance to those complaints their presence on 2010 procurement process constituted an actual and apparent bias against that complainant who was the plaintiff.

(5) They failed to consider the plaintiff company between 2006 and 2010 for any works previously awarded to the predecessor company which had fallen into liquidation notwithstanding that the plaintiff company was established in 2006 and performed the same work as the predecessor company.

(6) Failed to consider the plaintiff company for the temporary supply of road signs on 30 June 2010 when he advised that there were 4 other

companies from whom road signs could be sourced temporarily.

(7) David Compston was the contract administrator on another school traffic signs contract which required him to work closely and continuously with PWS over a number of years. In those circumstances and in order to avoid the appearance of bias to the reasonable man he should not have been asked to or have agreed sit on the 2010 evaluation panel assessing tender bids which included PWS.

(ii) Favouring PWS over the plaintiff and Hursts by the use of 40% marks for qualitative assessment that would enable the DRD to ensure its preferred contractor was awarded the Contracts (Framework Agreements).

(iii) In the alternative favouring PWS over the plaintiff and Hursts by changing the cost/quality ratio from 80:20 to 60:40. The plaintiff only became aware of this change as a result of solicitor examining the discoverable documents in this case from 5 November 2010.

(b) The 2010 process was insufficiently objective or capable of verification given the award of 40% marks for "qualitative assessment" carried out by the impugned evaluation panel.

(c) The DRD engaged in manifest error in the procurement process in the following respects:-

(i) The use of 40% marks for "qualitative assessment".

(ii) The scoring attributed to the plaintiff by the 2010 evaluation panel during its 40% "qualitative assessment".

(iii) By requiring the plaintiff to hold a registration of carriage certificate issued by the Northern Ireland Environment Agency for the disposal of its waste and by erroneously marking the plaintiff down for not having one.

[18] It is proposed to consider the grounds in the following manner –

First, the complaints of discrimination and bias relating to the evaluation Panel (grounds (a)(i)(1) to (7)).

Secondly, the complaints relating to the price/quality split (grounds a(ii), a(iii), b and c(i)).

Thirdly, the remaining complaints of manifest error (grounds c(ii) and c(iii)).

(1) Discrimination and Bias relating to the composition of the Panel

[19] The parties were agreed that the obligations of equality and non-discrimination embraced the complaints of discrimination and actual bias, but disagreed on the application of apparent bias. The defendants contended that apparent bias was not an aspect of the obligations arising under the Regulations. Reference was made to Pratt Contractors v Transit NZ [2003] UKPC 83 where the Privy Council considered contractual obligations arising upon the submission of a tender. It was decided that a preliminary contract came into existence between the employer and the tenderer which included implied duties to act fairly and in good faith. However the duties of fairness and of good faith did not impose upon an employer any of the obligations that would render it amenable to judicial review. Accordingly any finding of apparent bias was not a ground for establishing breach of contract. The duties of good faith and fairness required evaluation of tenders to be conducted honestly, with all tenderers being treated equally. The duties did not require the appointment of an evaluation panel whose members were without any views about the tenderers nor did the duties mean that the panel had to act judicially, in that they did not have to accord the tenderer a hearing or enter into a debate with the tenderer. An instance of this approach being applied in this jurisdiction is to be found in Scott v Belfast Education and Library Board [2006] NICh 4.

[20] The plaintiff contends that neither of the authorities referred to above was concerned with the Directive or the Regulations, where the obligations of equality, non-discrimination and transparency are each said to prohibit apparent bias. In addition the plaintiff contends that, apart from the statutory obligation which prohibits apparent bias, the defendants had a contractual obligation by reason of the express undertaking to avoid the appearance of bias in the procurement process set out in the Central Procurement Directorate Procurement Guidance Note 02/09 "Procedures and Principles for the Evaluation of Tenderers". The defendants' response was that this document was guidance only and did not impose any legal obligation on the defendants. Without deciding on the application of apparent bias as an aspect of the obligations arising under this procurement process I propose to consider the matters relied on by the plaintiff as amounting to discrimination, actual bias and apparent bias.

[21] The test to be applied in relation to apparent bias has been modified by the House of Lords in Porter v Magill [2002] 2 AC 357. At paragraph 103 Lord Hope stated the test that is to be applied -

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The application of the test to the present case may be adapted from the wording in Gillies v Secretary of State for Work and Pensions [2006] 1 WLR 781 at paragraph 17 -

> "The critical issue is whether the fair-minded and informed observer would conclude, having considered the facts, that there was a real possibility that the [*defendants would not evaluate the tender]* objectively and impartially against the other evidence."

In relation to the concept of the "informed" observer it is stated -

> "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."

In relation to the "fair-minded" observer it is stated -

> "… that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."

Ground (a)(i)(1) – the 2005 site visit.

