Neutral Citation No. [2012] NIQB 2 | *Ref:* **McCL8398**

Judgment: approved by the Court for handing down | *Delivered:* **24/01/12**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

BETWEEN:

WILLIAM CLINTON, trading as ORIEL TRAINING SERVICES

Plaintiff:

and

DEPARTMENT FOR EMPLOYMENT AND LEARNING
and
DEPARTMENT OF FINANCE AND PERSONNEL

Defendants:

McCLOSKEY J

I INTRODUCTION

[1] The subject matter of this action is a procurement exercise undertaken by the Department for Employment and Learning ("*the Department*") which had as its object the execution of contracts for the provision of certain publicly funded training and apprenticeship programmes in Northern Ireland. The Plaintiff tendered unsuccessfully for contracts being procured by the Department under the auspices of the "Training for Success" and "Apprenticeships NI" programmes and brings these proceedings accordingly.

[2] The initiation of proceedings in this case (and a related case) triggered the requirement imposed by Regulation 47G(1) of the Public Contracts Regulations 2006 precluding the Department from executing any of the contracts in question. This stimulated an application by the Department for an order pursuant to Regulation 47H extinguishing this automatic prohibition. In this case, the court delivered an *ex tempore* judgment refusing the Department's application. In a related case, arising out of the same procurement exercise, a similarly unsuccessful application was brought by the Department: see ***First4Skills –v- Department for Employment and Learning*** [2011] NIQB 59.

[3] The main landmarks and events in the factual matrix giving rise to these proceedings can be ascertained from the following chronology:

4th November 2010	Prior Information Notice
26th November 2010	Invitation to Tender & Instructions to Tender [etc] published on CPD eSourcing system
January 2011	Plaintiff's tender submitted
17th January 2011	Closing date for tender submissions (3.00 p.m.)
18th January 2011	Tenders opened by CPD
28th January 2011	Evaluation Panel provided with tenders
9th February 2011 & 11th February 2011	Initial Panel meetings
18th February 2011	"Clarification" sought from 13 tenderers
25th February 2011	Deadline for reply to requests for "clarification" (12 noon)
7th March 2011 to 14th March (various)	Panel reconvene – 12 further tenderers pass to Stage 2
25th March 2011	Letter to the Plaintiff notifying the impugned decision, formulated thus: "*… Your letter did not meet the Stage One Selection Criterion One and was therefore not considered further*".
4th April 2011	Issue of Writ.

… June 2011	Dismissal of the Department's Application under Regulation 47H of the 2006 Regulations.
30th June 2011	Reserved judgment, dismissing the Department's application in the parallel case: [2011] NIQB 59.

II THE PROCUREMENT STRUCTURE

[4] As noted in the court's reserved judgment [*supra*], the contracts being procured in the present instance were of the "Part B" variety within the scheme of the 2006 Regulations. Where Part B public services contracts are concerned, the regulatory and restrictive regime of the 2006 Regulations is less intrusive. Notwithstanding, both types of contract procurement are governed by the general principles enshrined in Regulation 4(3), which provides:

> "*A contracting authority shall (in accordance with Article 2 of the Public Sector Directive) –*
>
> *(a) treat economic operators equally and in a non-discriminatory way; and*
>
> *(b) act in a transparent way*".

Given the nature of both Plaintiffs' challenges, it is also appropriate to highlight Regulation 26:

> "*Subject to regulation 27, the contracting authority may require an economic operator to provide information supplementing the information provided in accordance with regulations 23, 24 or 25 or to clarify that information, provided that the information so required relates to the matters specified in regulations 23, 24 or 25*."

This Regulation applies only to Part A contracts. Accordingly, the powers which it expressly confers on a contracting authority were not exercisable by the Department in the competition giving rise to these proceedings. Notwithstanding, Regulation 47 is noteworthy in passing on account of the comparable, though not identically phrased, power reserved to the Department in the procurement competition under scrutiny, an issue which I shall revisit at a later stage of this judgment.

[5] During the pre-tender phase, the Department engaged in certain activities designed to publicise and illuminate the forthcoming procurement process. One of the steps taken included the publication of the "Pre Procurement Briefing Document". This was published at around the beginning of November 2010, in

advance of the two public information sessions conducted by the Department. This stated, *inter alia*:

> "*The* [Department] *… is committed to the development of a highly skilled, flexible and innovative workforce which will contribute to the twin goals of social inclusion and economic success for Northern Ireland. The quality and effectiveness of training for both young people and adults are crucial elements of that process.*"

This document makes clear that the overarching aim of the training programmes for which the relevant contracts were being procured was the enhancement of the skills of the Northern Ireland workforce. The two programmes concerned were explained in the following terms:

> "*Training for Success is a programme designed to address the needs of unemployed 16-17 year olds …*
>
> *This flexible programme will provide training in personal and social development, employability training and professional and technical training …*
>
> *Apprenticeships NI Level 2 and Level 3 is an all age apprenticeship provision for employed people who are contracted to work a minimum of 21 hours or more per week …* [designed to obtain] *… a relevant competence based qualification … and a knowledge based qualification where appropriate to the apprenticeship framework … and essential skills.*"

Interested bidders were invited to tender for the contractual provision of any of the nineteen categories specified in the so-called "Professional and Technical Groups" (see paragraph [6], *infra*). The publication continued:

> "*Contracts will be geographically zoned by local authority area and it is anticipated that there will be more than one supplier appointed to deliver each professional and technical group … within each area*".

As a general rule, contract providers would be permitted to recruit only trainees residing in the relevant local authority area. Paragraph 6.1 continued:

> "*A key driver for the client in the delivery of Training for Success and Apprenticeships NI is 'quality'.*"

In paragraph 13.1, under the rubric "Achievement Indicator", it was stated:

> "*In each of Training for Success and Apprenticeships NI the training outcomes are clearly defined as targeted qualifications. These will be recorded in the trainee's Personal Training Plan …*
>
> *As an ongoing achievement indicator for individual suppliers, the client will monitor* [the supplier's claims for Output Related Funding Payments] *and will develop an indicator based on the percentage of achievers against leavers. The client will reserve the right to publish these achievement outcomes.*"

The terminology employed in these passages is noteworthy: it includes the phrases "*… the training outcomes … targeted qualifications … achievement of qualification*s … [and] … *achievement outcomes*". Continuing, paragraph 19.5 stated:

> "*Selection criteria will be detailed in the Invitation to Tender and tenderers must provide evidence to assure the client that they have the experience and capability to perform the contract. Tenderers which fail to provide sufficient relevant information in relation to the selection criteria will not have their tenders evaluated*".

The distinction between the two stages of the contract award process was explained in these terms:

> "*Tenderers who assure the client of their ability to deliver the services will have their tenders assessed against award criteria detailed in the Invitation to Tender.*"

Pausing here, it would seem unexceptional to observe that the central purpose of the Stage One selection criteria was to demonstrate to the Department that a bidder possessed the experience and ability necessary to deliver the training services being procured. This is an entirely orthodox manifestation of the function of selection criteria in EU procurement law.

[6] The "Professional and Technical Groups" for which the contractual training services were being procured by the Department were divided into nineteen separate areas of the employment industry – such as finance, leisure and sport, agriculture, hospitality and construction. All of the nineteen "groups" were generic in nature, each having a detailed breakdown of individual subjects: thus, for example, in the "Construction" group there were five individual subjects – glass industry, construction, fencing, floor covering and stone masonry. In one of the pre-tender question/answer exchanges (whereof there were 207 in total), the Department provided the following clarification:

> "*Tenderers must demonstrate the required expertise in each professional and technical area for which they are tendering. Therefore a tenderer may be successful in only some of the professional and technical areas for which they are tendering*".

All clarifications of this *genre* were provided by the Department through the mechanism of the electronic clarification register. This discrete process continued during a period of some two months, spanning late November 2010 to mid-January 2011. Through this medium, other clarifications included the following:

(a) The requirement that all of the proposed nominated tutors/ teachers possess the necessary "level 3" qualification (as defined) must be observed at the time of contract award - to be contrasted with the earlier stage of tender submission. (Of relevance to Selection Criterion No. 2).

(b) Ditto, with regard to all nominated tutors intended to provide training in numeracy or literacy, which required a "level 2" teaching qualification. (Of relevance to Selection Criterion No. 3).

(c) Another response provided by the Department illuminated the distinction between the "*staffing plan*" and the "*workforce development*" plan, both of which had to be submitted with tenders:

> "*Staff numbers and job titles will be sufficient for the staffing firm. However, the workforce development plan should refer to named individuals where appropriate*".
>
> And again:
>
> "*A staffing plan indicates the roles and responsibilities of staff. A workforce development plan indicates how the organisation's workforce will develop and change.*"

[7] Prior to inviting tenders, the Department conducted two public information sessions, which included a visual presentation. This exercise encompassed, *inter alia,* the provision of advice and information on the preparation of tenders at a general level. In this way, potentially interested bidders were advised that the content of tenders would determine award decisions; the content must be explicit; broad statements should be avoided; "evaluators" would not draw inferences or make assumptions; and the tenders would have to specify, *inter alia*, the bidder's previous "*experience of delivery*". One of these information sessions was attended by the Plaintiff. At the trial, it was accepted by the Plaintiff that the information provided by the departmental representatives during this event did not detract from the need

to supply information relating to "*outcomes*" (however this may be defined), as required by Selection Criterion No. 1. The Plaintiff added that it was clear to him from this event that the Department's selection panel would be familiar with the framework and general methodology of Education and Training Inspectorate ("*ETI*") reports: this was not disputed by the Department.

