



Public Procurement and the EU Regulations - pitfalls, practice and possible solutions

Introduction

1. The purpose behind this paper is, in one sense, a simple one - namely to review the EU Procurement Rules. The reason we thought it was necessary, was because of the increasing number of cases - both reported and otherwise - where unsuccessful tenderers are not only bringing cases alleging breaches of the procurement rules but they are winning those cases.
2. Accordingly the paper is divided into four sections:
 - (i) A summary of the EU Procurement Rules - from the viewpoint of framework agreements, as this seems to be the area of most (legal) activity at the moment;
 - (ii) A look at some of the proposed future changes to the EU Procurement Rules;
 - (iii) A review of some of the recent cases from Europe, Northern Ireland, and England and Wales; and
 - (iv) Confidentiality and the competitive dialogue procedure

The EU Procurement Rules - Framework Agreements

3. Framework agreements are, of course, used typically where an employer has a long- term programme of work in mind and is looking to set up a process to govern the individual construction or supply packages that may be necessary during that framework term. Framework agreements allow an employer to instruct another party to carry out works or provide services, by reference to pre-agreed terms, over a (usually) pre-agreed period of time.
 4. Arrangements for framework agreements and call-off contracts are governed by the detailed rules of the Public Contracts Regulations 2006 (SI 2006/05) which are designed to implement the Consolidated EU Directive 2004/18/EC. By Regulation 19 a framework agreement is defined as an agreement with suppliers, the purpose of which is to establish the terms (in particular terms as to price and, where appropriate, quality) governing contracts to be awarded during a given period. This definition covers agreements which are in themselves contracts, i.e. an agreement in writing, which places a *binding obligation* on the public authority to purchase works, goods or services for consideration. This type of framework agreement was covered by the pre-2006 Regulations as it could be treated in the same way as any other contract. However, the term “framework agreement” can also refer to an agreement that sets out the terms and conditions between the parties for the purchase of works, goods or services *but* where there is *no binding obligation* on the parties and in particular the contracting authority to purchase anything. The contract is only formed when (and if) the purchase is actually made at a
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later date. It is this type of framework agreement that previously caused difficulties as it could be classified as a contract under the pre-2006 Regulations, and it is this type of agreement that the 2006 Regulations explicitly address.

5. If a contracting authority chooses to adopt a framework approach it will be necessary to advertise the proposed framework agreement, provided the estimated value of the works, goods or services procured over the life of the framework exceeds the relevant EU threshold. The OJEU notice must:
 - (i) Make it clear that a framework agreement is being awarded;
 - (ii) Identify the contracting authorities who are entitled to make purchases or call-off under the framework agreement;
 - (iii) State the length of the framework agreement (the maximum length of a framework agreement is four years unless there are justifiable exceptional circumstances);
 - (iv) Set out the estimated maximum quantity or value of works, goods or services to be procured under the framework agreement, in other words set out the value and frequency of the call-offs.
6. Framework agreements can be made with either one tenderer or more, but if there is more than one tenderer to be appointed then the minimum number should be three to ensure that when purchases are made there is still an element of competition.
7. Once the framework agreement has been awarded it is not necessary for the contracting authority to go through the procurement procedures again when making purchases under the framework, but the contracting authority is required to invite all tenderers who are capable of performing the contract and invite them to submit a tender within a specified time. The contracting authority must award the contract to the best tenderer on the basis of the award criteria specified.¹
8. Where a framework agreement is concluded with one supplier then subsequent contracts under the agreement must be awarded within the terms laid down in the framework agreement. There can be no substantive change to the specification or the terms and conditions that have been agreed at the time the framework was awarded.
9. The JCT Framework Agreement has been designed to comply with the EU Public Procurement Rules. The EU Consolidated Directive (2004/18/EC) defines a framework agreement as an agreement with the suppliers, the purpose of which is to establish the terms governing contracts to be awarded during a given period, particularly with regard to price and quantity. If a framework agreement, as defined under the Consolidated Directive, is duly advertised and let in accordance with its provisions, every separate call-off contract awarded under the framework will not have to be advertised separately. For a framework to be brought within the directive, its estimated maximum value must exceed the threshold set out in the directive.
10. Accordingly, the JCT Framework Agreement acknowledges that where an employer is subject to the 2006 Public Contracts Regulations:
 - (i) By clause 3.2 the parties acknowledge they have entered into the Framework Agreement pursuant to a compliant tender process including the issuing of the OJEU notice.

1. As we will see, these criteria must be transparent. See *Emm G. Lianakis AE v Alexandroupolis* - CILL May 2008

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- (ii) By paragraph 11 of the JCT Guide, the Framework is capable of establishing a pricing mechanism which will be applied to particular pricing requirements during the period of the framework.²
 - (iii) Note 7 to the Framework Particulars establishes the terms that will apply for example setting out the form of underlying contract which will apply to the separate call-offs.
 - (iv) Note 9 to the Framework Particulars and paragraph 12 of the JCT Guide confirm that an agreement should not be concluded for a period that exceeds four years.
11. In addition, the tender for a framework agreement must, like any other public tender, comply with the relevant EU regulations, and here is where certain authorities have been coming unstuck. For example, Directive 2004/18/EC on the Co-ordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts notes that:

Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result it is appropriate to allow the application of two award criteria only: the lowest price and the most economically advantageous tender. To ensure compliance with the principle of equal treatment in an award of contracts, it is appropriate to lay down an obligation - establish by caselaw - to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, but the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases they must indicate the descending order of importance of their criteria.

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

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

12. It is this question of openness and transparency where the focus of the recent litigation lies. To take one European example of this, the case of *ATI v ACTV Venezia et al.*³ Here the parties were given four award criteria

2. This does not necessarily mean that the price should be fixed.

3. [2005] ECR I-10109

with a maximum of 60% marks for the first criterion and a smaller figure for the other criteria. Subsequently, after the submission of tenders but before the envelopes were opened, the panel (or jury) divided or weighted the 25 percentage points available under criterion 3 into five subheadings. A disappointed contractor challenged that step. The ECJ ruled:

18. As a preliminary point, it must be observed, as the referring court pointed out, that, by the decision at issue in the main proceedings, the jury simply decided how the 25 points allocated for the third award criterion had to be distributed among the five subheadings in the contract documents.

19. Accordingly, the questions referred should be understood to relate essentially to the question whether Article 36 of Directive 92/50 and Article 34 of Directive 93/38 must be interpreted as meaning that Community law precludes a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those subheadings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared.

21. Next, it must be observed that the award criteria defined by a contracting authority must be linked to the subject matter of the contract, may not confer an unrestricted freedom of choice on the authority, must be expressly mentioned in the contract documents or the tender notice, and must comply with the fundamental principles of equal treatment, non-discrimination and transparency (see *Concordia Bus*, cited above, paragraph 64).

22. In the present case, it must be observed, in particular, that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives and that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed.

23. It must also be observed that, in accordance with Article 36 of Directive 92/50 and Article 34 of Directive 93/38, all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope.

24. Similarly, in order to ensure respect for the principles of equal treatment and transparency, it is important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, their relative importance, when they prepare their tenders.

