Neutral Citation Number: [2007] IEHC 29

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 589JR]

BETWEEN

DANNINGER

APPLICANT

AND

BUS ÁTHA CLIATH

RESPONDENT

AND

DEEPDRILL DEVELOPMENTS LIMITED TRADING AS O'DWYER LEISURE GROUP AND BENNETT (CONSTRUCTION) LIMITED

NOTICE PARTY

Judgment of Mr. Justice Charleton delivered on the 23rd day of February, 2007

Introduction

1. The applicant and the notice party are both entities that engage in property development. Bus Átha Cliath provides bus services for the Dublin city area and is an entity of Córas Iompair Éireann, being wholly owned by it. Prior to the Luas line being put in from Sandyford through to Connolly Station, one could catch a bus on Upper Abbey Street. This has been rendered impossible by the Luas line that runs there. The respondent made a decision to develop a site which it owns in that area so that it would become, on development, a bus station with a valuable commercial property above, below and to the sides of it.

2. At the time this project was advertised, it was subject to Council Directive 93/37/EEC of 14th June, 1993, concerning the coordination of procedures for the award of public works contracts. This directive was one of a long line setting out the law in this area. In applying review procedures in this area, I am bound by Council Directive 89/665/EEC of 21st December, 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. These directives were signed into Irish law in simple form by way of, *inter alia*, the European Communities (Public Works) (Amendment) Regulations, 1994, S.I. 293/1994 and the European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No. 2) Regulations, 1994, S.I. 309/1994. In turn, O. 84 of the Rules of the Superior Courts, which deals with the generality of judicial review applications, was amended through the introduction of a special rule in respect of these cases in S.I. 374/1998, the Rules of the Superior Courts (No. 4) (Review of the Award of Public Contracts) Rules, 1998.

3. The notice party won the contract to develop this site and the applicant lost. The applicant complains that Council Directive 93/37/EEC was not complied with in the award of the contract and therefore seeks an order of this court overturning it. The respondent and the notice party claim that the award was made validly and in accordance with European law. They further say that if it was not, such invalidity as the court might find does not entitle the applicant to judicial review, by reason of its delay in bringing these proceedings and by reason of its acquiescence in the procedure it now complains of.

4. My decision in this case revolves around the answer to three issues. Firstly, whether the project which the respondent wished to have developed for it was a public works contract or a public works concession contract under the relevant Directive. If it is the latter, much less strict rules apply to the tendering process which is concerned with the advertising of the tender opportunity only. If it is a public works contract, on the other hand, it is argued that an open or restricted procedure for the tender must apply: in addition the principles of non-discrimination, transparency and openness also require that a tender process end with an assessment of the bids when they are opened and there can be no room for a request being made for any further offer or, as the term of art puts it, "a best and final offer". The second issue is therefore whether a public works contract outlaws that form of double round tender procedure. The third issue is as to whether the applicant is disentitled to relief, the court exercising its fundamental discretion as to whether it should make an order in judicial review proceedings, by reason of the manner in which the applicant participated in the procedure, it is claimed with full knowledge of that flaw, if it be a flaw, and by reason of its delay in bringing proceedings. As a matter of fact, as human nature might dictate, the applicant only brought proceedings seeking to overturn the tender award when it discovered that it had lost.

Facts

5. The works in question here are to be built on a site that is just under 0.9 of an acre in area and which fronts onto Great Strand Street and Upper Abbey Street, a short walk from O'Connell Street. The respondent currently uses that land as a bus parking area. The lands are owned by Córas Iompair Éireann, as opposed to the respondent, and are a part of what may remain after a long standing plan, which never came to fruition, to build a large bus station in the centre city area in the vicinity of the Halfpenny Bridge.

6. On 14th September, 2005, a notice detailing certain building construction work, what was described as a public works concession, appeared in the Official Journal of the European Communities. This invited submissions to apply for tender documents from interested parties that:-

> "…wished to be considered for inclusion on a tender list for a works concession involving the acquisition and development of a Q-35 Ha(0.87 acre) site at Abbey Street Upper/Strand Street Great in central Dublin. The project incorporates the creation of a bus interchange facility for Bus Átha Cliath at ground level and an overhead development consisting of four or more levels of accommodation. It is proposed that the funding for the Bus Interchange will be provided by the overhead development opportunity. The successful tenderer will be required to deliver the project in its totality including financing and managing the title project, seeking planning approval, and executing the construction and fit-out… Applicants are required to provide the information detailed under conditions for participation. Following evaluation of the details a minimum of five applicants will be invited to tender for selection as preferred bidder and negotiate the works concession contract with the contracting entity."

7. The tender documents were, no doubt, then in the course of preparation. A number of parties expressed interest, the applicants on 7th November, 2005, and a tender list was drawn up. By letter dated 22nd December, 2005, the respondent wrote to the applicants enclosing a bundle of documents which consisted of the tender form, the tender conditions and the particulars and conditions of sale for the development.

8. These documents clarify what was envisaged by the respondent. A short specification is given for the bus interchange facility.

Basically, there are to be eight 'drive through' bus bays allowing buses to turn into the facility from Upper Abbey Street and exit, going in a westerly direction towards the Four Courts, onto Great Strand Street. There are to be passenger facilities and a retail unit, together with staff offices and facilities for the respondent, and the area under their control is to be capable of being fully secured outside whatever hours are worked. The outline plans call for an imaginative use of what is now a virtually empty space. The drawings indicate that a large building will be constructed on the site but that, at street level, buses will be driving in, parking, picking up or discharging passengers and exiting. Above and to the sides of the area required for this activity will be a development, perhaps of up to eight storeys, consisting of mixed retail, residential or hotel use. The applicants proposed a mixed retail and residential development while Deep Drill, the notice party, plan the development of a large hotel.