[8] The "Instructions to Tenderers" ("*ITT*") is one of the key documents falling to be considered. These explained that the evaluation of tenders would be divided into two separate stages. The first stage was concerned with seven selection criteria. These were described as "*selection criteria (pass/fail)*". Each of these began with the words "*Tenderers must …*" or "*Tenderers shall … "*. They required the provision by tenderers of specified data and information. The second stage of the procurement exercise entailed the application of specified "*award criteria*". These were teaching and learning; staff and resources; leadership and management; and partnerships. The separation of stages one and two and, hence, the distinction between the two separate groups of criteria had already been addressed in the "Pre Procurement Briefing Document" (paragraph [5], *supra*) and was addressed in paragraph 14.1 of the ITT, in these terms:

> "***Stage One – Selection Criteria***
>
> *… Tenderers are required to answer questions to confirm that the Tenderer has the required minimum standards …*
>
> *The minimum standards are specified in Section 13 at Stage 1 Selection Criteria above*".

This conveyed that satisfaction of the Stage One Selection Criteria, which were to be assessed on a pass/fail basis, would be a pre-requisite to progressing to Stage Two, when the award criteria were to be applied. The Plaintiff's tender was rejected at Stage One. Having regard to the terms of the impugned decision (paragraph [3], supra) and the reasons therefor proffered by the Department (paragraph [10], *infra*), the spotlight is firmly on Selection Criterion No. 1, which was formulated in the following terms:

> *"Tenderers must demonstrate that they have the necessary experience to deliver high quality training programmes in the professional and technical areas they have indicated of similar scope to that described through the use of an example (or examples) of programmes delivered within the last three years. This shall include dates, outcomes and explanations as to why the experience is considered to be relevant to the particular professional and technical groups being tendered for."*

The evidence established that prior to commencement of the procurement process there had been a series of drafts of the ITT. In one of these, Selection Criterion No. 1 was framed in different terms, as follows:

> "*Tendering organisations must provide examples that they have a minimum of three years experience of successfully delivering training programmes comparable to those for which they are tendering. This should include dates, outcomes and explanations as to why the experience is considered to be relevant to the particular professional and technical groupings being tendered for*".

At the trial, the Plaintiff sought to contrast the terminology of this earlier draft with the final formulation of this selection criterion.

Outcome and Impugned Decision

[9] The Department, in notifying the Plaintiff of its assessment that the first of the seven selection criteria had not been satisfied, explained its decision in the following terms:

> "*Insufficient evidence to demonstrate the necessary experience of delivering high quality provision in the professional and technical areas being tendered for. Whilst the numbers of learners engaged was presented, no data provided in respect of achievements, success rates or destinations into positive outcomes. The outcomes listed are generic qualifications but do not provide specific detail*".

Appended to this letter were the final, collective assessment comments of the four Selection Panel Members. Their comments regarding the Plaintiff's attempt to satisfy Selection Criterion No. 1 were these:

> "*Fail – insufficient evidence to demonstrate the necessary experience of delivery high quality provision in the professional and technical areas being tendered for. Whilst the numbers of learners engaged was presented, no data provided in respect of achievements, success rates or destinations into positive outcomes. The outcomes listed are generic qualifications but do not provide specific detail.*"

This was the impetus for a letter of complaint (dated 28th March 2011) from the Plaintiff, which contained the following passages:

> "*Question 1 does not ask for tenderers to provide evidence so how is it possible CPD to fail our response for providing 'insufficient evidence'. Nowhere in the question does it ask*

> *for the tenderer to provide data or details in relation to achievements, success rates or destinations into positive outcomes. Should this information have been specifically requested, Oriel Training Services would have provided such detail in any format that was required …*
>
> *CPD states that the outcomes listed in our response are generic qualifications. Clearly the evaluating panel were unable to differentiate between generic qualifications and types of qualifications and the personal and social skills that Oriel listed as outcomes to the programmes that we currently deliver …*
>
> *In answering Question 1 there is no right or wrong answer and any failure to meet a standard required by CPD could only be based on subjectivity from each or collectively by the members of the evaluating panel.*"

The response from CPD (dated 1st April 2011) contained the following passage:

> "*In this competition, as in all others, it is the responsibility of the bidder to assure themselves that they fully understand what is required by the* [Contracting Authority] *and to what level of detail.*"

The next step was the issue of the Writ in these proceedings.

[10] The letter communicating the impugned decision to the Plaintiff (paragraph [3], *supra*) was the impetus for the initiation of this action. By virtue of the automatic interim suspension, none of the contracts being procured by the Department has been executed. While the results of the exercise of assessing other competing tenders in accordance with the Stage Two selection criteria have not been published, the court was informed that this has been undertaken and completed on a without prejudice basis. This was a pre-eminently sensible step for which the Department must be commended.

III THE PLAINTIFF'S CHALLENGE

[11] By reference to its amended Statement of Claim, the Plaintiff's case is based, firstly, on the complaint that the Department's assessment to the effect that the Plaintiff had failed to provide "*data in respect of achievements, success rates or destinations into positive outcomes*" reflects the application of an undisclosed or, alternatively, ambiguous selection criterion. This gives rise to a complaint that the inter-related principles of equality of treatment and transparency have been infringed, to the Plaintiff's detriment. The second element of the Plaintiff's challenge entails a complaint that, in its solicitation of "clarification" from thirteen

other bidders, the Department acted in breach of its duty of equal treatment and/or contravened the competition rules. At the hearing, the Plaintiff's challenge concentrated on these two central complaints:

First Ground of Challenge: Formulation and Arguments

[12] In his skeleton argument on behalf of the Plaintiff, Mr. McLaughlin (of counsel) developed the **first** of the grounds of challenge in the following way:

(i) The Panel eliminated the Plaintiff, through the use of a non-disclosed selection criteria, namely the provision of "statistics" and "data" with a view to demonstrating "performance" and "quality" in the delivery of educational programmes. This non-disclosure was a breach of the principles of transparency and equal treatment.

(ii) Selection Criterion No. 1 was framed in ambiguous terms, particularly by reason of the word "*outcomes*" and, hence, failed to convey clearly the information required of a bidder in order to satisfy it. The result was that the Plaintiff, who applied a different but reasonable interpretation, was eliminated in breach of the inter-related principles of transparency and equality of treatment.

(iii) Insofar as the Panel interpreted Selection Criterion 1 as incorporating a requirement that tenderers demonstrate "performance" and "quality" as opposed to "experience" of providing relevant training programmes, it misinterpreted and misapplied the criterion and was guilty of manifest error in consequence.

(iv) Even if the Panel was entitled to consider the quality of the programmes previously delivered by the Plaintiff, it was wrong to eliminate him on this ground. The Plaintiff had plainly demonstrated the quality of his teaching by referring to his ETI grading, in circumstances where the Department had previously represented that this would be acceptable. It was contended that this gave rise to a manifest error.

Mr. McLaughlin's submissions also highlighted the following considerations:

(v) In two subsequent procurements, the Department altered the wording used in the tender documents to make clear precisely what evidence of experience was required. These were issued after the Plaintiff had submitted his letter of complaint arguing that "*statistics*" had not been specifically requested and that if it had been, he would have provided it. In the procurement for the Steps to Work programme, tenderers had to demonstrate a "*track record*". The evidence required was described in the following format:

"Tenderers must:…clearly demonstrate a successful track record of achievement in delivering services of a similar nature within the last 3 years including statistical evidence of the number of job outcomes and associated details (to include validated evidence of outcomes and associated achievement measures)…

(vi) The ITT (at para 14) placed a strict limit upon the number of pages in their tender. A specific instruction was given not to attach appendices, unless specifically requested. This instruction contracted the selection panel's interpretation, which required additional evidence over and above the statements and responses made in the tender submissions of bidders.

(vii) Question 1 is a selection criterion, not an award criterion. It is designed to filter applications, not to evaluate them. The evaluation process takes place during the award stage. Furthermore, the selection criteria have been established on a "pass/fail" basis. They do not attract markings or weightings, which call for the exercise of evaluative judgment by the panel, in contrast with the award criteria. It is, therefore, essential that they are both interpreted and applied objectively, without room for subjective interpretation or evaluation by the panel. Insofar as each selection criterion may incorporate an objective "threshold" which a tender must meet, it is fundamental to the principle of equal treatment that the threshold is set out clearly and unambiguously. In this case, the panel's interpretation incorporated a form of "evidential threshold". It did not accept that a party could "*demonstrate the necessary experience*" without statistical evidence of past performance rates. This was not stated clearly and is not obviously implicit in the use of the much vaguer word "*outcomes*".

(viii) The obligation to objectively apply Selection Criterion No. 1 was not discharged by the Department's selection panel. It plainly did regard Selection Criterion No. 1 as a platform for subjective evaluation of past performance and quality. It is submitted that it was quite reasonable for the Plaintiff to consider that this form of "quality evaluation" would take place at Stage 2, during the substantive evaluation of his tender. The identified award criteria are imbued with a need for qualitative assessment. Indeed award criteria Nos. 1 and 3 both make explicitly clear that the tenderer should demonstrate how it will deliver quality training programmes, both in its own actions and those of any sub-contractors.