25. Finally, it is for the national court to assess, in the light of these rules and principles, whether, in the case in the main proceedings, the jury infringed Community law by applying a weighting to the various subheadings of the third criterion for the award of the contract.

26. In that regard, it must be determined first whether, in the light of all the relevant facts of the case of the main proceedings, the decision applying such weighting altered the criteria for the award of the contract set out in the contract documents or on the contract notice.

27. If it did the decision would be contrary to Community law.

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.

29. If it did the decision would be contrary to Community law.

30. Third, it must be determined whether the jury adopted the decision to apply weighting on the basis of matters likely to give rise to discrimination against one of the tenderers.

31. If it did the decision would be contrary to Community law.

13. A slightly shorter formulation was adopted in the English case of *Lion Apparel Systems Ltd v Fireby Ltd*. Morgan J noted that:

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

The consequences of failing to comply with the European/ Public Procurement Rules

14. The courts can order interim or non-financial remedies by suspending either the award procedure or the implementation of a decision to award. Alternatively, a party who is able to show that there has been a breach of the procurement rules may be able to bring a claim for damages.
15. When considering whether to grant an injunction, the court will take the usual factors into account. These include whether there is a strong case to be tried and whether damages are an adequate remedy, for example the failure to advertise a contract or the unlawful exclusion of a tenderer are instances where damages would probably not be adequate. However, the 2006 Regulations state quite clearly that interim relief may not be awarded by the court once the contract has actually concluded.⁴ The courts must weigh up the damage resulting from the delay to the procurement against the other interests that may be prejudiced if no interim relief is given and the claim turns out to be well founded. This can vary considerably according to the nature of the project. The courts will need to take into account the interests of other firms involved in the award procedure who may also be prejudiced by the delay and, in particular, the interests of any firm that may have been awarded the contract.⁵ Equally, the court has to consider whether there would be inconvenience to the contracting authority if there is a delay to the contract.
16. If a claim is to be brought, there are a number of preconditions. Before an aggrieved party can commence legal proceedings for damages, it must notify the contracting authority in writing of the breach or anticipated breach of duty complained of and notify the authority of its intention to bring proceedings and seek damages under the 2006 Regulations pursuant to Regulation 47(7)(a).
17. There is also a strict time limit of three months in which to bring a claim from the date of the breach of the 2006 Regulations. The time limit of three months is not a guaranteed time period within which to bring proceedings, but a long-stop period. Regulation 47(7)(b) states that:
- Proceedings under this Regulation must not be brought unless those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of those proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.
18. If a claim for damages is being brought, then there are primarily three legal bases upon which that claim can be made:
- (i) Breach of statutory duty;
 - (ii) Breach of an implied contract; or
 - (iii) Misfeasance in public office.

⁴ Regulation 47(9)

⁵ *Boroughs Machines v Oxford Area Health Authority*

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19. Regulation 47(1) places an obligation on the Contracting Authority to comply with the relevant provisions of the Regulations and with any directly effective Community obligation under the Procurement Directives. Thus any Contracting Authority that is entering into a contract under the 2006 Regulations has a statutory duty owed to any actual or potential tenderer who could or would have been awarded the contract. The court is given the following powers by Regulation 47(6):

A breach of the duty owed in accordance with paragraph (i) or (ii) is actionable by any economic operator which, in consequence, suffers or risks suffering loss or damage and those proceedings shall be brought in the High Court.

20. In the case of *Harmon CFEM Facades v Corporate Officer of the House of Commons*,⁶ Judge Lloyd QC noted that:

As a matter of general approach, I consider that where compensation is sought by a tenderer for being deprived of an opportunity to be awarded the contract, the approach should be to award damages on a “contractual” basis rather than on a ‘tortious’ basis, although the remedy is a statutory remedy and usually the assessment damages for breach of a statutory duty is akin to those for a comparable tort.

21. The Judge also acknowledged that:

I consider that it is now clear in English Law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenders fairly.

22. The terms of the implied contract included the principles of fairness and equality. The judgment in *Harmon* therefore establishes the existence of an independent cause of action in contract covering similar matters as that claimed under the Regulation. At the time, this aspect of the decision in *Harmon* was criticised by a number of commentators but this common law approach of implying an agreement to act fairly during the tender process has developed vigorously in various Commonwealth countries as well as in more recent times in the UK.⁷

23. The remedy of misfeasance had been open to litigants before the Regulations came into existence and it remains available to aggrieved tenderers. Misfeasance in public office involves an element of “bad faith” and arises when a public officer exercising his power specifically intended to injure the claimant, or where he acted in the knowledge of, or with reckless indifference to, the illegality of his act and in the knowledge, or with reckless indifference to, the probability of causing injury to the claimant or a class of claimant. If successful in proving a breach of the duty of care that the public officer owed, then the losses that are recoverable are only those losses which were foreseeable by the public officer concerned, as a probable consequence of his act. In *Harmon*, this claim failed because the Judge felt that the other remedies which were available to the claimant were effective.

24. Of course, establishing a breach does not automatically translate into an award of damages. A claimant must also prove that it has suffered a loss as a result of that breach. Claims for damages following a breach of the Regulations or, for that matter, an implied contract, will inevitably contain a claim for the tender costs incurred. If such a claim is to be successful, the claimant has to show that it would not have tendered at all had it known the Regulations would be breached or that the contracting authority would breach its obligations to treat it fairly under the implied contract. Would the tenderer have tendered for the contract in any event

6. [1999] EWHC TCC 195

7 See for example, *Aquatron Marine v Strathclyde Fire Brigade* [2007] CSOH 185

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- irrespective of the contracting authority's actions?
25. The other element of a claim for damages is the loss of profit or overheads that the tenderer would have obtained or the chance of doing so had the tenderer been awarded the contract. The ability to make claims for loss of chance or loss of receiving a future benefit is well established. The leading case is *Allied Maples v Simmons & Simmons*.⁸ The claimant must establish on the balance of probability that there is some link between the defendant's negligence and the claimant's loss. Where the quantification of the claimant's loss depends on future uncertain events, the loss has to be determined on the court's assessment of that risk materialising. Where the breach consists of an omission, then the link depends on answering the hypothetical question as to what the claimant would have done if the defendant had not been guilty of the omission. Provided that there was more than a speculative chance, the court will assess the loss of chance on a percentage basis and award a corresponding percentage of the overall damages claimed.
 26. In *Harmon*, the court considered that it was "virtually certain" that Harmon would have been awarded the contract if the defendant had not breached its obligations and as a consequence Harmon succeeded in recovering its tender costs. However, in relation to Harmon's claim for loss of profits, the Judge distinguished between the evaluation of "success" and the probability that the whole net profit would be recovered. The recovery of profit would clearly have been subject to the number of uncertainties, and on the facts the Judge assessed the overall percentage of probability of profit being earned as 35%, which means that *Harmon* would be entitled to 35% of whatever profit it could establish it would have made had it been awarded the contract.
 27. It is likely that claims for breach of the Procurement Rules will increase. There is an increasing awareness within the construction industry and legal firms of the ability to commence claims under procurement regulations. Other factors which may provide some encouragement to tenderers are the Freedom of Information Act and also the internet. Local authorities, in particular, post on the internet the minutes of various committee meetings. It is therefore possible to obtain information as to what has been discussed and decisions taken as to why contracts have been awarded.
 28. There have been some reported cases of claims under framework agreements;⁹ undoubtedly more will follow. In complex projects, the failure or substantial amendment of the project can cause tenderers to lose many millions of pounds in wasted tender costs. These losses are real, as opposed to loss of future profit, and in these circumstances tenderers have and will pursue claims to recover those losses.