[22] It is the applicant's case that the circumstances and aftermath of the 2005 site visit involving Compston and McKendry were such that they should

not have served on the 2010 Panel. In the 2005 scheme, part of the evaluation of quality involved site visits to the premises of each tenderer. The 2005 Panel was selected by Brian Maxwell of Road Service. Three members of the Panel were selected to conduct the site visits together with Catherine Denyer of CPD. The site visit to the plaintiff's predecessor premises was on 9 April 2005. Each member of the Panel had a site visit record sheet identifying the matters that the Panel would examine during the site visit and the site visit record sheet contained a comment box to be completed in respect of each matter to be considered. One part of the record sheet was 'design control' which was concerned with the manner in which the tenderer would process orders. This part of the process was demonstrated by Ethel Mahood, Mr Connolly's sister, who worked for the company. She was asked questions about the process by Ms Denyer. The three members of the Panel were present in the room while the exchanges took place between Ms Mahood and Ms Denyer and Mr Connolly was of the view that the three members of the Panel were not privy to the exchanges between Ms Denyer and Ms Mahood. On the other hand the three members of the Panel all gave evidence that they were listening to the exchanges between Ms Denyer and Ms Mahood and that they made their entries on the record sheets in the light of those exchanges. I am satisfied that the members of the evaluation panel were aware of exchanges between Ms Denyer and Ms Mahood and that they made their entries in the record sheets based on their view of those exchanges.

[23] Another part of the site visit record sheet was concerned with the manufacturing process and in particular with extraction systems in the screen processing room and with health and safety equipment. Mr Connolly's evidence was that Ms Denyer and Mr Minford accompanied him to the screen room and that Mr Compston and Mr McKendry did not. Accordingly Mr Connolly was of the opinion that the entries made by Compston and McKendry on their respective record sheets about ventilation in the screen room were false. On the other hand the evidence of Ms Denyer and of the three members of the evaluation panel was that all four of them were present with Mr Connolly in the screen room. All gave evidence that in the screen room Mr Connolly was asked about ventilation and all stated that Mr Connolly had replied that windows were opened and fans were turned on. Mr Connolly denied that he had been asked about ventilation or that he had stated that the room would be ventilated by opening windows and turning on fans. His evidence was that the screen room contained an extraction system.

[24] I am satisfied that all three members of the Panel were in the screen room and that Mr Connolly was mistaken when he contended that Compston and McKendry were not present. I am satisfied that Mr Connolly was asked about ventilation in the screen room and that he referred to the opening of windows and the use of fans. I am satisfied that Mr Connolly was not asked about the presence of an extraction system but the request for information about ventilation should have been sufficient to provoke a response about the

presence of the extraction system if one was present. I am satisfied that Mr Connolly was not asked about the availability of breathing apparatus.

[25] On the factory floor all four visitors were present when a sign was manufactured. The creation of the sign involved the use of a guillotine. When Mr Connolly attended a debrief on the 2005 tender, which was held on 24 March 2005, he was referred to the absence of the use of goggles at the guillotine. In evidence Mr Minford indicated that this was intended to be a reference to the use of the angle grinder at the guillotine, although he stated that the meeting was so fraught that he may not have referred to the angle grinder. He did refer to the use of the angle grinder in his record sheet. Mr Compston also gave evidence about the use of the angle grinder but did not note its use in his record sheet. Mr McKendry did not recall the use of an angle grinder but had made an entry that no goggles or ear defenders were used, although could not recall the nature of the operation where they should have been used. Ms Denyer did not see an angle grinder. When it was put to Mr Connolly that a workman had used an angle grinder without goggles or ear defenders he stated that goggles would have been needed but not ear defenders and that he was not made aware of this at the time.

[26] The Balfour Report investigated this issue as Allegation 8, recording the complaint as being that members of the 2005 site visit panel had fabricated parts of the site visit records and assessed parts of the factory they had not visited. The Report found no evidence to substantiate the allegation. The Balfour investigation never identified the precise allegation made by Mr Conway in relation to the site visit. However all those present at the 2005 site visit were interviewed during the investigation and each confirmed their presence at all parts of the site visit so the complaint was not upheld.

[27] After the site visit the four visitors made fair copies of their record sheets and destroyed the rough copies made during the visit. All four met the following Friday and the three members of the Panel agreed a moderated record sheet of the visit, which was written up by Ms Denyer at the meeting and later typed. The handwritten version was then destroyed. A freedom of information request for the contemporaneous notes of the site visit produced the fair copy record sheets. The rough notes made during the site visit were not retained and their previous existence was not disclosed in response to the freedom of information request. While there were shortcomings in the retention of records I am satisfied that there was no wilful attempt to conceal the existence of relevant information.