[13] On behalf of the Department, it was submitted by Mr. Giffin QC and Mr. McMillen QC that the court should reject the contention that the word "*outcomes*" in Selection Criterion No. 1 is ambiguous. Emphasis was placed on the ***Siac***

Construction test (paragraph [] *infra*) of whether this award criterion was so formulated "*… as to allow all reasonably well informed and normally diligent tenderers to interpret it in the same way*". Counsels' submissions highlighted the mechanism for seeking clarification of this criterion pre-tender, coupled with the absence of any such request from the Plaintiff or any of the any other sixty-one bidders. It was emphasized that only four of the sixty-two bidders were assessed to have failed this criterion. Counsel's submissions further pointed to the absence of evidence that any bidder other than the Plaintiff construed this criterion as the Plaintiff claims to have done. It was further submitted that the word "*outcomes*" has a clear and readily apparent meaning viz. *what has actually come out of the programme in question, in terms of the results delivered;* that this is a well established meaning in this field (relying on the Department's evidence); that this is supported by the Plaintiff's self-evaluation "IQRC" report; and that the Plaintiff's case in this respect is undermined by its inclusion of ETI gradings in its tender. Finally, Mr. Giffin's submissions stressed **the context** in which the word "*outcomes*" is to be construed by the court. In this respect, it was submitted that the court should apply the yardstick of commercial common sense, giving effect to the commercial purpose underpinning Selection Criterion No. 2.

First Ground of Challenge: the Evidence Summarised

[14] It was common case that the Plaintiff's organisation is a highly experienced provider of the training services being procured and is one of the major players in Northern Ireland, particularly in the realm of the "Training for Success" Programme. The thrust of the Plaintiff's first ground of challenge is encapsulated in the following averments in his first affidavit:

> "*I accept that I did not provide statistics for the success rates for trainees. This was because I did not believe the tender asked for this information …*
>
> *If the Defendant intended parties to provide 'statistics' or 'data' in response to question 1, I believe that it was framed in an ambiguous manner …*
>
> *If the tender* [i.e. Instructions to Tender] *had been specific in requesting the information which the Defendant now states was required, I would have provided it without any difficulty or hesitation.*"

I interpose here the comment that it was common case that the Plaintiff could indeed have provided the information in dispute, in a manner acceptable to the Department.

[15] In his tender, the Plaintiff sought to comply with Selection Criterion No. 1 by providing a moderately lengthy narrative which contained certain figures and data. The representations made included the following:

(a) The Plaintiff had worked successfully and competently with the Department and others during the previous ten years in "*the delivery of mainstream, national and pilot training programmes*".

(b) The outcome of a contractually required Education and Training Inspectorate ("*ETI*") inspection in November 2008 was the allocation of "**grade 3 – good**".

(c) The outcome of a related, though somewhat different, self-assessment exercise, also involving the ETI but in a less intrusive manner, in June 2010 [the "IQRS" exercise] was "**grade 2 – very good**", placing the Plaintiff's organisation in the top 20% in Northern Ireland.

(d) Since 2008 the Plaintiff "*… has engaged with 412 Training for Success Learners and 789 Apprenticeships NI …* [and] *with over 496 employers in supporting their workforce development plans*".

(e) The "outcomes" for the Training for Success Programmes delivered by the Plaintiff since 2007 were:

> "*Employability Skills, Enterprise Skills, Personal and Social Skills, Vocational Related Qualification Level 1 and Level 2, National Vocational Qualification Level 2, Essential Skills Literacy, Numeracy and ICT, QCF Entry Level 3 to Level 2 Award, Certificate and Diploma. Employment and Progression to FE.*"

In the next sentence, the tender stated:

> "***Relevance***
>
> *The Training for Success Programme being tendered for is the revised version of the current programme. There are many similarities in that both programmes aim to address the needs of unemployed school leavers and have similar* ***outcomes and objectives***".

[My emphasis].

(f) The tender then detailed the Plaintiff's previous experience in the Apprenticeships NI Programme and, under the heading "Outcomes", stated:

> "*National Vocational Qualification Level 2; Vocational Related Qualification; QCF Level 2; Essential Skills Literacy, Numeracy, ICT; Employment Rights and Responsibilities, First Aid Certificate, Apprenticeships NI Level 2 Certificate*".

(g) The tender then provided details of the Plaintiff's previous experience in the "Steps to Work" Programme and the "*outcomes*" information supplied was comparable to that provided in respect of the aforementioned two programmes.

[16] The evidence considered by the court included the two ETI "reports" (understood in the sense described above). The first of these recorded [in paragraph 6.5]:

> "*Over the past year, the retention rate for the TFS Programme is poor at 44%. The success rate is satisfactory at 75%. The retention rate for the current group of trainees on the TFS Programme is excellent, however, at 96%.*"

The Plaintiff asserted, without challenge, that the information considered by the ETI in allocating a **grade 3** following this inspection included data relating to trainee retention, results/qualifications obtained by trainees and "destination" data viz. information relating to subsequent training and/or further education and/or employment obtained. The second of these reports, the "IQRS" exercise, was of a different character, being a "*self evaluation*" report and linked development plan, prepared by the Plaintiff, relating to the period March 2009 to March 2010. This included, in tabular form, data relating to trainee numbers, retention percentages and "*positive outcomes*" with reference to three separate training programmes (including the two being procured). This information was assessed by ETI, resulting in a **grade 2** performance score. There was no dispute between the parties that the information considered by ETI giving rise to this scoring assessment included the kind of material which, the Department contends, was omitted erroneously from the Plaintiff's tender.

[17] In his evidence, Mr. Clinton explained how he had interpreted Selection Criterion No. 1. This, he said, conveyed to him a requirement to demonstrate a bidder's experience in delivering relevant training programmes, by the provision of an example or examples. He interpreted the word "*outcomes*" as "*qualification outcomes … skills outcomes*". He suggested that his organisation's tender had made reference to the ETI "reports" for the purpose of demonstrating that the Plaintiff had previously delivered **quality** programmes: both reports verified the quality of training previously provided by the Plaintiff. When questioned about the terms in which the Selection Panel had expressed its reasons for deeming the Plaintiff's tender non-compliant with Selection Criterion No. 1: ("*… no data provided in respect of achievements, success rates or destinations into positive outcomes …*"), the Plaintiff

replied that this information would have been provided by him in the tabular form contained in the second of the ETI "reports" if he had been aware of this requirement. In compiling his organisation's tender, he had not construed the word "*outcomes*" in the manner reflected in the Selection Panel's collective comment. He had relied specifically on two of the "clarification" responses provided by the Department during one of the pre-tender public information events. These were:

> "*ETI will not be on the panel.* ***DEL do have an understanding of ETI gradings ...***
>
> ***Will ETI grades be considered in the selection phase?***
>
> *Tenderers are free to submit evidence that will help demonstrate compliance with the selection criteria, including relevant external quality assessment*".

[Emphasis added].

The Plaintiff made the case, by reference to these questions and answers, that his invocation of the two ETI "reports" in response to selection Criterion No. 1 was (a) permissible, under the procurement competition rules and (b) sufficient to achieve compliance with this discrete criterion.

[18] In support of his challenge, the Plaintiff also sought to highlight and distinguish the formulation of a comparable selection criterion in two subsequent procurement exercises conducted by the Department. In the "Steps to Work" procurement exercise, the Department's selection criteria were arranged under the heading "Stage One – Minimum Standards – Professional/Technical Ability". There were two specified minimum standards – track record and capacity to deliver. With reference to the "track record" minimum standard, the criterion stipulated:

> "*The tenderer must clearly demonstrate that they meet the Track Record minimum standards detailed by providing* ***a minimum of three detailed examples of previous assignments with dates ...***
>
> ***Tenderers must:***
>
> ***(a) clearly demonstrate a successful track record of achievement in delivering services of a similar nature within the last three years including statistical evidence of the number of job outcomes and associated details (to include validated evidence of outcomes and associated achievement measures) ...***".

[Emphasis added].

The second example on which the Plaintiff relied was a disability support services procurement exercise, in which the selection criteria were expressed under the heading "Technical or Professional Ability (Pass/Fail)" and the terminology employed for the equivalent criterion was:

> "*The client shall seek to ensure that a high degree of skills and expertise is evident in the delivery of similar support and would therefore wish to see detailed information with relevant examples on the following:*
>
> *(a) Details of three years relevant support organisation experience … this should include dates, the client group the services have been provided to and explanations as to why the experience is considered to be of relevance.*
>
> *(b) Details of three years relevant experience of the key personnel* ***in successfully delivering services of a similar nature****. This should include dates and explanations as to why the experience is considered to be of relevance.*"

[Emphasis added].

I observe, uncontroversially I believe, that the first of these two examples is demonstrably stronger from the Plaintiff's perspective.

[19] The Department's main deponent and witness, Mr. McVeigh, defended and sought to explain the selection panel's interpretation and application of Selection Criteria No. 1. His affidavits contained the following material averments:

(a) "*No specific evidence was presented to demonstrate performance from 2007. The obvious way to do this is to say, for example, that in a particular year the Plaintiff trained XX persons of whom YY completed the course and XX obtained YY qualification while XX obtained ZZ qualification and AA per cent went straight into employment. Indeed of the 62 Stage 1 tenders received, 58 contained performance data … either in tabular form or as part of the written narrative*".

(b) The provision of data in respect of qualification achievements, success rates or positive progression (e.g. employment, further education or further training) "*… was necessary to demonstrate sufficient and relevant experience in delivering high quality training programmes. The information that the Plaintiff provided was meaningless.*"

(c) "*The submission demonstrated that the Plaintiff had wide experience in the relevant areas. There was no evidence that he had experience that would allow him to deliver 'high quality' training programmes. All the panel had was the*

Plaintiff's statement as to this attribute and some very brief statements as to external assessments".