Procurement legislation: the future

29. The Office of Government Commerce" ("OGC") is currently consulting on the best way to implement (the new ineffectiveness remedy in Directive 2007/66 "Remedies Directive"). The OGC's consultation ends on 24 October 2008. The purpose of the old legislation was to ensure that anyone who had suffered a loss as a result of breaches of EU procurement legislation, would have effective and prompt review procedures. The basis of the new Regulations is to improve those procedures and make them more effective.
30. Further, the legislation is intended to:

⁸ [1995] 1WLR 1602

⁹ For example *Henry Brothers (Magherafelt) Ltd & Others v Department of Education For Northern Ireland* - [2007] NIQB 116 and *Lettings International Limited v London Borough of Newham* [2007] EWCA Civ 1522

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- (i) harmonise the standstill arrangements following contract award; and
 - (ii) introduce ineffectiveness as a remedy for illegal direct awards.
31. The first proposed change relates to the standstill procedure. This is the 10-day period between contract award and contract conclusion during which an unsuccessful bidder may apply for a review of a public authority's decision and seek information on why it has not been awarded the contract. The Remedies Directive imposes a new minimum standstill period of 10 to 15 days (and being a minimum period the government could close a longer period), depending on the means of communication used to inform bidders that they have been unsuccessful (electronic or otherwise). Whilst a breach of the standstill period currently does not carry any immediate sanctions in the UK under the new Regulations, such a breach in the future will lead to the automatic suspension of the contract conclusion pending resolution of the challenge. The concluded contract may also be set aside. Currently, if a contract is awarded in breach of the standstill period, a tenderer only has recourse to damages.
32. Accordingly, under the new Regulations contracting authorities¹⁰ will be required to provide each bidder with a precise statement of when the standstill period starts and ends. Again this is new.

What is “ineffectiveness”?

33. This is a new concept introduced by the Regulations. It is being introduced to act as a remedy and therefore a deterrent to the “illegal direct award”. It allows for the possibility that a contract that has been concluded, could be rescinded under this new “ineffectiveness” principle. Currently, contracts that have been concluded, cannot be rescinded.
34. A contract under the new directive will be considered to be ineffective if:
- (i) a contract notice is not published in the OJEU when required;
 - (ii) legislation is not correctly followed, i.e.:
 - the contract is concluded before the end of the standstill period;
 - the contract is awarded during an ongoing review sought by a disgruntled bidder from the authority.
 - (iii) a contract is concluded before the court has taken at least interim measures.
35. However, in order for the rule to apply in these circumstances, the following conditions must be met:
- (i) because of the breach, the tenderer cannot pursue other remedies apart from the contract annulment;
 - (ii) the breach is combined with an infringement of the relevant Procurement Directive and has diminished the chance of the disgruntled bidder from winning the contract.
36. How will a contract be rescinded under the new “ineffectiveness” principle? The new Remedies Directive leaves Member States to decide on how to apply ineffectiveness in the context of procurement legislation. They may, for example, choose that contracts are annulled retrospectively, such that the contract is annulled from the date when it came into operation; or prospectively, from the time a court decides to

¹⁰ There is a potential opt-out provision for services such as health care or even framework agreements. It remains to be seen what approach the Government will take.

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- apply the annulment.
37. The OGC stresses that a retrospective cancellation of a contract declared ineffective would “seek to ‘undo’ what has already been done”, which in many cases would be “difficult, unwise or even impossible”. Additionally, it is unclear what such an approach to ineffectiveness would entail in practice, particularly where it is impossible to “undo” a service performed or to return a consumed product.
 38. Member States may opt for prospective annulment of contracts only. This would free the “parties from any obligations under the contract”, but the OGC has indicated that prospective annulment would need to be combined with additional penalties.
 39. In some cases, prospective cancellation could lead to one party having benefited more from the contract than the other. In such a case the OGC has suggested that the courts should decide which method of annulment should apply. Member States may also allow courts the discretion not to apply ineffectiveness in exceptional circumstances.
 40. Are there any proposed exemptions from ineffectiveness? Yes, under certain conditions, contracts can be exempted from ineffectiveness:
 - (i) if an OJEU publication is not required (for example in the case of Part B services), but a voluntary notice is published before the selection process and the contract is awarded at least 10 days after this publication;
 - (ii) in the case of DPS and framework agreements, ineffectiveness will not apply if the standstill period is waived, provided the contracting authority respects the specific DPS and framework regulations.
 41. So what penalties does the New Remedies Directive propose? The new directive states that penalties, whether as an alternative to ineffectiveness or as an addition to prospective ineffectiveness, must be in the form of fines or a shortening of the contract duration. Additionally, according to the new directive, penalties must be “effective, proportionate and dissuasive”. The OGC welcomes comments on how this requirement should be satisfied and on whether to impose fines, shorten the contract or apply both.
 42. What are the time limits? The Remedies Directive suggests minimum time limits for seeking a review of a procurement process in court. This can be extended by the Member States. The minimum limit will be 30 days if a contract award notice is published (for contracts requiring no prior publication), or if the authority informs the candidates of the conclusion of the contract and explains the decision, as required, under existing procurement rules.
 43. The minimum limit will be six months from the day after which the contract was awarded in cases where the above requirements have not been met.

Challenges for breaches of the EU Public Procurement Rules - recent caselaw

44. As I have said, one of the more important trends which we have noticed over the past year or so is the increasing number of cases coming before the courts involving successful challenges to tender procedures, in particular in relation to alleged breaches of the European Public Procurement Rules. One reason for this is undoubtedly that tenderers are
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becoming more aware of the possibility and indeed availability of their right to challenge the procurement process if they are unsuccessful. Accordingly, the final part of this paper will look at the following decisions, all of which came out in 2008:

- (i) *EMM G Lianakis AE and Others v Municipality of Alexandroupolis*
 - (ii) *Letting International Ltd v London Borough of Newham*
 - (iii) *McLaughlin and Harvey Ltd v Department of Finance and Personnel*
 - (iv) *McLaughlin and Harvey Ltd v Department of Finance and Personnel - Part 2*
 - (v) *McLaughlin and Harvey Ltd v Department of Finance and Personnel - Part 3*
 - (vi) *Henry Brothers (Magherafelt) Ltd & Others v Department of Education for Northern Ireland*
45. As we have seen, back in 1999 HHJ LLOYD QC, in the case of *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons 2*, observed that the principle of equal treatment of tenderers requires that all tenders comply with the tender conditions so as to ensure an objective comparison of those tenders which are submitted.