Ground (a)(i)(2) - Schedules O, P, Q and R in 2005

[28] Schedules O, P, Q and R required different types of signs, each in metal, plastic and collapsible form. Up to 80% of expenditure would have

been on the metal version of each sign. Tenderers were required to tender for each of the three types of sign within each schedule. The predecessor of the plaintiff tendered for the metal and plastic parts of the schedules but did not tender for the collapsible form. PWS tendered for the metal form of the schedules only. None of the tenderers completed the tenders for all three forms of each schedule. Accordingly in respect of schedules O, P, Q and R none of the tenders was in accordance with the requirements of the tender documents.

[29] The 2005 Panel that included Minford, Compston and McKendry considered how to deal with schedules O, P, Q and R in the light of non compliance with instructions. Sean Doran and Catherine Denyer were the CPD representatives. The CPD were asked for advice on the approach that should be taken to schedules O, P, Q and R in the circumstances. Sean Doran discussed the matter with his line manager Gabriel Lynch. The options were to either re-tender separately for each material under each schedule or to treat separately each material under the existing tenders. CPD advice, signed off by Gabriel Lynch, was in accordance with the latter option. Sean Doran advised the Panel accordingly and the advice was accepted. The outcome was that, although the predecessor of the plaintiff was cheaper on price, PWS was awarded the contracts for the supply of metal signs under the schedules for which they had tendered.

[30] Mr Connolly's preferred option was to award the contracts under each schedule for metal and plastic signs together where tenders had been submitted for metal and plastic signs under any schedule, in which event PWS would not have been awarded any of the work as they only tendered for metal signs. This was not an option considered by CPD.

[31] The above account is treated as an incident of actual or apparent bias in that Mr Compston and Mr McKendry together with Mr Minford were part of the Panel that made the decision to award schedules O, P, Q and R. It is not correct to state that they "wrongly represented" the position to CPD. The eventual decision was made by the 2005 Panel as a whole based on the advice of the CPD representatives as signed off by Mr Doran's line manager. I am satisfied that the decision was not made to advantage or disadvantage any particular tenderer nor was the advice offered on that basis. Further I am satisfied that the circumstances in which schedules O, P, Q and R of the 2005 tender were dealt with by Mr Compston and Mr McKendry together with Mr Minford provide no basis for any complaint of actual or apparent bias.

Ground (a)(i)(3) – Jackson Minford

[32] There are three steps in the plaintiff's complaint about the connection of the two Panel members with Mr Minford. First that the two members had a professional and collegiate association with Mr Minford, secondly, that Mr Minford had an inappropriate and undisclosed relationship with PWS and thirdly that as a consequence of that relationship Mr Minford was removed from the 2010 process. Mr Minford visited the PWS trade stand in Amsterdam and visited other stands at that trade fair. I am satisfied that there was no impropriety arising from his visit to the PWS trade stand. During the Balfour investigation it emerged that Mr Minford, in his capacity as Secretary of the Institute of Highway Engineers, had secured from PWS and other work connections, sponsorship for the Institute's annual golf tournament of sums in the region of £50 to £100. This connection was not disclosed by Mr Minford to the Balfour investigation when he was being asked about his relationship with PWS. He stated that he did not consider it to be relevant. However the connection was disclosed by PWS when they were interviewed by the Balfour investigation. The result was that Balfour recommended that Mr Minford should not be involved in further traffic signs procurement. Accordingly Mr Minford was removed from the 2010 Panel.

[33] The defendants circulated conflict of interest forms to all those potential members of evaluation panels. Mr Minford, who completed a conflict of interest form, did not disclose any conflict of interest arising from the golf sponsorship connection with PWS. He did not consider that it constituted a conflict of interest. The defendants might be clearer as to what should be declared on conflict of interest forms. However I do not accept the plaintiff's characterisation of this relationship as "inappropriate". That a conflict of interest might arise between members of an evaluation panel and those being evaluated does not render the relationship inappropriate. That such conflicts of interest might arise in relation to members of evaluation panels in any area of procurement or recruitment is not uncommon.

[34] In any event the essential nature of this ground of complaint is that there was actual bias on the part of Mr Compston and Mr McKendry, or in the alternative that the circumstances gave rise to apparent bias, arising from their professional and collegiate association with Mr Minford and in their reaction to his removal from the 2010 process. I am satisfied that there was no actual bias on the part of Mr Compston or Mr McKendry. Similarly I am satisfied that in all the circumstances there is no basis for a complaint of apparent bias.

[35] The Balfour Report investigated this matter as Allegation 20 on the basis that Jackson Minford had spent a full day with the PWS at a trade fair in Amsterdam in 2004. The Report found no evidence to support the allegation that Mr Minford had spent a full day with PWS at a trade fair in Amsterdam.

However the Balfour investigation discovered that Mr Minford, as Secretary of the Institute of Highway Engineers, had sought and obtained from PWS, sponsorship for the Institute's annual golf tournaments. Accordingly the Report concluded that Mr Minford should not be involved in any procurement process for signs in the foreseeable future.