(d) "*Each of the panel members who had individually concluded that* [the Plaintiff] *should fail considered that the requirement to demonstrate the necessary experience to delivery high quality training programmes had not been met on the basis of the information supplied …*".

(e) "*A critical point was that* [the Plaintiff] *had not in our view provided the information about the 'outcomes' of programmes delivered within the last three years which the* [ITT] *had called for. We would have expected a tenderer to have satisfied this requirement by providing data about the volumes of training delivered within the time frame stipulated and about performance in terms of the number or proportion of individuals successfully completing the programmes in question. Simply setting out the qualifications which the programmes were designed to deliver was not, in our view, a demonstration of the outcomes of those programmes*".

(f) Most bidders had provided some information about "trainee results/destinations" [my shorthand], albeit in varying formats and detail.

(g) One of the factors highlighted in the panel discussions was that "*… the 2008 ETI grading reflected performance in the period 2007/2008, whereas the selection criterion was concerned with the quality of programmes delivered within the last three years. It was felt that it could not be safely assumed that performance had continued at the 2008 level over the next three years*".

(h) "*All the panel recognised that there were arguments which could be made both ways and we did not reach our decision lightly …*

In the end, [the Plaintiff] *just did not do as good a job of responding to this criterion as the vast majority of the other tenderers*".

Mr. McVeigh's first affidavit also discloses that the CPD representative [Mr McBride or a colleague] had some involvement in the impugned decision. He avers specifically that advice was sought "*as to the basis upon which we proposed to fail* [the Plaintiff]" and "*… the advice was that it was proper for us to proceed on that basis*".

[20] In his evidence at the trial, Mr. McVeigh suggested that the purpose of Selection Criteria No. 1 was to enable the panel to measure "*the quality of the effectiveness*" of the training provided by the bidder during the relevant period. The panel, he claimed, expected bidders to provide particulars of the numbers of trainees who secured obtainable qualifications from the programmes delivered by the bidder. They were looking for information relating to the proportion of "successful" trainees. Information on "*success rates*" ***could*** include particulars of what became of trainees who did not leave a programme and duly completed same. Information on

"*destinations into positive outcomes*" ***could*** include particulars of the fate of early leavers, for example whether they had progressed to further education, further training or employment. The central defect in the Plaintiff's tender, he maintained, was that the information supplied in purported compliance with Selection Criterion No. 1 was confined to the numbers of trainees who began the programmes provided. The tender lacked "*performance data*".

[21] In response to questions posed in cross-examination and from the court, Mr. McVeigh suggested that the essence of Selection Criterion 1 was the "*demonstration of bidders' success in their past experience*". The requirement to supply information of this kind was, he claimed, *implicit* in the word "*outcomes*". This required a bidder to demonstrate past experience in delivering high quality relevant programmes. In the matter of comparing and contrasting Selection Criterion 1 with its equivalent in the "Steps to Work" procurement process, Mr. McVeigh agreed that these two differing formulae were, in substance, the same: specifically, he accepted that the "Steps to Work" formulation required a bidder to provide information neither additional to nor different from the information sought by implication in the word "*outcomes*" in Selection Criterion 1. Mr. McVeigh further agreed that the "missing" information must have been supplied by the Plaintiff to the ETI in the process of compilation of its 2008 report. He confirmed that if the Plaintiff had provided – in whatever form – the data contained in Section 2.2 of its April 2010 IQRS report, this would have been acceptable to the selection panel. Mr. McVeigh confirmed that the grade 2 achieved by the Plaintiff arising out of the 2010 Report reflected a good level of performance by the company in achievements, success rates and destinations into positive outcomes. He accepted that this was "*built into*" the grade 2 awarded by ETI. While he sought to emphasize the self-reporting character of the 2010 Report, he was driven to accept that, in this respect, all sixty-two tenders were, in principle, no different: all of them contained unaudited, self-reported information of this kind.

[22] Mr. McVeigh suggested that the word "*outcomes*" has a well known meaning to operators in this industry. He accepted that "*achievements*", "*success rates*" and "*destinations into positive outcomes*" are three different things. Mr. McBride, the CPD representative, confirmed that there had been some involvement of his organisation in the formulation of the selection/contract award criteria. He acknowledged that he possesses no expertise in the industry in question. He suggested that the purpose of Selection Criterion No. 1 was to demonstrate a bidder's previous experience of delivering high quality training programmes. He agreed that there was nothing prescriptive about this criterion viz. it did not prescribe the information to be provided in tenders. What had to be demonstrated could be provided in a variety of ways. He was somewhat uncertain about whether there had been any impropriety on his part in his active contribution to the impugned decision. Explaining and illuminating the individual and collective panel assessment records, Mr. McVeigh testified that, at the outset of the selection panel meeting, he and two other members favoured allocating a "fail" to the Plaintiff in respect of Selection Criterion 1, while a fourth member advocated a "pass". Mr. McVeigh's personal assessment, in advance of the meeting was,

> "*Provided general description of provision delivered but basically this needed to be enhanced. Generic outcomes provided not specific regarding achievements, success rates and positive outcomes. I would have expected and wanted a lot more detailing experience.* ***Discuss with panel***."

[My emphasis].

Mr. McVeigh agreed that his individual assessment did not record either a "pass" or "fail" outcome. Notwithstanding this, coupled with the three words highlighted, he espoused the case that, from the outset, he was a member of the "fail camp". He suggested that the main difference of opinion between the two "camps" concerned the weight to be attributed to the two ETI "Reports". He agreed that panel members debated two competing interpretations of Selection Criterion 1 and accepted that both were reasonable. Ultimately, the member of the minority camp was converted to the majority view.

Second Ground of Challenge: Formulation and Arguments

[23] The foundation of the Plaintiff's complaint of inequality of treatment is an uncontested assertion that, during the Stage One process, the Department invited thirteen other tenderers, but not the Plaintiff, to provide further information and/or "clarification". It is agreed that twelve of these thirteen tenders were, ultimately, adjudged to satisfy the seven selection criteria. The Plaintiff contends that he was the victim of unequal treatment in consequence. In the amended Statement of Claim, a further, related complaint is identifiable. This is to the effect that in some of the thirteen cases in question the Department's requests, properly analysed, were not seeking "clarification" of information provided in the tenders: rather, they were tantamount to requests for the provision of essential information which the bidders concerned had omitted from their tenders. The essence of this discrete complaint is that, in thus acting, the Department contravened the rules which it had devised for this procurement competition.

[24] Mr. McLaughlin submitted that, in most instances, the Department's requests to bidders for "clarification" of the content of their tenders requested the provision of the qualifications held by individuals who were identified as proposed tutors. The gravamen of the Plaintiff's submissions was that, in conducting this process, the Department permitted other bidders to submit additional information in circumstances where there was no ambiguity in their tenders and that, in some cases, this allowed bidders to provide missing information, thereby curing outright omissions in their tenders. This facility was not extended to the Plaintiff. As a result, Mr. McLaughlin submitted, the Plaintiff was the victim of unequal treatment. It was suggested that this discrete process had the following pattern:

(i) Certain tenders listed proposed individual tutors and their qualifications, which did not meet the minimum required standard. Notwithstanding the content of the tender, "clarification" was sought. Confirmation was received that the individual concerned did not have the qualification or would not in fact be providing training.

(ii) While some tenders listed proposed individual tutors and their qualifications who/which did not meet the minimum required standard, "clarification" was sought by the Department. Confirmation was received that the individuals did in fact hold the relevant qualification. This was clearly new information.

(iii) In other instances, tenders listed proposed individual tutors and their qualifications who/which did not meet the minimum required standard. Upon a "clarification" request, the panel was informed that the individuals were undertaking the relevant course or that they would obtain the qualification. This represented both new information and a breach of the process, since the individuals did not have the qualification at the time of the tender.

(iv) Some tenders listed individual tutors with some information about qualifications held, but not sufficient to meet the requirements. Upon "clarification", additional information was supplied about the full extent of the qualifications actually held by the individuals. Six examples of this were instanced.

(v) Certain other tenders listed individual tutors with some information about qualifications held, but upon "clarification" it was confirmed that they did not actually have the qualification, but were undergoing the relevant course or hoped to obtain the qualification in the future two specific instances.

[25] Ultimately, it was common case that, having received all sixty-two tenders, the Department sought "clarification" from thirteen bidders, of two basic types:

(a) The qualifications held by some of the named proposed tutors.

(b) The subjects to be taught by some of the named proposed tutors.

The submissions on behalf of the Defendant, highlighted that the information of the latter type had not been requested in the ITT. Furthermore, the minimum qualification thresholds specified in the ITT applied only to those proposed as tutors in professional and technical subjects – in contrast with, for example, personal/social development and essential skills. The main submission advanced by Mr. Giffin QC and Mr. McMillen QC was that the Plaintiff was not comparing like with like: the various instances of "clarifications" sought by the Department, it

was argued, are not truly comparable with the Plaintiff's situation, which was one in which essential information had been omitted from its tender. In all of the instances upon which the Plaintiff seeks to rely, the relevant spreadsheet (SC2) had been completed by the bidder, but in a manner giving rise to some ambiguity, incompleteness or possible error. It was contended that all of the "clarification" requests arose out of information which had been provided by the bidders concerned. If a similar facility had been extended to the Plaintiff, this would have entailed the solicitation of information not previously provided in its tender.