EMM G Lianakis AE and Others v Municipality of Alexandroupolis

46. So what must you tell bidders about your award criteria and your evaluation methodology? This basic principle of equal treatment came before the European courts in the case of *EMM G Lianakis AE and Others v Municipality of Alexandroupolis*.¹¹ This was a case about Article 36(2) of Council Directive (EEC) 92/50 which provides that:

Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.

47. Here, the town council had invited tenders for a town planning project. It had set out the award criteria in the contract notice and had listed these criteria in a specific order of priority. The list was (i) proven experience on projects carried out over the last three years (ii) manpower and equipment, and finally (iii) the ability to complete the project by the anticipated deadline. Thirteen consultancies responded. However, during the evaluation procedure, the committee in charge of the appointment set weightings of 60%, 20% and 20% for each of the three award criteria. It also set up certain sub-criteria, for example stipulating that experience should be evaluated by reference to the value of completed projects.
48. As the stipulation of the weighting factors and sub-criteria was only made at a date after the submission of the tenders, certain tenderers brought proceedings against the town council. The Greek Court referred the case to the European Court asking whether Article 36(2) precluded a contracting authority from acting in this way, i.e. stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or notice.
49. The European Court noted that the purpose of the legislation is to ensure that there is no discrimination between different service providers. Where a contract is to be awarded to the economically most advantageous

11. Case C-532/06

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- tender, a contracting authority must state in the tender documents the award criteria which it intends to apply. Potential tenderers must be in a position to ascertain the scope of the criteria elements when preparing their tenders. Therefore, a contracting authority cannot apply weighting rules or sub-criteria which it has not previously brought to the tenderers' attention.
50. Tenderers must be placed on an equal-footing throughout the procedure, which means that the criteria and conditions governing each contract must be adequately publicised by the contracting authorities. Here, the projects award committee referred only to the award criteria and it was only later after submission of the tenders that it introduced the stipulation of the weighting factors. Accordingly, this did not comply with the article requirements. In other words, the European Court was making clear that compliance with the legislation requires the equal treatment of tenderers. The evaluation process must be transparent and objective. That had not happened here.
51. As to the consequences of any such breach, where a public authority does not adhere to applicable public procurement law (or the "OJEU Procedure") when tendering for work, then it is susceptible to a claim by an aggrieved tenderer. The whole thrust of the public procurement law is to ensure that those tendering are able to compete on an equal basis and that public contracts are awarded fairly. There is also common law authority to the effect that public authorities engaged in tendering processes may in fact create collateral contracts with the tendering parties. The nature of those contracts is likely to be that if the public authority in question has stated that it will evaluate tenders in accordance with a given procedure, then that public authority is obliged to the tendering parties to do just that.

Letting International Ltd v London Borough of Newham:¹² the requirement of transparency

52. Here, Mr Justice Silber applied the Lianakis decision and held that a contracting authority cannot further define its award criteria following submission of tenders, as to do so would be contrary to the relevant directive and the principles of equal treatment and transparency. Letting International Ltd (LIL) had tendered for a position under a framework agreement. The tender evaluation criteria stated that the contract would be awarded on the basis of the most economically advantageous tender.¹³ The evaluation of the tenders was to be based on the detailed written response, pricing and site visits. The evaluation criteria were weighted as follows, specification (50%), price (40%) and suitability of premises, staffing and working conditions (10%).
53. After LIL's tender failed, it sought details from Newham as to how the tenders had been marked. It emerged that the proportions attributed to the subject matter of the method statements establishing compliance with specification were not equal but varied between 5% and 17%. These weightings were established after the tender had been published but before any tenders had been received. LIL also learnt that the overall criteria of compliance with the specification had been broken down into 28 sub-criteria. The weightings had not been previously disclosed. Finally, when evaluating the sub-criteria, full compliance with the specification received three marks out of five, whilst the next highest mark was reserved for tenders which not merely met but actually exceeded the specification. Consequently, LIL obtained an interim injunction, upheld by the Court of Appeal, restraining Newham from entering into any contract

12. [2008] EWHC 158]

13. Often shortened to MEAT

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- or framework agreement pursuant to the above tender arrangements.
54. Following the *Lianakis* case, and in accordance with the Public Contracts Regulations 2006, the Judge noted that if parties wish to use sub-criteria, they must state them in the tender notice. The requirement of transparency means that all criteria used to enable a contracting party to determine which tender will be accepted must be disclosed. The weighting here should, in the view of the Judge, have been disclosed. The critical factor was not whether the disclosure of the weightings would have affected the preparation of the tenders, but whether they could have affected the tenders.
55. If a tender meets and focuses on the sub-criteria considered most important by the contracting authority, it is much more likely to obtain higher marks than one which deals not only with those issues, but also matters which fall outside the selected key sub-criteria. A claim for breach of the EC regulations is not dependent on a party showing that if there had been full disclosure of the relevant criteria and approach, the party's tender would have been different. All a party has to show is that as a result of the breach, it risked suffering loss and damage. Thus, the claim that Newham failed to mark its tenders fairly and objectively became academic as it would not alter the relief to which LIL was entitled. (As it happened, LIL failed in this part of their case.)
56. Accordingly, if LIL had been informed, as it should have been, of the weight attached to each item in the method statements and that to obtain full marks it had to exceed the specification, then it would have had a "significant chance" of being both a successful tenderer and then successfully obtaining some work under the framework agreement. That was enough to justify bringing its claim for breach of the transparency provisions.
57. During the case, the parties had agreed that if the Judge reached the conclusion that he did, he should then invite the parties to agree on the remedy that should be adopted. This he did, although noting that:
- rather than having a new tender procedure, Newham might consider it prudent merely to add the name of the Claimant as one of the successful tendering parties. This is merely a suggestion and I will happily hear submissions if this were not to be mutually acceptable.

Seeking an injunction - *McLaughlin and Harvey Ltd v Department of Finance and Personnel* - Part 1

58. It is not yet known whether this suggestion will assist in the resolution of the dispute. However, it is certainly often the preferred outcome for aggrieved tenderers. In the Northern Irish case of *McLaughlin and Harvey Limited v Department of Finance and Personnel*,¹⁴ M & H had sought an interlocutory injunction preventing the award of the framework agreement to the successful tenderers.
59. In October 2007 M & H had tendered for a place on the defendant's proposed four- year framework agreement for various construction projects with an estimated value of £500m-£800m. On 17 December 2007 they were told that their tender had been unsuccessful and therefore requested a debrief meeting. At this meeting, M&H claimed that they realised that the Department had marked their tender using a methodology which had not been disclosed to them in advance. M & H claimed this was in breach of the European requirement for transparency and was therefore unfair. They had come sixth in the competition (there

being five places on the framework) but their score was only 1% behind and so even a modest improvement in their score would have affected the outcome materially. However, M&H were unable to persuade the court that the Department should not be allowed to proceed with the award of the framework agreement. The key test in such cases is a sequential one taken from the decision in *American Cyanamid Co v Ethicom Ltd*:¹⁵