Ground (a)(i)(4) – Being subject to complaints

[36] The plaintiff objected to the presence of Mr Compston and Mr McKendry on the 2010 Panel by virtue of the previous complaints made against them. I am satisfied having heard their evidence that there was no actual bias against the plaintiff by reason of their having been the subject of previous complaints. The plaintiff's objection extends to apparent bias arising from the presence on the Panel of those who had been the subject of unsubstantiated complaints. I am satisfied that in all the circumstances there is no basis for a complaint of apparent bias.

Ground (a)(i)(5) – Temporary contracts 2005 - 2010

[37] The plaintiff contends that there was discrimination and bias against the plaintiff in that those evaluating the 2010 tender had not considered the plaintiff in relation to two sets of orders for traffic signs from 2005 to 2010. The plaintiff's predecessor company had won certain contracts under the 2005 process but the company went into liquidation and was unable to perform the contracts. The plaintiff was formed in January 2006. The contracts that had been awarded to the plaintiff's predecessor were then awarded to others without a tendering process. None of that contract work was offered to the plaintiff.

[38] The evidence of those officials called to give evidence on behalf of the defendants was that the company to which the contracts had been awarded had gone into liquidation and they were not aware that Mr Connolly was operating a new company from new premises providing the same service. Mr Connolly notified those with whom the predecessor company had been doing business that he was now engaged in business with the plaintiff. However he had not given such notice to Road Service.

[39] I have not been satisfied that there is any basis for concluding that Road Service officials acted in a discriminatory manner or that there was bias, actual or apparent, in not contracting with the plaintiff between 2006 and 2009.

[40] The second set of orders arose after the 2009 process had been set in train for another round of contracts. That process was eventually abandoned but in the period from March 2009 to July 2010 certain supplies of traffic signs

were arranged by add-on contracts for existing contractors. The plaintiff was not considered for those contracts. Road Service did not engage with the plaintiff in the add-on contracts as the plaintiff was not an existing contractor.

[41] I have not been satisfied that there is any basis for concluding that Road Service officials acted in a discriminatory manner or that there was bias, actual or apparent, in not contracting with the plaintiff between 2009 and 2010.

Ground (a)(i)(6) – Temporary contracts in 2010

[42] In July 2010, when the 2010 process was called into question, proposals for interim arrangements for supply of traffic signs by quotations from specified suppliers did not include the plaintiff. On 2 July 2010 in an email from Aaron Foster to David Compston, Mr Foster, the area buyer for Road Service East Area, proposed to seek quotations from PWS, Hirsts and Signs and Equipment (the plaintiffs predecessor company) on a 100% cost basis. On 5 July 2010 Desmond Metrustry emailed buyers to indicate that he had been speaking to David Compston who had suggested the names of companies that could provide quotations. The four companies named did not include the plaintiff. Mr Compston's evidence was that arrangements were being made in July 2010 for an interim period and he referred to suppliers that were already set up on the Department's electronic ordering system, Account NI, which system did not include the plaintiff. In the event the quotation system was not put in place.

[43] I have not been satisfied that there is any basis for concluding that Road Service officials acted in a discriminatory manner or that there was bias, actual or apparent, in not including the plaintiff in the proposed arrangements in July 2010.

[44] Similarly the plaintiff raised issues about the provision of temporary AA signs. The Balfour Report at Allegation 22 investigated the complaint that AA Signs Limited had been permitted to provide Road Service with signs without any tender being put in place. The Report found that AA Signs Limited had been paid some £499,000 during the period July 1997 to December 2009 for the supply, erection and removal of information and diversion signs with no formal contractual arrangements having been in place, even though the aggregated level of expenditure from 2001/02 onwards had exceeded the competitive tendering threshold as defined by departmental accounting procedures.

[45] While there are issues as to compliance with procurement principles in relation to the above contracts in 2005 to 2009 and March 2009 to July 2010 and in July 2010 and in relation to AA signs they are not directly the subject of

these proceedings and I find that their treatment by the defendants does not bear on the issues arising in these proceedings, nor does the involvement of Mr Compston or Mr McKendry in any of the arrangements for those contracts affect their involvement or may be perceived to affect their involvement in the 2010 Panel.

Ground (a)(i)(7) – School traffic signs.

[46] In the course of his evidence Mr Compston disclosed that he had been responsible for the administration of a contract for the provision of school traffic signs by PWS. Accordingly the plaintiff amended the Statement of Claim to include apparent bias in relation to that connection between Mr Compston and PWS. I am satisfied that there is no basis for the complaint of apparent bias in this regard.

Overall conclusion in relation to the membership of the Panel.