Second Ground of Challenge: the Evidence Summarised

[26] The starting point in the court's evaluation of this particular complaint is marked by the following material passages in the ITT:

> "*IX Tenders must be fully compliant with the requirements detailed in the tender documentation.*
>
> *X Tenders may be rejected if the required information is not given at the time of tendering …*
>
> *9.* ***Assumptions***
>
> *Tenderers must not make assumptions that either* [CPD] *or the client has prior knowledge of their organisation or their service provision. Tenderers will only be evaluated on the information provided in their response …*
>
> *10.* ***Compliance***
>
> *Tenders must be submitted in accordance with these Instructions to Tenderers. Failure to comply may result in a tender being rejected by [CPD]".*

It was common case that the impugned requests for "clarification" by the Department focussed on the second and third of the selection criteria. These two criteria required the provision of information relating to the names and qualifications of the proposed tutors. Per Selection Criterion No. 2:

> "*Tenderers shall provide a full list of staff names and their relevant qualifications (to be completed on the attached Confirmation of Staff Qualifications spreadsheet …) indicating that all teaching/training staff have a minimum of a level 3* [qualification] *… in the professional and technical area/s in which they are teaching/training.*"

Selection Criterion No. 3 stated:

> "*Tenderers shall provide evidence in the form of a signed confirmation statement (not loaded as an attachment) that named individuals delivering teaching/training for Professional and Technical Programmes have at least a level 2 literacy and numeracy qualification or equivalent. This may be subject to verification at a later stage.*"

Broadly, the further information solicited by the Department from the thirteen bidders in question, and duly provided, related to two matters, each connected with Selection Criteria 2 and 3. The first concerned the qualifications held by certain persons identified in the tenders as proposed tutors. The second concerned the subjects which would be instructed/taught by some of those named as proposed tutors.

[27] With regard to the second ground of challenge, Mr. McVeigh's affidavits contain the following material averments:

(a) The CPD advice was that "*… for example, if the panel found itself unable to be sure from the information supplied which individuals would be delivering which training, that was a permissible subject of clarification, but that the panel ought not to be seeking new information from bidders*".

(b) "*We did our best to apply that advice. Certainly all the clarifications which we sought were by way of questions about the information that had been supplied to us and where the tenderers had indeed supplied detailed information. We believed that these were cases in which potential anomalies or ambiguities in the information which had been provided. It did not seem to us … that what we were doing was in any way comparable to asking a tenderer … to provide different and better evidence in relation to a judgment about quality (which was the problem in relation to Oriel)*".

(c) "*In seeking clarification on qualifications outlined in tender documents, the panel was trying to establish whether all individuals delivering professional and technical training held or were working towards a relevant Level Three qualification and held literacy and numeracy qualifications at Level Two.*"

The first affidavit of Mr. McBride, the CPD representative involved in the procurement process, makes reference to the pre-tender public information events and includes the following averment:

> "*At these events all potential tenderers were left in no doubt as to the need to fully address the selection and award criteria which were to be listed in the* [ITT]. *It was explicitly stated that failure to do so and to provide a comprehensive response to the information sought by the evaluation panel* ***might*** *result in the tender being rejected*".

[My emphasis].

Mr. McBride also makes the following unambiguous averment:

> "*Clarification was sought … from thirteen companies concerning their responses to the selection criteria …*
>
> ***No new information was provided by the tenderers, only clarification of the information submitted in the tenders***".

[My emphasis].

In his second affidavit, Mr. McBride avers that "clarification" was only required from 13 out of 62 tenderers and related to just 39 staff out of 256, representing just 15% of personnel proposed. He continues:

> ***"No new information was accepted as part of the clarification process which only clarified information already submitted in tenders. Not to have clarified unclear information would have diminished the robustness of the procurement and the decision making processes; furthermore, to have excluded the tenderers at that point without seeking clarification would have been disproportionate***".

[My emphasis].

Of the thirteen bidders concerned, twelve were adjudged suitable to progress to the award stage.

[28] Mr. McVeigh and Mr. McBride were in agreement about one particular fact. Both testified that the impetus for the solicitation by the panel of advice from Mr. McBride on the panel's "clarification" powers was the tender of BT. Mr. McBride avers:

> " *…The evaluation panel were of the view that there was a need to* ***clarify*** *elements of this tender. This gave me the opportunity to restate and apply the ground rules for* ***clarification*** *as I understood them. My advice to the evaluation panel was that where a tenderer provided information which the panel could not make a decision on, that information could be* ***clarified****; in contrast where information was not provided or the response was clear but did not fulfil the criteria, the panel could not request* ***additional information***"

[My emphasis].

Both the averments and the evidence of Mr. McVeigh make clear beyond peradventure the context in which this advice was sought and provided: in short, all concerned proceeded on the basis that the Department's powers were confined to seeking "clarification" of information contained in tenders and did not extend to the solicitation of additional, or supplementary, information. In his evidence, Mr. McBride confirmed that this was the centrepiece of his exchange with the panel. Mr. McVeigh and Mr. McBride testified unequivocally that the advice had been general in nature. Mr. McBride agreed that the effect of his advice to the panel was that the threshold for seeking "clarification" had two elements, or criteria, viz. whether the panel had detected some ambiguity or inconsistency in a tender and, if so, whether the panel thought it necessary to seek "clarification" thereof. Mr. McBride agreed that the panel should not seek new information not already contained in a tender and suggested that he had advised the panel thus. In response to the court, Mr. McBride confirmed that, in advising the panel on this issue, he had not appreciated that neither the verb "*to clarify*" nor any of its derivatives appears in the relevant sections of the ITT.

[29] The raw material relating to the contentious requests for "clarification" by the Department is fully contained in the evidence considered by the court. This evidence falls to be evaluated in the light of, in particular, the competition "rules" devised by the Department to regulate this discrete procurement process (paragraph [25], *supra*) and the evidence of the Department's witnesses (*supra*). While the evidence bearing on this discrete issue was somewhat bulky, it can be conveniently reduced to the following summary (in which I have initialized the names of the bidders concerned):

(a) Contained within the tender of "BT" was the completed pro-forma spreadsheet (re Selection Criterion No. 2) purporting to detail the names of proposed tutors and their qualifications. The "clarification" sought of this bidder by the Department was, in relation to nine named individuals:

> "*What NVQ Level 3 occupational area do they qualify in?*"

In response, the bidder provided a table, which included a column entitled "NVQ Level 3 occupational area". With regard to three of the individuals in question, the response in the column headed "Relevant Qualifications" was "*NVQ L3 Vehicle Parts Operations*". The selection panel duly considered the further information supplied, concluding:

> "*Clarification received … panel content … pass*".

(b) In the tender of "CG", within the same completed spreadsheet, the bidder purported to specify the qualifications of the various named proposed tutors. With reference to three of the named persons, the "clarification" sought by the Department was:

> "*What professional and technical areas will the staff be delivering and what is the relevant qualification of same?*"

Eliciting the following response:

> "*SC and BR both have a PGCE. AD has …* [four specified qualifications]".

The panel subsequently commented:

> *"Clarification received … panel content … pass*".

(c) In the completed tender of "LSD", the bidder purported to specify the qualifications of (*inter alios*) five of the named proposed tutors/ trainers. This elicited the following request for "clarification":

> "*Clarification is required in respect of … in the professional and technical areas they will be delivering and their relevant qualifications of same?*"

In response, the bidder stated:

> [Re CK] *Due to the Level Three occupational requirement she is currently undertaking a Level Three Certificate in Business Administration Principles … It is expected that she will complete the full qualification by April 2011 …*
>
> [Re the other four tutors] *All of these tutors are involved in the delivery of engineering training … and although not meeting the Level Three requirements are currently undertaking the City & Guilds Level Three Certificate …The expected completion date for these tutors is also April 2011*".

Subsequently, the panel recorded:

> *"Clarification received … panel content … pass*".

(d) In the tender of "NCT", it was stated, unambiguously, that two named proposed tutors held "*a minimum of Level Two Literacy and Numeracy*

qualifications or equivalent". The actual qualifications possessed by the named tutors were then detailed in the completed spreadsheets. The Department then sought "clarification" of the professional and technical qualifications of two of the named tutors. This elicited the response that one of them was working towards achievement of a relevant Level Three Certificate. Continuing, the response stated that two other tutors "*both hold a minimum of Level 2 Literacy and Numeracy qualifications or equivalent*". The original omissions in the tender were unequivocally acknowledged:

> "*Two omissions from statement – namely* [JC and GMCG] …
>
> *We would like to apologise for this oversight and omission …* [from the tender]".

Subsequently, the panel commented:

> "*Clarification received … panel content … pass*".

(e) In the completed tender of "NWC", the bidder, within the requisite spreadsheet, purported to detail the "*relevant qualifications*" of, *inter alios*, three of the proposed tutors. This elicited the following "clarification" request from the Department:

> "*Clarification is required on* [on AMCG and MM]. *Have they Level Two only?* [Re JL] – *What is she teaching?*"

The bidder responded:

> "[JL] *Will be teaching personal and social development and will be starting the UU Teaching Certificate at the start of the new academic year.* [AMCG and MM] *are administrative staff. Both are sitting Level Three Stage Accounts in March and working towards their Level Three Business Admin towards the end of the year*".

Subsequently, the panel commented:

> "*Clarification received … panel content… pass*".