- (i) Has the plaintiff shown there is at least a serious issue to be tried?
 - (ii) If it has, has it shown that damages would not be an adequate remedy for the plaintiff and would be an adequate remedy for the defendant if an injunction were granted and it ultimately succeeded?
 - (iii) If there is doubt about the issue of damages the court will then address the balance of convenience between the parties;
 - (iv) Where other factors are evenly balanced it is prudent to preserve the status quo;
 - (v) If the relative strength of one party's case is significantly greater than the other, that may be legitimately taken into account; and
 - (vi) There may be special factors in individual cases.
60. The Judge added a seventh, namely that the court has an overall discretion to do what is just and convenient in the circumstances.
61. One of the factors the court took into account was the effect on the Department of granting the injunction but then the Department and not M&H succeeding at the trial. Usually this could be dealt with by M & H as claimant giving an undertaking or cross-undertaking in damages. However, the undertaking offered here was a qualified one confined to the additional costs sustained by the Department in putting individual projects out to tender generally pending the trial. The Department noted that construction inflation was running at 4%-6% and that inevitable delays caused by the injunction could add as much as £1.6m to construction costs on projects of this size. Furthermore, the Judge noted that the whole purpose of this framework agreement is to obtain greater value for money for the public purse and the loss of that for projects for half a year would cost them £7.5m. Therefore M & H's undertaking in damages would not fully compensate the Department in the event of an interlocutory injunction being granted but the Department ultimately succeeding at the full hearing.
62. The final question the court considered was whether or not it could order the Department to add M & H to the list of contractors who benefit from the framework agreement. At first blush, that argument was contrary to Regulation 47(9) of the Public Contracts Regulations 2006.

In proceedings under this Regulation the court does not have power to order any remedy other than an award of damages in respect of a breach of duty owed if the contract in relation to which the breach occurred has been entered into.

63. That seemed to preclude any award other than damages if the injunction was not granted and the Department proceeded to conclude the framework agreement. But did it? The court disagreed that a framework agreement was a "contract" within the meaning of Article 47(9). This definition distinguished between an agreement or arrangement and a contract which would only be entered into thereafter. There was a clear distinction in the language of that Regulation between the framework agreement as such and any contract or specific contract made under it.

15. [1975] A.C.296

The purpose of Regulation 47(9) is not to compel a contracting authority to break a contract with another economic operator which it has entered into. Either the disappointed economic operator obtains interim relief preventing the contract from being entered into or it must be content with damages. However, a framework agreement is different. It is the selection of a number of operators, the number not being defined in the Regulations, who will be eligible to bid for these contracts over the duration of the framework agreement. Therefore it was not impossible that the court, if satisfied that there was a breach of transparency or a manifest error or unfairness which could have had a causative effect on the outcome, would order the Department to add the plaintiff as a sixth contractor to the list.

64. Public bodies are increasingly using framework agreements and the failure by a contractor to secure a place on those frameworks can have a significant impact on its business. This case demonstrates some of the hurdles faced by a contractor in trying to prevent the award of that framework agreement where it alleges there has been unfairness in the tender process. In this case, no evidence was put forward by the plaintiff that the existence of its business rested on being awarded a place on the framework agreement and therefore damages would constitute an adequate remedy. The court also was clearly persuaded by the submissions that any delay to the contract award would significantly delay and increase the costs of major infrastructure projects which ran contrary to the intention of awarding the framework in the first place.

McLaughlin and Harvey Ltd v Department of Finance and Personnel - Part 2

65. So the court having refused to grant an injunction, the next step was a full hearing on liability. Judgment was released in September 2008. The Judge found in favour of M & H. The Judge, Deeny J went through the events again. He noted that it was when they sought a debrief meeting that M & H learnt that all the tenders had been marked using a particular methodology that had not been disclosed in advance. M & H came sixth, only 1% behind the contractors placed fifth and fourth. M & H said that these undisclosed criteria were new. The Department said the criteria were a perfectly legitimate working out of detail of the material which had been included in the tender documents.
66. The selection of the economic operators for the framework agreement was to be carried out by a panel of the central procurement directorate of the Department. Various tender documents were prepared. All tenderers were directed to read the tender documents and it was stated that the responses would be evaluated against the criteria provided in Section 8.3 of these documents. However, there was to be additional material not in the documents given to the tenderers, which M & H said consisted of criteria or sub-criteria to be used for evaluation. The Judge found that the tenderers were judged by a number of different criteria but that the criteria were given weightings which varied from topic to topic. It did not seem that the weightings for each topic were predicted or even predictable by a reasonable bidder. They were subjective judgments formed by the tender panel collectively. What the Department should have done was to provide the weightings to the bidders in advance. This material could have affected the preparation of the tender documents. It was likely to have done so. A bidder would be bound to take it carefully into account in allocating their bid.
67. That said, there was no intention on the part of the Department to
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discriminate against M & H. Indeed, no other bidders were given the information. What had happened was that those preparing the evaluation guide prepared it before they looked at the tenders. The Judge thought that it would be preferable that any sub-criteria development for the tenders should be formulated and spelt out before the tenders are received so as to avoid the suspicion of some special treatment. The Judge did note that it was somewhat surprising that the Panel managed to do all their valuation work without making any notes at all. This was particularly the case when the scheme in relation to weightings and sub-weightings was very detailed and complex.

68. Therefore, the Judge found that there was a breach by the Department of a duty owed under Regulation 47 of the Public Contracts Regulation 2006.

McLaughlin and Harvey Ltd v Department of Finance and Personnel - Part 3 - the remedy

69. Following the judgment in Part 2, the parties were unable to agree on a remedy for M & H. Therefore the case found its way before Judge Deeny again. He made it clear that the matters complained of were neither minimal nor tangential but entitled M & H to some substantive remedy. In particular the Judge recalled that even a modest improvement in the marking of M & H's tender could have materially affected the outcome. Further, some 30% of the marking overall was given under the criterion of price. M & H had the fourth lowest price of the economic operators and therefore was well placed to benefit from any slight improvement in the quality assessment of its tender. Finally the tender was for a place on a Framework containing some £800m worth of contracts over a period of four years.
70. A key issue was the extent of the court's powers to grant remedies. M & H's first preference was for the court, by way of declaration, mandatory injunction or otherwise, to order the Department to add it to the list of preferred economic operators under the Framework. Alternatively M & H asked that the court set aside the contract award leaving the Department either to rerun the competition or dispense with the Framework altogether.
71. Two European Directives were relevant. First, Directive 89/665/EEC of 21.12.89 which notes that:

Whereas the opening up of public procurement to community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law ...Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully in compensation of persons harmed by an infringement.

72. Article 2(1) of the Directive 89/665 provides that Member States:

shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

- (b) Either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
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(c) Award damages to persons harmed by an infringement.

73. Whilst this Directive is currently applicable it came out before Framework Agreements became common.

74. The second directive is Directive 2004/18/EC of 31 March 2004. The theme of this directive is the clear distinction between Framework Agreements and contracts. Regulation 47(6) notes that:

A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court.