[47] I am satisfied that none of the matters relied on by the plaintiff whether individually or collectively constitutes discrimination or actual bias or apparent bias. Further I am satisfied that there is not any basis on which either Mr Compston or Mr McKendry should have been disqualified from involvement on the 2010 Panel. In addressing these matters I have refrained from expressing any conclusion on the dispute about the applicability of apparent bias, whether as a statutory obligation or a contractual obligation, to the challenge to this procurement process.

[48] It is apparent from discovered documents that some of the first defendant's officials were not well disposed to the plaintiff because of complaints about various procurement processes. Nevertheless I am satisfied, in relation to complaints of discrimination and bias, that those involved in the evaluation Panel and the representatives of the CPD who advised them, completed their assessments and reached their decisions in an appropriate manner.

(2) The Price/Quality Split.

[49] The plaintiff contends that the 2010 process was not objective because of the 60/40 split which involved evaluation of the tenders on the basis of 60% price and 40% quality. The complaints made by Mr Connolly in 2005 that led to the establishment of the Balfour review included what became "Allegation 1" in the Balfour Report, namely that the inclusion of quality in the assessment criteria was "just a mechanism" to enable the defendant to award contracts to their preferred supplier, PWS. Consideration of the

evaluation criteria over the years indicated that there had been a move away from an entirely cost based assessment as follows – 1999, 80% cost 20% quality, 2002, 60% cost 40% quality, 2005, 30% cost 70% quality, 2009, 30% cost 70% quality. The Balfour Report found no evidence to suggest that the changes to the evaluation criteria were just a mechanism used by Road Service/CPD to ensure that PWS obtained the lion's share of the work.

[50] The plaintiff's present complaints about the 60/40 split do amount to a claim that the 60/40 split was a mechanism to favour PWS, although it is expressed in terms of favouring PWS by the use of 40% quality and in the alternative favouring PWS by changing the split from 80/20 to 60/40. Further the plaintiff contends that the use of 40% for qualitative assessment represents a lack of objectivity in the 2010 process. In addition the plaintiff contends that the use of 40% marks for qualitative assessment represents a manifest error.

[51] Among the changes made for the 2010 process was the introduction of the requirement for Sector 9A accreditation. There is a British Standard for "Quality Management Systems – Requirements" in BS EN ISO 9001:2008. The ISO is the International Organisation for Standardisation and the document represents the European standard which has been given the status of a national standard in the UK. It provides for the adoption of a quality management system. This standard has then been given effect in relation to highway works by the "National Highways Sector Schemes for Quality Management in Highway Works" and Sector Scheme 9A operates "For the manufacture of permanent and/or temporary road traffic signs". The introduction states that the Sector 9A scheme sets out to identify a common interpretation of the current BS EN ISO 9001 standard for Organisation and Certification Bodies engaged in the Sector.

[52] The plaintiff took the view that if it was now required to obtain accreditation under Sector 9A in relation to a quality management system for traffic signs, the extent of any quality evaluation of tenders should be greatly reduced. There would not be a requirement for site visits as part of the evaluation process. The defendants considered that Sector 9A accreditation confirmed the quality management system in relation to the product, namely the traffic signs, but did not address the additional quality requirements in relation to delivery, environment and complaints. The plaintiff referred to the BS and 9A scheme at paragraph 7.1 on "Planning of product realisation" where 9A required the production of a contract specific Quality Plan (although the appendix stated that this was only required for highway agency motorways and all purpose trunk roads contracts). Further, reference was made to the BS and 9A scheme at paragraph 7.2.1 on "Determination of requirements relating to the product" where the BS demanded determination of the requirements for delivery and post delivery activities where there was no additional requirement under 9A. Post delivery activities included supplementary services such as recycling or final disposal. In addition the BS

and 9A scheme at paragraph 7.2.3 on customer communications required effective arrangements for communicating with customers in relation to customer complaints and 9A provided for no specific interpretation.

[53] Mr Connolly had taken his complaint to his MP who had written to the Minister with the result that Mr Bell and Mr Glover of CPD had a meeting with the Minister. On 18 March 2010 Mr Connolly and his solicitor met Mr Bell and Mr Glover together with Ms Dornan of CPD. In relation to the 2010 scheme Mr Connolly was advised that the turnover threshold would not be required and that Sector 9A accreditation would now be required. The minute of the meeting stated "The quality/cost split had not yet been decided, the Highway Sector Scheme effectively removed the qualitative assessment and the balance of the evaluation would most likely come under the cost element. CPD explained that any pricing/financial comparison of submitted tenders would be undertaken by CPD, with the other elements of the evaluation being handled by DRD Road Service". Mr Connolly was heartened by the statement that the introduction of Sector 9A "effectively removed" the qualitative assessment.