(f) The bidder "STTL", in its completed spreadsheet, detailed the names of (*inter alios*) four proposed tutors and purported to list their "*relevant qualifications*". In response, the Department sought "*clarification*" of "…

what level of qualification …[they] *… have now*". The factor common to all four individuals was that, in the completed spreadsheet, the specification was framed thus:

> "*Appropriate Level Three qualification (see Workforce Development Plan)*".

In response, this bidder detailed the qualifications held by the four tutors in question (a series of degrees, diplomas and certificates) and continued:

> "*All four people will undertake appropriate qualifications in employability, personal development and careers advice and guidance alongside the Certificate in Teaching …*"

Subsequently, the panel commented:

> "*Clarification received … panel content … pass*".

(g) In the tender of "SL", it was stated that a named proposed tutor possessed two "*relevant qualifications*", including "*NVQ L2 in plumbing*". The Department responded:

> "*Clarification is required on* [KM] – *does he hold a Level Three vocational qualification?*"

The bidder responded:

> "*The confirmation of staff qualifications is incorrect.* [KM] *holds NVQ Level Two in plumbing and is currently working towards Level Three as outlined in the workforce development plan. This was an administrative oversight. Apologies for any confusion caused.*"
>
> "*C and G NVQ L2 in plumbing, EDI L3 Assessor Award*".

In due course, the panel accorded a "pass" to this bidder in respect of Selection Criterion No. 2.

(h) Finally, the completed spreadsheet within the tender of "STS" purported to list the "*relevant qualifications*" of five named proposed tutors. This prompted the following "clarification" request from the Department:

> "*Clarification is required regarding staff members and the Professional and Teaching areas that they will be delivering, in particular* [four named persons]".

The bidder replied:

> "LB – *employability/monitoring – Cert in mentoring level three*
>
> BM – *Essential Skills numeracy – post graduate Certificate in Education (FE)*
>
> BM – *CEIAG/Monitoring – Cert in Mentoring Level 3*
>
> CM – *Retail – Cert in Retail knowledge level 3.*
>
> NC – *Essential skills ICT/ICT – BA (Hons) Graphic, Interactive and Multimedia Design*".

The rationale of this request was recorded as "*clarification would be required on who is teaching what i.e. the relevance of some qualifications*". Although not expressly recorded (in the evidence before the court), it would appear that the further information thus supplied satisfied the selection panel.

IV GOVERNING PRINCIPLES

[30] Both the European and domestic jurisprudence have placed substantial emphasis on the manner in which information to potentially interested bidders about matters such as the rules of the procurement competition concerned and the formulation of contract selection and award criteria are expressed. One of the dominant principles in this field, that of equality of treatment of all bidders, coupled with the kindred principle of transparency, features with particular force in decided cases where issues of this kind have fallen to be determined. Some of the prominent European decisions were considered by this court in ***Federal Security Services –v- Northern Ireland Court Service*** [2009] NIQB 15, where the central issue was that of undisclosed contract award criteria :

> "*[34] The issue of undisclosed contract award criteria was considered by the European Court of Justice in* ***Universale-Bau and Others*** *[2002] ECR 1–11617. The Court ruled in favour of the tendering party. It its judgment, it stated:*
>
> > "*[91] The principle of equal treatment, which underlies the Directives on procedures for the*

> *award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with …*
> *[93] It follows … that the procedure for awarding a public contract must comply, at every stage, particularly that of selecting the candidates in a restricted procedure, both with the principle of the equal treatment of the potential tenderers and the principle of transparency so as to afford all equality of opportunity in formulating the terms of their applications to take part and their tenders …*
> *[97] … [the Directive] … imposes on the contracting authority the obligation to state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of their importance …*
> *[98] … The requirement thus imposed on the contracting authorities is intended precisely to inform all potential tenderers, before the preparation of their tenders, of the award criteria to be satisfied by these tenders and the relative importance of those criteria, thus ensuring the observance of the principles of equal treatment of tenderers and of transparency."*

To like effect is the decision of the European Court in ***ATIEAC*** *[2005] ECR 1 – 10109: see paragraphs [22] – [31] and, in particular, paragraph [28]:*

> *"Second, it must be determined whether the decision contains elements which, if they had been known at the time the tenders were prepared, could have affected that preparation".*

The same approach is discernible in the subsequent decision of the European Court in ***Lianikis,*** *Case C – 532/06: see paragraphs [36] – [40] especially.*

[35] In ***SIAC Construction –v- Mayo County Council*** *[Case C-19/00] [2002] All ER (EC) 272, the European Court considered the interaction between the obligation of equal treatment and the principle of transparency, from the perspective of the formulation of contract award criteria. The Court stated:*

> "*[32] The Court has held … that the purpose of co-ordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interest of traders established in a Member State in which to offer goods or services to contracting authorities established in another Member State …*
> *[33] In accordance with that objective, the duty to observe the principle of equal treatment of tenderers lies at the very heart of Directive 71/305 …*
> *[34] More precisely, tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority*".

The judgment then recalls that the Court had previously ruled that, in the determination of the most economically advantageous tender, it is permissible to include the reliability of supplies amongst the contract award criteria. It continues:

> "*[40] However, in order for the use of such a criterion to be compatible with the requirement that tenderers be treated equally, it is first of all necessary … that that criterion be mentioned in the contract documents or contract notice.*
> *[41] Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified …*
> *[42]* ***More specifically, this means that the award criteria must be formulated, in the contract documents or in the contract notice, in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret the in the same way***".

[Emphasis added]."

There is a discernible emphasis in the decided cases on the requirement that criteria be **clearly defined**: see, for example, ***Commission –v- French Republic*** [2004] ECR I-9845, paragraph [34]. In ***Federal Securities***, this court's review of the various authorities impelled to the conclusion that the test to be applied is the following:

> *"If the tenderers had known in advance of the relevant information, bearing on the award criteria or the proposed contract, might this have influenced the terms in which they formulated their tenders?"*

[31] It may be said that the overarching principle in play is the requirement that award criteria be so formulated "*… as to allow all reasonably well informed and normally diligent tenderers to interpret them in the same way*" (***Siac Construction,*** paragraph [42], *supra*). An instructive summary of the applicable principles is found in the judgment of Weatherup J in ***Scott –v- Belfast Education and Library Board*** [2007] NICH 4 which, following consideration of the decision in ***Siac Construction,*** formulated three propositions:

> *"1. The duty to observe the principle of equal treatment of tenderers lies at the heart of the Directive and tenderers must be in a position of equality, both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority.*
>
> *2. The principle of equal treatment implies an obligation of transparency in order to enable compliance to be verified. Transparency means that the award criteria must be formulated in the contract documents or the contract notice in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. Further, transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire process.*
>
> *3. Further, when tenders are being assessed the award criteria must be applied objectively and uniformly to all tenderers. If the documents are not capable of being interpreted by the tenderers in the same way then the process may lose that objective and uniform approach to the assessment of tenders."*

[32] The exercise of an express power to seek further information of bidders was the subject of the decision of the Court of First Instance in ***Tideland Signal –v- European Commission*** [Case T 211/02]. In that case, there was a specific provision in the Instructions to Tenderers empowering the procuring agency in the following terms:

> *"In the interests of transparency and equal treatment and without being able to modify their tenders, Tenderers may be required, at the sole written request of the evaluation*

> *committee, to provide clarifications within twenty-four hours. Any such request for clarification must not seek the correction of formal errors or major restrictions affecting performance of the contract or distorting competition.*"

The Commission declined to exercise this power. In its reasoning and conclusions, the court stated:

> *"[33] The Court recalls that the Commission enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Review by the Community courts is therefore limited to checking compliance with the applicable procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-145/98 ADT Projekt v Commission [2000] ECR II-387, paragraph 147). "*

This is followed by an interesting passage which illuminates the juridical rationale underpinning an express power on the part of a contract award authority to solicit further information from a bidder:

> *"[34] Moreover, it is essential, in the interests of legal certainty, that the Commission should 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 tenders. Thus, where a tender is ambiguous and the Commission does not have the possibility to establish what it actually means quickly and efficiently, the institution has no choice but to reject that tender.*"

The court held, firstly, that the Commission had erred in failing to recognise a clear ambiguity in one discrete aspect of the bidder's tender. Having done so, the court then addressed the manner in which the express power enshrined in the Instructions to Tenderers was overlaid by principles of European Law:

> *"[37] In response to the Commission's argument that its Evaluation Committee was nevertheless under no obligation to seek clarification from the applicant, the Court holds that the power set out in section 19.5 of the Instructions to Tenderers must, notably in accordance with the Community law principle of good administration, be accompanied by an obligation to exercise that power in circumstances where clarification of a tender is clearly both practically possible and necessary …*

> *While the Commission's evaluation committees are not obliged to seek clarification in every case where a tender is ambiguously drafted, they have a duty to exercise a certain degree of care when considering the content of each tender. In cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then, in principle, it is contrary to the requirements of good administration for an evaluation committee to reject the tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is liable to be vitiated by a manifest error of assessment on the part of the institution in the exercise of that power."*

One of the interesting features of this passage is the acknowledgement on the part of the court that, in the real world, a contract procuring authority cannot – and is not required to – close its eyes and mind to "*surrounding circumstances*".