75. Regulation 47(8) notes:

Subject to paragraph (9), but otherwise without prejudice to any other powers of the court, in proceedings brought under this Regulation the Court may

(b) If satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with paragraph (1) or (2) -

(i) order the setting aside of that decision or action or order the contracting authority to amend any document;

(ii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach; or

(iii) do both of those things.

76. However, paragraph (9) of the Regulations reads:

In proceedings under this Regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into.

77. The Department said that this paragraph prevented the court from granting any remedy other than an award of damages in respect of the breach of duty. However the Judge rejected this argument. The reason for this was that in his view, the wording of the Regulations specifically referred to a breach in relation to "the contract" which has been entered into. By that was meant a public services, supply or works contract as defined in the Regulations. It would also extend to a specific contract under a Framework Agreement, but not the Framework Agreement itself. If a court is dealing with a public contract or a specific contract under the Framework Agreement (which is just another type of public contract) and the party bringing the proceedings has either not sought or been refused interim relief then the court is not at liberty to set aside that specific public contract. Damages are the only remedy.

78. In the view of the Judge, the purpose of the Regulations was clear. By definition the contract will have been given to a third party which, by the time the matter is before the court, may well be engaged in the very works of supply or construction under the contract. It would be entirely unfair on that third party and, indeed, on the public, to interfere in that

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- contract which has been made. The economic operator under such a contract will have performed work for the Department and will have received or will have been promised remuneration as consideration in return. For the court to set aside a contract which may be partly or wholly performed would be contrary to principle and inappropriate. Therefore damages would be an appropriate remedy.
79. However, the position was completely different with regard to a Framework Agreement. The Framework consists of the pre-selection of certain economic operators who will be allowed to bid, without competition from parties outside the Framework, for specific contracts during the life time of the Framework. Therefore the Department had not made any promises to the economic operators under the Framework, and it had not yet, in fact, awarded any specific contracts.
80. The court considered but dismissed the suggestion that the Department would be at risk of significant litigation from the five successful economic operators if the tender had to be re-run. Whilst they may not succeed the second time, the fact was that the first procedure was conducted unlawfully. Therefore they had not lost anything to which they were lawfully entitled. If in fact they were the best economic operators under the Framework Agreement, it is likely that they would succeed on a re-run of the Framework Agreement procedure. If they did not it was because the second procedure was fairer and more transparent than the first.
81. The position was less clear-cut with regard to M & H's preferred remedy - adding it as a sixth economic operator to the Framework Agreement. In that event the work available to the other five economic operators would be diluted to the extent of having an additional competitor. An additional competitor was as it happened consistent with the strong aim of encouraging competition in community law. But the successful parties had entered into a procedure by which they were selected as one of only five economic contractors eligible for this substantial quantum of work over the next four years. Thus the likelihood of the successful tenderers being able to take action against the Department was not "beyond the bounds of possibility".
82. Judge Deeny said that the aim of the court was to achieve fairness and transparency according to law. The setting aside of the decision would, in all likelihood, lead to a rerun of the Framework Agreement competition. It would be rerun in the more transparent way indicated by the court. That would be in the public interest to secure the tenderers who would be most economically advantageous to the public. If M & H was right it may well improve its performance but if it does not, as above, the fairer new procedure should lead to the five best tenderers succeeding, whether or not they are in the present top five or six.
83. There was no legal precedent for the proposal that the Judge here should simply add M & H to the list of contractors. As we have seen, Silber J proposed it in the *Newham* case. However, ultimately the court here felt that to insert M & H into the Framework, whilst it could be done, it could only be done by a "somewhat strained" interpretation of the legislation. On the other hand the Judge was entirely satisfied that the court had the power to set aside the decision to enter into a Framework Agreement with five parties but excluding M & H.
84. The Department submitted that that the proper remedy here was one of
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damages. The issue before the Judge was which is the most appropriate remedy to grant? The assessment of the loss of profits might well have to wait for some time, perhaps years, to allow the court to make a reasonable estimate of the profits which the successful economic operators enjoyed from the Framework Agreement. This was in the view of the Judge clearly not ideal. The profits of the economic operators who were given contracts under the Framework Agreement (or who are not) would not necessarily be publicly available, particularly as they applied to each contract. Indeed as some of these contracts were likely to be of a very substantial nature it may take years for them to work out before one would know what profit, if any, the economic operator made out of a particular contract.

85. The Judge accepted that the appropriate way to proceed on any assessment of those damages would be on the basis of the loss of chance principles. However, reliably fixing the value of that percentage loss of chance would take time, face difficulties and be costly. This led the Judge to conclude that whilst the Department was entitled to maintain that damages could be an adequate remedy, in his view they were an inferior remedy here to that of setting aside the Framework Agreement. Judge Deeny said that:

I say that not only for the reasons set out above but for public policy reasons. At the present time there is a question mark over whether the best five economic operators were selected under this Framework Agreement. Given that some £800m of works are said by the Department to be at stake here it must be in the public interest to try and ensure that the best five, whether or not that includes the plaintiff, are in fact selected. Secondly it cannot be in the public interest for the public to pay for these new buildings and to pay the plaintiff again a percentage of the profits of the contractor who actually builds the new buildings. That is in the most literal sense of the word a waste of money. It may be that in some circumstances there is no alternative to such an award being made, but where, as here, there is a much better alternative I consider it preferable to opt for it.

Henry Brothers (Magherafelt) Ltd & Others v Department of Education for Northern Ireland

86. This is another case in two parts - so far. Henry Brothers made an application for interim relief to restrain the Department of Education from concluding a framework agreement for the provision of major construction works. After the bids were evaluated, Henry Brothers did not make the top eight.
87. That evaluation, in accordance with the tender procedure, was weighted 80% qualitative and 20% commercial. The proposed contract was the NEC3, and the Department chose to rely upon the fee percentage of the determinative commercial criteria to the exclusion of any other objectively verifiable element of cost. The view of the Department was that the percentage fee was the key financial differentiator between contractors. To a large degree all the Northern Irish contractors would source goods from the same place. The Department was relying on the collaborative approach to pricing of the NEC3.

88. There were certain difficulties with this approach. As Henry Brothers said:

For the assumption to even stand a remote chance of being correct each contractor would need to use exactly the same subcontractors, material suppliers and labour on each of the projects and to secure the same commercial terms with each. This just does not happen in the industry.

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89. At first instance the Judge refused the injunction. The fundamental issue here was likely to be the nature and structure of the criteria adopted by the Department for the purpose of identifying the most economically advantageous offer. This case involved a fairly sophisticated scoring system and the personnel employed by the Department appear to have been experienced. It could be argued that the use of the percentage fee as a pricing mechanism was a transparent and objective criterion aimed at identifying the most economically advantageous tender, that it was properly advertised and remained fixed after the primary competition, and that it was applied fairly to each of the competing contractors without discrimination. Furthermore, whatever may be the strengths of the criticisms of the manner in which the secondary competition was to be conducted, it was as a result of the primary competition, rather than the secondary competition, that the plaintiffs had been excluded. The Judge said:

While the balance is not a particularly easy one to resolve, after giving careful consideration to all the relevant factors I am not persuaded that I should exercise my discretion in favour of the plaintiffs and, accordingly, I refuse the application for interim relief. However, I am satisfied that the issue as to whether the procedure adopted by the department complies with the relevant domestic and EC law is an important one and one that needs to be authoritatively determined as soon as may be convenient for the parties.