[54] The 60/40 split was finalised in April 2010 in exchanges between representatives of CPD and Road Service. On the CPD side those directly involved were Messrs Doran and Morgan who had discussed with Mr Glover his meeting with Mr Connolly. On the Road Service side were Messrs King and Compston who were taking their instructions from Brian Maxwell. The decision to adopt the 60/40 split was in effect made by Mr Maxwell.

[55] E-mail exchanges between 14 April 2010 and 21 April 2010 show the evolution of the price/quality split from 80/20 to 60/40. Mr Morgan and Mr Doran considered the impact of Sector 9A accreditation and Mr Doran produced the initial proposal on 14 April 2010 for an 80/20 split with delivery methods being 10%, environmental 7% and complaints 3%. Mr Doran described Sector 9A as providing the manufacturing guarantees which got the product to the suppliers door but did not get the product along the road to the Road Service depot. After discussions the proposal on 20 April 2010 was for a 70/30 split and after the final exchanges on 21 April 2010 the split was settled at 60/40.

[56] Mr Maxwell, who was not directly involved in the above exchanges, gave evidence that he had firm views on the split being 60/40. He was informed of the initial proposal for an 80/20 split and his reaction was that that was insufficient on the quality side. He made Mr King aware of his preference for 60/40 and when Mr King was reporting back on his exchanges with CPD, Mr Maxwell considered that he was not being provided with any information that indicated that the 60/40 split was inappropriate. Mr King was aware that Mr Maxwell's desired split was 60/40. He attended meetings with CPD on 14 April and 20 April and he went to see Mr Morgan on 21 April

and told him that Road Service required a 60/40 split. Mr Morgan's evidence was that CPD did not set quality and that it was the client's role to determine the qualitative aspect, although if he had thought that the split was inappropriate he would have said so.

[57] On 21 April 2010 Mr Morgan spoke to Mr King, who had spoken to Mr Maxwell, and they wanted a 60/40 split. Mr Morgan considered that the proposed 60/40 split was appropriate. Thus the 60/40 split was agreed. The breakdown of the 40% for service delivery was delivery methods 15%, environmental – packaging, waste disposal and recycling 15% and complaints system 10%.

Ground (a)(ii) – Favouring PWS by use of 40% quality.

[58] The complaint of favouring PWS is treated as a complaint of discrimination and actual bias by the adoption of a 40% quality mark with the purpose of favouring PWS as the preferred contractor. I am satisfied that in effect the decision to adopt the 40% quality mark was that of Brian Maxwell and I am further satisfied that he did not adopt the 40% quality value so as to advantage or disadvantage any particular tenderer. To the extent that this complaint might extend to an issue about the unintended consequences of adopting 40% for quality I refer to the conclusions on the 60/40 split discussed below.

Ground (a) (iii) – Favouring PWS by changing from 80/20 to 60/40.

[59] The plaintiff's alternative complaint of favouring PWS concerned the change of the price/quality ratio in April 2010 from 80/20 to 60/40. Again I am satisfied that the change was brought about by Brian Maxwell's decision to secure a 60/40 split and that he did so without seeking to advantage or disadvantage any particular tenderer. Again, to the extent that the complaint might extend to the unintended consequence of adopting 40% for quality, I refer to the conclusions on the 60/40 split discussed below.

Ground (b) – Lack of objectivity in the adoption of 40% quality.

[60] The plaintiff did not object to the adoption of the three quality aspects, namely delivery methods, environmental and complaints system, but contended that they should only represent 10% to 20% of the evaluation as any greater weighting for quality would have a disproportionate impact on the outcome of the tenders.

[61] In relation to a quality/price ratio in general, Procurement Guidance No 3 applies to construction contracts and there is no guidance in relation to service contracts, such as the present contracts. In construction contracts the quality/price ratios vary for different project types. For innovative projects the range is 20/80 to 40/60, for complex projects the range if 15/85 to 35/65, for straightforward projects the range is 10/90 to 25/75 and for repeat projects the range if 5/95 to 10/90. The present service contracts were said by the plaintiff to be the equivalent of a "straightforward project" so that, by analogy with the constructions contracts, the quality/price ratio should be in the range of 10/90 to 25/75. The defendants did not accept that an analogy can be drawn with construction contracts.

[62] In the present case the defendant's carried out no analysis of the quality/price split, either before or after it was agreed. Mr Maxwell described it as a matter of assessment and judgment. The 2009 contract had adopted 70% quality and the adjustment was made for the introduction of the Sector 9A accreditation to produce 40% quality. This was the same split as the 2002 process when there was no requirement for Sector 9A accreditation.

[63] The plaintiff pointed to the impact of the quality assessment being set at 40%. PWS were awarded the highest marks for quality, 185 out of 200, Hirsts were awarded 120 out of 200 and the plaintiff awarded 80 out of 200. These marks were then added to the weighted score for price on each contract. PWS was the lowest price on one tender, Hirsts was the lowest price on 11 tenders and the plaintiff was the lowest price on 9 tenders. After applying the quality scores PWS won 18 contracts, the plaintiff won 2 contracts and Hirsts won 1 contract. Thus the quality evaluation had a virtually determinative effect on the outcome.