[33] The decision in ***Leadbitter –v- Devon CC*** [2009] 124 Con LR is a fact specific illustration of a bidder's realisation that it had failed to include within its tender certain required information, a failure to rectify this omission by the stipulated deadline and an ensuing refusal by the procuring authority to accept late submission. A noteworthy feature of the judgment of David Richards J is its espousal of the principle of proportionality as one of the legal touchstones for evaluating the authority's conduct in this respect: see paragraphs [53] – [55]. The application of the principle of proportionality in this sphere was confirmed by the Court of Appeal in ***Azam –v- Legal Services Commission*** [2010] EWCA. Civ 1194, which affirmed the approach of the learned judge in ***Leadbitter***. While the approach adopted by the courts in *both* decisions might be described as restrictive, perhaps verging on the austere, I remind myself that the matrix of each of these cases entailed a failure, outright in nature, by a bidder to comply with a tender submission deadline. ***All About Rights Law Practice –v- Legal Services Commission*** [2011] EWHC 964 (Admin) is another fact specific illustration of an unsuccessful challenge to a procuring authority's refusal to accept the late submission of information omitted in error from a bidder's tender. In rejecting the claimant's challenge, Davis J acknowledged the austerity of his decision, while emphasizing simultaneously the imperatives of equal and transparent treatment of all bidders: see paragraph [82]. The same philosophy is detectible in the judgment of Blake J in ***R (Hoole & Co) –v- Legal Services Commission*** [2011] EWHC 886 (Admin), paragraph [32].

[34] Every contract procuring authority's duty of equality of treatment derives from the obligation enshrined in Regulation 4(3)(a) of the 2006 Regulations (paragraph [4], *supra*) to "*treat economic operators equally …*". Discrimination law generally is ever expanding and developing: see, for example, Protocol No. 12 to the European Convention on Human Rights. Generally, unequal treatment equates to

discrimination and vice versa. A noteworthy feature of unequal treatment in the particular context of EU procurement law is the absence of *proscribed grounds*. Thus, the enquiry for the court is *not* whether a bidder has been the subject of differential, or disparate, treatment on a ground such as race or gender. Rather, what the court must determine is the superficially simpler question of whether the contracting authority has subjected the bidder concerned to unequal treatment. In determining this question, it seems to me inevitable that the court will examine the treatment administered to other bidders with whom the Plaintiff seeks to compare himself. One of the well established features of discrimination law generally is that the situation or circumstances of so-called "comparators" must be materially similar to that of the Plaintiff. This is, *inter alia*, a reflection of the truism that no complaint of differential treatment can be considered in a vacuum. I do not understand the principles applicable in the particular context of EU procurement law to be any different: see, for example, ***Deane Public Works –v- Northern Ireland Water*** [2009] NICH 8, paragraph [25], a passage in which the Lord Chief Justice also highlighted "*the proper range of discretion*" available to the contract procuring authority. In ***Hoole –v- Legal Services Commission*** [2011] EWHC 886 (Admin), Blake J formulated the following proposition:

> "[30] … *Any general duty to give an applicant an opportunity to correct errors in the absence of fault by the Defendant yields to* ***the duty to apply the rules of competition consistently and fairly between all applicants*** *and not afford an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed*".

[My emphasis].

More specifically, the learned judge highlighted the need for the claimant to establish that he "*… had been disadvantaged by comparison with more favourable treatment of others in the same situation*": see paragraph [32]. Notably, this passage acknowledges, in terms, the absence of bright luminous lines in this context. Want of comparability was also one of the grounds upon which the challenge in ***Hossacks –v- Legal Services Commission*** [2011] EWHC 2700 (Admin) failed: see paragraphs [32] and [34]. Fundamentally, the comparative material failed to sustain the Plaintiff's case that they "*… had not been treated equally by comparison with others in like situations*".

V CONCLUSIONS

First ground of Challenge

[35] Having rehearsed *in extenso* the salient aspects of the evidence and the governing principles, I make the following conclusions.

[36] The primary contention on behalf of the Plaintiff is that the impugned decision is vitiated by reason of the existence and operation of an undisclosed contract selection criterion. I acknowledge, in principle, that in some cases the distinction between an undisclosed criterion and an unclear or ambiguous criterion may be somewhat blurred. However, on this issue, I prefer Mr. Giffin's submission. No aspect of Selection Criterion No. 1 was concealed from the Plaintiff or other bidders. The terms of this selection criterion clearly reflected a considered decision on the part of the Department and its advisers. There is no question of any oversight or error having occurred. When finally formulated, this selection criterion was published in full to all interested parties. The real issue, in my view, is whether the construction accorded to this criterion by the Department's selection panel justifies the conclusion, applying the ***Siac*** test, that it was not formulated "*… in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret it in the same way*". Fundamentally, the question becomes whether Selection Criterion No. 1 was susceptible to a uniform interpretation by this hypothetical audience.

[37] The meaning of Selection Criterion No. 1 is a question of law for the court. The test devised in ***Siac*** is essentially an objective one. Self-evidently, the evidential matrix to which this test is to be applied will be acutely case sensitive. In applying this test in the present case, there was no dispute between the parties that the exercise to be performed by the court can permissibly take into account certain evidence of a subjective nature. This evidence is threefold – the construction applied by the Department's selection panel; the construction applied by the Plaintiff; and the construction applied, *apparently or by inference,* by the large majority of bidders. There was also no dispute between the parties that the court could permissibly take into account the evidence relating to an earlier draft of this criterion and the terms in which its equivalent has been formulated in other contract procurement competitions. Indisputably, the context is a matter of critical importance. Thus the court must consider this criterion as a whole and do so within its wider setting. Furthermore, I accept Mr. Giffin's submission that the overall context is a commercial one, imbued with ingredients of common sense and commercial purpose. Ultimately, the battle lines between the parties were drawn in the following way:

(a) The construction espoused by the Plaintiff – and duly applied in his tender – was that Selection Criterion No. 1 imposed a requirement to demonstrate a bidder's experience in delivering relevant training programmes, by the provision of an example or examples and the specification of qualification and skills outcomes.

(b) On behalf of the Department's selection panel, the construction of this criterion espoused – and duly applied – was the imposition of a requirement that every bidder's tender provide "*… data … in respect of achievements, success rates or destinations into positive outcomes …*".

Based on Mr. McVeigh's evidence, the approach clearly adopted by the panel was to treat this criterion as imposing a requirement that every tender incorporate **data** of all of these matters. The question for the court is: was this criterion so formulated as to permit all reasonably well informed and normally diligent tenderers to interpret it uniformly?

[38] The ***Siac*** test exhorts the court to attempt, so far as reasonably practicable, to occupy the shoes of the hypothetical tenderer. The test provides some insight into the characteristics and attributes of such a tenderer: well, but not necessarily fully, informed and usually careful and attentive, but not invariably a paragon of diligence. The incorporation of the adjectives "*reasonably*" and "*normally*" in the test convey the notion of a tenderer who may be vulnerable to a certain (though not excessive) degree of error, inattention and other human weakness. In other words, the ***Siac*** hypothetical tenderer is a terrestrial, rather than celestial, being, hailing from earth and not heaven. In its determination of this issue, I consider that the court should approach the matter not as an exercise in statutory construction or as one involving the interpretation of a deed or contract or other legal instrument. To adopt such an approach would not, in my view, be consonant with the ***Siac*** test. Rather, the court's attention must focus very much on the "industry" concerned, in which the professionals and practitioners are not lawyers.

[39] In the present case, I find that the Plaintiff construed this criterion as requiring the demonstration of quality *to some extent*. Nothing else can realistically explain his reliance in the tender on the ETI "reports" and this is reinforced by the Plaintiff's evidence to the court: see paragraph [17] above. Thus the court's focus is very much on the single word "*outcomes*". It was submitted on behalf of the Department that "*outcomes*" in this context, denotes "*results … what has actually come out of the programme in question, in terms of the results delivered, in some shape or form…*". What is clear beyond peradventure is that the correct meaning of "*outcomes*" in this respect has generated a disproportionate amount of debate, discussion, argument and disagreement – in the parties' affidavits, in their submissions and in the evidence of the witnesses. Moreover, the various formulations which have been proffered to explain its meaning have varied. Thirdly, some of these formulations themselves require explanation and definition, "*destinations into positive outcomes*" being a paradigm example. These considerations, in tandem, tend to contradict the Department's contention that "*outcomes*", in this context, has an obvious meaning that is broadly recognised and well established in the industry in question.

[40] "Outcome" is an ordinary word, an unpretentious and unsophisticated member of the English language. Purely in the abstract, one can readily conceive of several synonyms for the word "outcome" – consequence, score, upshot, result and end product being prominent examples. While mindful of the importance of a contextualised approach, I observe that this simple exercise lends some weight to the Plaintiff's case, since none of these synonyms would be conventionally considered a precise equivalent. I accept that, in an imperfect world, there is no objective gold

standard of clarity to be applied by the court in determining this issue. Ultimately, I consider the question to be one of degree: objectively, is the meaning of Selection Criterion No. 1 sufficiently clear? Would all reasonably well informed and normally diligent tenderers have construed it uniformly? On balance, I resolve this issue in the Plaintiff's favour. I conclude that, in this context, the Department's expectation that compliance with this criterion would require the provision by all bidders of *data relating to achievements, success rates and destinations into positive outcomes arising out of previously delivered programmes* is expressed with insufficient clarity in the criterion as a whole and in the word "*outcomes*" in particular. I further reject the Department's claim that the word "*outcomes*" has a well recognised meaning in the industry concerned. Mr. McVeigh's claim to this effect was, ultimately, bare and unsupported assertion. I find that it is unsubstantiated and is confounded by several aspects of the evidence: the Department's briefing publication (paragraph [5], *supra*); the terms of the equivalent selection criterion in two other comparable selection exercises; the formulation of an earlier draft of Selection Criterion No. 1; the extensive internal debate amongst four presumed experts generated by this aspect of the Plaintiff's tender; the detailed and elaborate terms in which the Department has seen necessary to explain and define the word "*outcomes*" in this context; and the panel's need to resort to CPD for advice on the discrete issue of whether it could properly reject the Plaintiff's tender for non-compliance with this criterion. The phraseology of this criterion, in my view, gave rise to an unacceptable degree of doubt and uncertainty. While I take into the evidence bearing on this issue in its totality and acknowledge that there are factors pointing in both directions, the balancing exercise which I have performed clearly favours this conclusion for the reasons explained. To summarise, Selection Criterion No. 1 fails the test of sufficient clarity.