90. This case, too, went to a full liability hearing and the judgment was released in October. This hearing set out in full the procedure adopted by the Department. On 13 March 2007, a contract notice was published in the *Official Journal of the European Communities*. The notice stated that the framework agreement would last for 38 months and that the estimated total value of the project was between £550m and £650m. The maximum number of envisaged participants would be eight.
91. Each contractor who requested information was supplied with a copy of the Memorandum of Information and instructions to tenderers, 3 and market information day was held on 23 March 2007. The contract was to be based on the NEC form and a two-stage strategy would be adopted involving a primary competition for the purposes of selecting those to be included within the framework agreement and a secondary competition to identify a contractor who had a specific project. During the tender process, eight clarification notes were issued.
92. Contractors were required to return questionnaires by 4 May 2007. On opening the tenders, the consultants recommended that all 12 contractors had met the criteria stipulated and should be invited to tender.
- (i) On 9 June 2007, invitations to tender were sent out by email.
 - (ii) Contractors were required to return tender submissions by 7 August 2007. During this stage, 11 clarification notes were issued. Clarification note 4 indicated that tenders would be evaluated in accordance with the following criteria: 80% qualitative and 20% commercial, the commercial section being based on a submission of direct fee percentages, subcontract fee percentages and indicative fee percentages for design services. The qualitative section was based on response to 26 questions across 7 weighted sections.
93. Following assessment, the eight highest-ranking contractors were identified. Henry Brothers were excluded.
94. At the full hearing, there was a full discussion about the fact that the only information directly relating to price taken into account by the
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Department was the fee percentages. The Department explained that they had adopted this approach because of perceived flaws in competitive tendering based solely upon the lowest price which, in the Department's view, tended to encourage a low bid/high claim culture, in that successful contractors made unrealistically low bids on the assumption that the project could be made profitable as a consequence of a series of claims made during the contract. The Department's approach also, in their view, eliminated any manipulation of the prices by bidders seeking to win the contract by means of unrealistic and unsustainable low prices. There was an important distinction between the primary framework competition and any specific contract.

95. Henry Brothers disagreed. They felt that such an approach was not capable of providing an accurate assessment of out-turn cost. Under cross-examination, the Defendant's experts accepted that fee percentage by itself could not predict out-turn costs without the addition of further information and that depending on circumstances, different contractors might be in a position to provide discount and more advantageous prices. There may also be significant differences according to the manner in which the contractor allocated staff between the office and the working area, which may be reflected in the difference between the allowance for profit and cost.
96. Henry Brothers said that whilst price was not expressed as a:
- mandatory element of the most economically advantageous offer criteria, the natural meaning of the word economically means that a component of the assessment must involve analysis of the comparative price or cost of each bid. Without comparison of the price the comparison is meaningless as any bidder can promise whatever it likes if it is not subject to the relevant financial constraints comparisons or whatever it would expect to be paid to provide that which is promised.
97. Henry Brothers said that the omission to require the competing tenderers at the primary stage to submit a price for or to cost a representative sample of a historic contract was flawed. It was contrary to the application of the general principle procurement law and the principles of equal treatment and transparency. It permitted specific contract prices to be established through a 1:1 negotiation or discussion between the Department and the ultimately successful contractors within the framework. This was contrary to the general principles of competition law.
98. The Department said that as a contracting authority it had a wide discretion to choose the criteria to which it proposed to have regard for the purpose of determining the most economically advantageous offer. The list of criteria set out in the regulations was not exclusive and might include matters that were unrelated to either price or cost. A competition for multi-party framework would have to include a mechanism relevant to the establishment of prices.
99. It was accepted that the Department chose to award the framework agreement on the basis of the offer which was most economically advantageous from the point of view of the Department in accordance with regulation 30(1)(a) of the regulations. However, whilst the Judge recognised that a contracting authority enjoys wide discretion in choosing contract award criteria and that that discretion may include criteria that are not of a purely economic nature, he did not provide support for the proposition that some criteria relating to price/costs may be omitted altogether at the primary competition stage. All the recent cases tended to suggest that there was an involvement in the assessment of cost.
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Unless the cost or price of the relevant goods or service was not fixed or in dispute, it would be very difficult to reach any objective determination of what was or was not economically advantageous without some reasonably reliable indication of price or costs in relation to each other non-price advantages might be taken into account.

100. As Judge Lloyd QC said in the Harmon case: “price is the starting point for the exercise”.

101. Accordingly, the original decision to rely upon the percentage fees and bands was based upon an incorrect factual assumption which would be sufficient to amount to a manifest error, namely that costs would always be the same in the construction industry whether any see option A or see option C was used. However, that was not to say that it was always necessary to require tenderers to carry out costing, of examples or otherwise, produces detailed out-turn costs at the primary competition stage, or that fee percentages could never legitimately be used as a pricing mechanism. However, as a minimum requirement:

in order to comply with the regulations and the relevant principles of community law they could only do so functioning in conjunction with the establishment of specific prices/costs at the secondary competition stage, possibly followed by a counter-check by the costs manager to safeguard against abnormally low bids etc. Otherwise the defect of using such a percentage without the additional information conceded as necessary by the department is compounded by the non-competitive establishment of specific prices/costs.

102. Accordingly, the Judge, Coghlin, found the Department to be in breach. Once again, the third judgment on liability is still to come. Watch this space.

Confidentiality and the competitive dialogue procedure

103. One of the aims of the EU Procurement Regulations is to reinforce the EU’s drive towards free movement of goods and services within the EU. In that respect the aim is to continue to open up the market for public procurement work throughout the EU member countries. This is done by encouraging and supporting the concept of fair competition. The reasoning goes that if competition is open to anyone then not only does this assist the market to function, but public bodies and utilities should also obtain the goods, services or works more economically.

104. The EU and UK Government’s driving force behind the concept of competition is to obtain value for money (or (“VFM”) when procuring works, services and supplies. VFM is defined by the Office of Government Commerce as:

the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user’s requirements.

105. There are four main procurement procedures:

- (i) Open Procedure;
- (ii) Restricted Procedure;
- (iii) Negotiated Procedure; and
- (iv) Competitive Dialogue Procedure

106. From a procedural point of view the distinction between these approaches starts from the advertising of the potential contracts, minimum time

periods for a response, and particularly what then happens next.

(i) Open Procedure

Anyone may respond to the OJEU Notice by submitting a tender. This is the simplest way to tender work, but leaves the public body with little control of the number and quality of tenders.

(ii) Restricted Procedure

Tenders are selected from those who respond to the OJEU Notice. Only those selected are invited to submit a tender. This means that a limited number of tenders are submitted. The effect is twofold. First, a bidder knows that they have an ascertainable chance of winning, and so is encouraged to submit a carefully prepared tender. Second, the authority is not overwhelmed.