[64] In the two contracts won by the plaintiff it is claimed that in one case their prices were 67% cheaper than PWS and in the other case 54% cheaper. In other instances where the plaintiff's prices were 30% to 40% cheaper than PWS, the plaintiff did not win the contracts because of the quality evaluation. Had the price quality split been 80/20 the plaintiff contends that it would have won 5 contracts, Hirsts 4 contracts and PWS the remaining 12 contracts. Thus what the plaintiff describes as the subjective evaluation of the quality criteria is largely determinative of the outcome of the tender process.

[65] Recital 46 of the Public Sector Directive states that contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non discrimination and equal treatment. The overall task in the present exercise was to determine the most economically advantageous tender for the contracting authority. There must be such transparency as will ensure that the tenderers are reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. In the present case there has been a

history of concern about the objectivity of the criteria when they include a quality assessment. The price aspect of the assessment is objective and transparent. The stated quality criteria are objective matters although their assessment includes a subjective element, which is inevitable when any qualitative assessment has to be undertaken. However the price and quality criteria must also be considered in combination because it is the overall assessment that determines the most economically advantageous tender. Objective criteria must be capable of justification as relevant to the determination of the most economically advantageous tender. The balance between relevant criteria must be capable of justification as appropriate to the determination of the most economically advantageous tender. The prospect of significant impact of one criterion or a number of criteria on the overall assessment may require explanation if there is to be compliance with the obligations of objectivity and transparency. It is necessary to ensure that the tenderers are reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It may not be sufficient merely to state the criteria and their weightings. The potential impact of a qualitative criterion may require particular attention as it includes a subjective element in the assessment. In the circumstances of the present case the allocation of 40% of the marks to the quality assessment requires justification if the criteria are to be seen to be objective and transparent. No justification was offered for the conclusion that 40% of the marks be allocated to quality, other than it was left to Mr Maxwell to make the assessment and exercise his judgment. Ultimately this is indeed a matter of judgment but not one that is bereft of explanation.

[66] Given the history of the traffic signs contracts and of concerns about quality assessment and subjectivity and the introduction of sector 9A accreditation as a measure of quality and the assurance by CPD that sector 9A accreditation had effectively removed quality assessment and the potential impact of the marking arrangements when 40% of marks are accorded to quality, the final adoption of a 40% measure of quality requires explanation and justification. The failure to do so is compounded when it is demonstrated that the arrangements for quality assessment effectively determined the allocation of the contracts and secured the award of those contracts to the tenderer who in broad terms was submitting higher prices. The adoption of the 40% quality measure does not accord with the obligations of objectivity and transparency.

Ground (c) (i) – Use of 40% quality as a manifest error.

[67] The plaintiff contends that the adoption of the 40% quality mark constitutes a manifest error. The plaintiff accepts that the three quality elements are appropriate and contends that the quality measures should be some 10% to 20% of the total. Accordingly the debate is in effect to establish

where in the range of 20% to 40% the quality assessment should be measured. No attempt has been made to assess the appropriate relationship between price and quality and the impact of a higher quality assessment on a lower price assessment. In the absence of an exercise that determines where the balance should lie it is not possible to determine that the Department's adoption of a 40% quality measure constitutes a manifest error. 40% may turn out to be justified as the measure of quality. I have found the defendant's failure to be that no proper analysis has been undertaken in this regard.

(3) Manifest Error

Ground (c)(ii) - Scoring

[68] The plaintiff contends that the Panel's marking of the quality criteria represented a manifest error. The Panel comprised Brian Maxwell, Damien King, David Compston, David Moore, Barry McMillen, Michael McKendry and Gary McCracken with the CPD representatives being Sean Doran and Jim Morgan. The Panel met on 17 June 2010. Each member carried out an individual assessment of the three quality criteria in respect of each tenderer. A scoring matrix was applied with scores from each member of 0-5 for each criterion. The Panel then agreed a moderated score for each criterion for each tenderer. In relation to the plaintiff the assessment of delivery methods was an agreed score of 2 where the supporting comments indicated limited detail, no mention of proposals to prioritise and organise supply and limited detail on delivery vehicle. The environmental score was 2 with supporting comments referring to no registration of carriage certificate, limited detail on reduction of waste packaging and no copy of environmental policy. For complaints the score was 2 with supporting comments referring to limited detail on the complaints procedure, a copy of which was not attached. With 15% for delivery methods the score of 2 produced a weighted score of 30, with 15% for environmental the score of 2 produced a weighted score of 30 and with 10% for complaints the score of 2 produced a weighted score of 20 giving a total of 80 out of 200.