[41] The next question is whether, under the umbrella of the first of the Plaintiff's grounds of challenge, the impugned decision is vitiated by manifest error. The first conclusion which I make is that the Department was guilty of a very obvious error of this kind on account of the selection panel's misinterpretation of Selection Criterion No. 1: the effect of the conclusion expressed in the immediately preceding paragraph is that the panel's interpretation of this criterion betrays a clear error of law and is unsustainable in consequence. If this assessment is incorrect, the conclusion that the panel lapsed into manifest error is quickly made by a different route. In brief compass, it was represented to all bidders that panel members would be cognizant of matters pertaining to ETI reports. One grafts onto this the unequivocal acceptance in the Department's evidence (paragraph [21], *supra*) that the allegedly "missing" information must have been available to ETI in the context of its 2008 report concerning the Plaintiff and was "built into" the ETI awarded grade 2 in the context of the 2010 report. I highlight further the Department's acceptance that the panel would have been satisfied by the incorporation in the Plaintiff's tender of the data contained in Section 2.2 of its 2010 report. Furthermore, I find elements of inconsistency and misdirection in the Department's averments concerning the vintage of the 2008 report and the self-reporting nature of the 2010 report. From this different angle, all of these factors impel to the conclusion that, as

regards the first ground of challenge, the Plaintiff's complaint of manifest error is sustained.

Second Ground of Challenge

[42] I begin my consideration of the Plaintiff's second main ground of challenge with a finding. Having considered all the evidence, I am left in no doubt that the Department's selection panel was in error concerning the relevant competition rule from beginning to end. I have set out in paragraph [25] above the relevant provisions of the ITT. In simple terms, the effect of these provisions was to devise a competition rule conferring on the selection panel a discretionary power to seek further information from tenderers. This power was not expressly circumscribed by reference to any threshold requirement such as ambiguity or inconsistency or incomplete data. The essential thrust of this power is acknowledged in paragraph 11 of Mr. McBride's first affidavit, albeit at a more general level and without reference to these specific ITT provisions. All of the evidence clearly establishes that, duly guided by Mr. McBride's advice, the exclusive focus of the panel was that of *"clarification"* of information contained in tenders. Having set off on this track, the panel then established a self-limiting boundary, or dividing line. This is expressed, for example, in paragraph 13 of Mr. McVeigh's second affidavit. In brief compass, having formulated its self-denying ordinance, the panel's approach was that it could not solicit anything further from bidders in the absence of some perceived "*ambiguity or lack of clarity*" in the tender. I hold that this was a misdirection, as neither of these thresholds was specified in the relevant competition rule. As a result, the panel clearly erred in law. I hold further that, in the event, the panel strayed from the boundaries of its self-devised approach.

[43] Next, I find that the thrust of Mr. McVeigh's affidavit and sworn evidence was that the Plaintiff's tender included *some information, albeit limited, about the quality of previously delivered programmes*. This is particularly clear from paragraph 11 of Mr. McVeigh's second affidavit. It is equally clear from the averments therein, coupled with his sworn testimony, that the panel's conclusion was that the information bearing on "quality" in the Plaintiff's tender was insufficient. Thus this was not a case of outright failure to provide the kind of information which the panel was seeking: it was, rather, one of *insufficiency of information supplied* (according to the selection panel's assessment). I hold as a matter of law that, in these circumstances, the panel had a discretion, deriving from the relevant competition rule, to request the Plaintiff to provide further information. However, the panel failed to appreciate the existence of this discretion, for the reasons explained in the foregoing paragraph. In this respect, it clearly erred in law. Furthermore, this error was plainly material, as I find that the panel considered itself precluded from seeking further information from the Plaintiff. I conclude that, as in ***Tideland***, a manifest error was committed in consequence. To have requested further information from the Plaintiff would not have entailed any infringement of the duty of equality of treatment (*infra*). Furthermore, bearing in mind the underlying philosophy of the ***Tideland*** decision, to have done so would, in my view, have been

harmonious with the principles of legal certainty and good administration – while the converse proposition applies equally.

[44] This finding is not determinative of the Plaintiff's inequality of treatment ground of challenge. However, it illuminates the reasons why the Department did not request the Plaintiff to provide further information. I agree with Mr. Giffin that where the court is seised of an inequality of treatment challenge in this sphere, comparability (in shorthand) is the central consideration: see paragraph [33], *supra*. In resolving this issue in the present case, I consider that the court should view the distinctions which the Department seeks to make broadly and roundly, rather than narrowly and technically. In performing this task, I remind myself that the panel's requests for "clarification" sought two basic types of additional information, summarised in paragraph [24] above. The first type – relating to the qualifications held by some of the named proposed tutors – was either omitted from the relevant tenders or was not expressed with sufficient clarity to the panel's satisfaction. The second type – the subjects to be taught by some of the named proposed tutors – had not been specified in the ITT, giving rise to a variety of responses. Given my construction of the relevant competition rule (above), I reject Mr. McLaughlin's submission that there was a breach of process. All of these requests, in my view, reflected legitimate exercises by the panel of the discretionary power reserved to it. I formulate the fundamental issue to be determined by the court in the following terms: if the panel had requested the Plaintiff to provide data of "*achievements, success rates and destinations into positive outcomes*" arising out of previously delivered similar programmes, would this have been sufficiently comparable with the panel's requests to other bidders to provide information of the two types summarised above?

[45] The burden of the Department's case is that there is insufficient similarity between the two scenarios sketched immediately above. Ultimately, the central focus of the Plaintiff's complaint was that, in four cases in particular, the panel's "clarification" requests elicited from the bidders concerned new and additional information relating to the actual or projected qualifications of a number of proposed tutors. In my opinion, the fact that these requests elicited new or additional information from the bidders concerned is largely self-evident. Insofar as the Department's submissions raised a degree of controversy in this respect, regarding one of the requests/answers, I propose to be guided by the selection panel itself, whose records clearly convey that further information was requested and was duly supplied. The burden of Mr. Giffin's submission was that the court should properly distinguish between the two scenarios outlined above on the ground that the requests addressed by the panel to the bidders in question entailed specific questions about identified individuals which arose out of information provided in the tenders concerned. This submission acknowledged that *incompleteness of information* was one of the triggers for these requests.

[46] I am satisfied that the two scenarios sketched above are not identical. This conclusion is easily reached. The question for the court is whether they are

materially different. The answer to this question requires the court to take into account the full context and to make an evaluative judgment accordingly. I consider that the first factor common to the two scenarios is that of requesting *further information bearing on the quality, credentials and expertise of the bidder*. If the panel had requested the Plaintiff to provide (in the words of paragraph 9 of Mr. McVeigh's second affidavit) further information "*… about performance in terms of the number or proportion of individuals successfully completing the programme in question*", I consider that this would be properly characterised a request for further information of this kind. Secondly, the stimulus for such a request would be that of perceived *incompleteness of information in the Plaintiff's tender.* The court's determination of this issue, in my view, is not properly undertaken through the prism of an exercise of discretion, or choice, on the part of the panel – the more so, in circumstances where (as I have held) the panel plainly did not appreciate the discretionary power at its disposal and fell into error in consequence. Rather, the question for the court is whether the two scenarios under scrutiny are materially different. In my view, the two factors which unite the two scenarios sufficiently to warrant a negative answer to this question are those highlighted above. In short, I consider that these two scenarios are not distinguished by the kind of bright luminous lines implicit in the submissions on behalf of the Department. It being common case that the Plaintiff would have been able to supply the "data" concerned in a format acceptable to the Department, the resulting detriment to the Plaintiff is obvious. Accordingly, I resolve this issue in the Plaintiff's favour.

[47] The Department's failure to request the Plaintiff to provide further information may also be viewed through the prism of *proportionality*. Evidentially, the rationale of this failure was a misdirection in law, entailing a misconstruction of the relevant competition rule. Any objective observer would have viewed a request to the Plaintiff to supply the "missing" information as fair, modest and reasonable in all the circumstances. Taking into account the evidence in its totality, the conclusion that this failure was disproportionate follows readily. I conclude accordingly, having regard to the philosophy identifiable in the decision in ***Tideland*** (*supra*), while acknowledging the particular factual matrix of that case.

Remedy

[48] While I have found in the Plaintiff's favour, it is appropriate to record the court's view that the members of the Department's selection panel and the CPD representatives clearly acted diligently and conscientiously throughout the process. The court's findings that they erred in certain discrete respects do not reflect adversely on any individual, having regard particularly to the legal complexities with which public procurement law is veritably saturated.

[49] For the reasons elaborated above, the Plaintiff's challenge succeeds. Giving effect to this conclusion and having regard to the prayer in the amended Statement

of Claim, I propose, subject to further submissions, to order that the impugned decision be set aside and to award costs to the Plaintiff.