(iii) Negotiated Procedure

The authority may identify one or more organisations with which the authority can negotiate the contract. An OJEU Notice is nearly always required. This procedure is only really appropriate where the authority requires something that only one organisation can provide, for example an artistic works or an item covered by an exclusive right.

(iv) Competitive Dialogue Procedure

This fourth procedure was introduced in the 2006 Public Contracts and Utilities Contracts Regulations (SI 2006 No's 5 and 6.). The key difference between the competitive dialogue and the negotiated procedures is that with the other three procedures, a tender specification is required which needs to be specific enough to enable tenders to submit bids. With the competitive dialogue, the tender document can be more descriptive setting out an authorities requirements and the basis for the dialogue which the authority considers will be necessary with the chosen tenderers.

107. Once the OJEU Notice period has expired the authority enters into a discussion with the bidders in order to develop at least one suitable solution. The bidders can then submit a tender based on the solution. In effect, the bidders are using their expertise to develop a VFM solution (design and buildability focused) for the authority. The basic idea is to give authorities the freedom to discuss particular contract specifications and problems with potential tenderers. The steps or stages making up the competitive dialogue process are:

- (i) OJEU Notice;
 - (ii) Pre-qualification questionnaire;
 - (iii) Select participants. Minimum of three. Based on open transparent criteria;
 - (iv) Invitation to participate in (competitive) dialogue;
 - (v) Dialogue phase. Purpose of this phase is to identify the best means to satisfy the contract requirements. Note the number of those participating can be reduced at this stage providing that the procedure for doing so is set out in the initial invitation and provided that the remaining number of bidders is sufficient for genuine competition;
 - (vi) Final tenders submitted based on the solution or solutions developed;
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- (vii) Evaluation of tenderers against (transparent) award criteria. The competitive dialogue process is not treated any differently to any of the other procedures;
 - (viii) Post-tender discussions. The authority may seek clarification from those who have submitted compliant bids;
 - (ix) Selection of preferred bidder. This is done against the predetermined award criteria based on the most economically advantageous tender;
 - (x) Notification to preferred bidder and other bidders;
 - (xi) Mandatory standstill period of 10 days (the Alcatel or “challenge period”). A request for a detailed note describing the reasons for the award decision has to be made within two days after the date on which the notice was sent. The authority must then issue that detailed note at least three days before the end of the standstill period;
 - (xii) Clarification and confirmation of commitment between the preferred bidder and the authority; and
 - (xiii) Contract signed.
108. Article 1(11)(c) of the 2006 Regulations makes it clear that this procedure is to be used where the project is particularly complex because the authority finds it impossible (term used in Recital 31) objectively to:
- (i) “define the technical means ... capable of satisfying its needs or objectives”; and/or
 - (ii) “specify either the legal or financial make up of a project.”
109. The idea as expressed by Article 29(3) is that contracting authorities shall:
- “shall open ... a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.”
110. Recital 31 lists some potential examples of projects that might justify the use of the competitive dialogue process: integrated infrastructure projects, large computer networks, those with complex legal and financial requirements. One of the aims is to allow authorities to engage in communication with bidders on all aspects of the contract pre-bid submission.
111. However whilst it might have been thought that the UK’s PFI initiative, involving complex long-term legal and financial requirements, may well meet the threshold requirements for the use of competitive dialogue, this is not necessarily the case. It may be that the use of this procedure is restricted following the Pimlico Schools case. Here the UK argued that a school procured under the PFI arrangements meant that the other procedures were inappropriate because of the complex nature of a long-term concession agreement. The EU Commission did not accept this argument. It was, after all, a school, and despite the long-term nature of the contract, there was nothing complex or unusual in what should amount to a standard procedure for the repeat procurement of schools. However each project will be treated on its own merits and it is important to maintain a full audit trail, outlining how the decision to use the competitive dialogue process was reached.
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Confidentiality

112. Inevitably given that the competitive dialogue process encourage if not calls for innovation and the development of alternative proposals in relation to what are often initially only outline proposals, the question of confidentiality is one of the major concerns about the competitive dialogue process. What if one of the tenderers is worried about “sharing” trade secrets? What about concerns that an authority may “cherry pick” the best parts of each bid? The whole idea behind the competitive dialogue process is that tenderers and the authority contribute their own experience and that must include know-how to the bidding process.
113. The basic solution set out by the Regulations is that solution(s) discussed with individual participants may be revealed to all of the bidders, but only if the originating participant agrees. It is therefore important that the method, scope and confidentiality of the entire process should be set out at the initial stage. The OGC’s own Guidance Notes suggest that an authority should attempt to agree with the tenderers which parts of the bid are commercially sensitive and which parts can be shared. It also suggests that in order to keep information confidential it may be necessary to undertake bilateral negotiations that is negotiate several different solutions in parallel based on each tenderer’s own proposals.
114. There was no case law when this Guidance was issued. That remains the case. However, on 14 February 2008, the European Courts had to consider the question of confidentiality when it came to the consideration of whether a tender process was fair or not. In the case of *Varec SA v Belgium*, Belgium issued a tender for the supply of parts for military tanks. Varec’s bid was rejected on the ground that it did not meet the required technical specifications. Varec challenged the decision in front of the tender tribunal. The successful tenderer objected to the proceedings on the ground that if the tribunal agreed to review Varec’s challenge, it would compel the successful tenderer to reveal some of its business secrets. Accordingly, it refused to disclose the full details of its bid to the tribunal. Before the court, the question was whether the tribunal was obliged to protect confidential business information (i.e. not disclose it to third parties) while at the same time being entitled to take note of such information for the purposes of the claim. The ECJ decided that:
- [The law] must be interpreted as meaning that the body responsible ... must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration.
115. Thus the tribunal was allowed to take into account confidential information when reviewing challenges brought by third parties. However it had to guarantee that it would protect commercially sensitive information when dealing with such challenges. Therefore when it came to the potential disclosure of confidential information, the court placed confidentiality above transparency. The procurement rules are intended to ensure fair competition and therefore contracting authorities are obliged to respect the confidentiality of information. It is possible to apply that decision to the competitive dialogue process. Whilst an authority can and patently will take into account confidential information, it must take steps to safeguard that information.

Conclusion

116. With new legislation on the horizon, and a number of legal cases looming,
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this is a fast moving area of law. Given the current economic uncertainties, more contractors are likely to look to local authorities for work, which may mean that there will be more disappointed tenderers, who will be looking for a proper explanation as to why they were unsuccessful and who will be perfectly prepared to go to court to seek redress.

117. Therefore those involved in preparing and evaluating public tenders must be sure that their processes are open and fair and fall within the guidelines. Although all the aggrieved tenderer is likely to want is to be added to the framework or to win the work he lost out on, subject to the up and coming court judgments, the penalties for failing to do this are likely to lie in damages. However, these may be substantial.
118. Alternatively, local authorities may find themselves forced to act as the metropolitan borough of Rochdale was recently forced to do.¹⁶ The original OJEU notice did not contain sufficient information on the evaluation weightings that were to be applied and so the tender procedure for a town centre regeneration project had to be re-run. And that, of course, will lead to delays and additional costs.

19 November 2008
Jeremy Glover

16. Rochdale Observer - 22 August 2008