[69] In relation to PWS the moderated score for delivery methods was 5 with the response described as very good. For environmental matters the score was 4 with the supporting comment that the environmental policy statement identified all packaging but no mention was made of other materials. For complaints the score was 5 with the response described as very good. The respective weighted scores were therefore 75, 60 and 50 giving a total of 185 out of 200. Mr Connelly described the PWS response as flowery, implying that it lacked any substance.

[70] The tender documents made clear that information to be relied on in the evaluation of the quality criteria should be included in the tender. All

members of the Panel marked the plaintiff lower than PWS in their individual assessments and all agreed to the respective moderated scores for the plaintiff and PWS. I am satisfied that there is no basis for interfering with the assessments of the quality criteria made by the members of the Panel, either on the basis of the materials submitted by the plaintiff or PWS or in respect of the scoring of or the supporting comments on the plaintiff or PWS.

Ground(c)(iii) – Registration of Carriage Certificate.

[71] The plaintiff further contends that the defendants made a manifest error in requiring the plaintiff to hold a registration of carriage certificate and for marking down the plaintiff for not having such a certificate. The plaintiff's tender in respect of the environmental aspect stated that, should the Road Service personnel request the protective packaging to be left on the product, the plaintiff would do one of two things. Either the plaintiff would uplift the packaging upon their next delivery and if necessary leave a container in which the packaging could be stored or the plaintiff would allow the packaging to be disposed of by whatever methods were currently deployed in the depot.

[72] The Panel concluded that were the plaintiff to return to the site to remove waste material it would require a waste disposal certificate. The plaintiff disputed that this was the case. Reference was made to the Waste and Contaminated Land (Northern Ireland) Order 1997 and the Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations (Northern Ireland) 1999. The basis on which a member of the Panel with experience of the operation of waste disposal certificates advised the Panel of the need for a certificate was that the plaintiff's proposal to return to the defendant's premises at a later date to collect waste material engaged the need for obtaining the requisite certificate.

[73] Was the Panel's conclusion a "manifest error"? I am satisfied that there was no manifest error on the part of the Panel in relation to its conclusion on the need for a certificate.

Remedies.

[74] Regulation 47A deals with the duty owed to economic operators and provides that a contracting authority owes a duty to an economic operator to comply with the provisions of the Regulations. Regulation 47C deals with the enforcement of duties through the Court and provides that a breach of the duty owed in accordance with Regulation 47A is actionable by any economic operator "which, in consequence, suffers, or risks suffering, loss or damage". I am satisfied that the defendants are in breach of the duty owed under the

Regulations to the extent that they have not complied with the legal obligations of objectivity and transparency in measuring quality at 40% in the assessment of the tenders. Further I am satisfied that in consequence of that breach the plaintiff has suffered or risks suffering loss or damage in respect of the three contracts that the plaintiff would otherwise have won had the price/ quality split been 80/20 rather than 60/40.

[75] Regulation 47I deals with remedies where the contract has not been entered into, which is the present case. Regulation 47I(2)(a) provides that where the Court is satisfied that a decision was in breach of duty the Court may do one or more of the following –

(a) Order the setting aside of the decision or action concerned,

(b) Order the contracting authority to amend any document,

(c) Award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

Pursuant to Regulation 47I(2)(a) this Court will order the setting aside of the decision of the defendants in relation to the three contracts referred to above, namely Contract 17 for "Triangular metal and collapsible temporary signs", Contract 18 for "Circular metal and collapsible temporary signs" and Contract 20 for "Other temporary signs – chevron lane closures and contra flow metal temporary signs."

[76] There are three other contracts affected by the exercise undertaken by the plaintiff, namely the three contracts that would have been awarded to Hirsts on an 80/20 split. However Hirsts have not issued proceedings to enforce the defendants' duties and the plaintiff who has issued proceedings is not a party which "in consequence suffers, or risks suffering, loss or damage" under Regulation 47C. Accordingly no Order will be made under Regulation 47I(2)(a) in respect of those additional three contracts.

[77] Regulation 47G provides for a contract to be suspended by the issue of proceedings to challenge an award decision. Regulation 47G(1) provides that the starting of the proceedings requires the contracting authority to refrain from entering into the contract. Thus the issue of the present proceedings resulted in the suspension of the award of the 21 contracts in question. Regulation 47G(2) provides that the requirement to refrain from entering into the contract continues until "the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal)."

[78] The defendants and the plaintiff have indicated to the Court the possibility of an appeal against the decision of the Court. Accordingly an Order will be made under Regulation 47G(2)(b) continuing the requirement that the defendants refrain from entering into the remaining 18 contracts. That Order will continue until such time as both parties give notice that there will be no appeal or the time limit for appeal expires without either party lodging notice of appeal. In the event of a notice of appeal the defendants will continue to be required to refrain from awarding the 18 contracts until further Order.