9. This land is very valuable. In consequence, the respondent could expect to get their bus interchange built by the developer and to receive, over and above the cost of that, a substantial sum. The tender provides that the developer is to purchase the long lease to the site for a price that is the subject of the competition for the work, laying down a 10% capital payment in submitting the tender.

10. Paragraph 4.14 of the tender conditions is headed "Price Basis", and reads as follows:-

> "The capital payment part of the Consideration (as defined in the Conditions of Sale) shall be at the fixed price specified in the Tender Form and shall not be a formula bid nor subject to price adjustment or any price variation formula. The Board reserves the right to request a best and final offer from one or more Tenderers."

11. Under clause 7.1 the respondent seeks a tender which is fully compliant with the conditions and which is unqualified. Non-compliant tender offers can be rejected. Clause 9.7 reserves to the respondent, by way of assistance in the examination and comparison of tenders, the right to seek clarification; including price breakdowns. This may involve attending meetings. Clause 10 indicates that the tenders are to be evaluated by seeking that which is most economically advantageous and it lists criteria subject to an overall maximum score of 5,000 points. Financial advantage is the most important, followed by deliverability and, finally, the feasibility of the proposal put. In that clause too, the board of CIÉ reserved the right to accept or reject any tender and it indicates that the board of CIÉ is under no obligation to accept the highest tender or any tender submitted.

12. The applicants prepared a tender and submitted it together with 10% of the capital sum on 28th February, 2006. They offered the sum of €19 million to participate in the project. The notice party also submitted a tender on 28th February and their capital payment was priced at €17,131,672.50. There was also another lower tender bid, but that party does not need to be considered further. There was subsequent correspondence with both the applicant and the notice party in accordance with clause 9.7 of the tender conditions. Certain matters were queried through letters, one to the applicant and the other to the notice party, of 3rd March, 2006. The query to the notice party was about liability for VAT and about the height of the development. That to the applicant also makes a VAT query but goes on to ask for a description of the proposed development, which had not been given in the tender it submitted, and certain cost headings.

13. On 10th March, those who had tendered went to a meeting with the respondent. There was no suggestion that any issue as to the price expected was discussed at that meeting. Instead, issues were raised as to such things as ramp heights and ventilation for the bus interchange, among other matters.

14. On 13th March, 2006, the following letter was received by the three interested parties who had tendered:-

> "I refer to your recent bid for the above project. There are a number of Parties involved and I am taking this opportunity to ask you for your best and final bid for the project. This bid is to be received by 17.00 on Thursday 16th March, 2006, to the undersigned. If no further bid is received I will understand that there is no increase in the figure already submitted."

15. The applicant wrote to the respondent on 16th March, 2006, amending the conditions of tender by detailing such matters as acceptable planning permission height and an issue regarding wayleaves from neighbouring property owners. The tender offer remained at €19 million and the letter ends by stating that the applicants "look forward to your favourable review of our final bid for the project". The respondents, on the other hand, decided to increase their price. Adrian Shanagher, financial director with the notice party, explains their decision in an affidavit of 25th July, 2006:-

> "The notice party were of the view that the respondent was certainly entitled to ask for [best and final offers] and consequently took no issue with the process. The assumption that we made was that if all parties had submitted compliant tenders, allowing the award criteria to be applied (which evidently was not the case with the applicant's tender, in view of the deficiencies that we are now aware of) then at least two tenderers must have bid approximately the same amount. We spent some time considering the value of the Contract to us and our unique proposed hotel use. We were keen to win the Contract. We therefore decided to increase our price, and in fact assumed that the other tenderers would do likewise. We thought it best to 'sharpen our pencils' and increase our bid by as much as was possible within the confines of the project. Consequently, we decided to increase the capital payment aspect of our bid by almost €3 million. This €3 million increase had been held in reserve when we initially tendered €17 million as at that time we considered a residential appraisal of the site to warrant a price of no more than €15 million (net of cost of providing the interchange). As a result, by letter dated March 16th 2006, we submitted our [best and final offer] to the respondent."

16. As is stated in the affidavit of 23rd June, 2006, of John Hunt, the materials manager of the respondent, "all three final bids were opened under controlled conditions in Bus Átha Cliath's Materials Department at 17.15 hours on 16th March, 2006". Then, the bids were evaluated by a panel of the board of the respondent on the 21st March, 2006. The notice party's bid came out on top. It had bid nearly €1,000,000 more than the applicant. It appears that the applicant heard of this. An otherwise inexplicable telephone conversation took place on 24th March at approximately 10.00 hours. Following that, there was a meeting between the two most competitive tenderers; the applicant and the notice party. This is set out in the affidavit of Adrian Shanagher and it has not been contradicted. Liam Carroll, the managing director of the applicant, called Liam O'Dwyer of the notice party and protested that he felt he was about to lose in the tender process. The affidavit continues:-

> "Liam O'Dwyer indicated that he had not heard either in an official or unofficial way that this was the case. Liam Carroll asked whether Liam O'Dwyer would meet with him. Liam O'Dwyer agreed to meet on the basis they were both known to each other, but indicated that I would attend at this meeting. We were both surprised that Liam Carroll appeared to know something that we were entirely unaware of, i.e. that we were likely to win the Contract. We were unsure as to how he knew that we were to be awarded the contract (which of course subsequently transpired to be correct). We arranged to meet with Mr. Carroll at 5.00 p.m. in Deep Drill's head office at 39 Dawson Street. Liam Carroll arrived at 5.00 p.m. I made notes of the meeting immediately afterwards. After a general discussion, Liam Carroll repeated that he had heard that the

> notice party were the successful bidder in relation to the Contract. He indicated that the applicant had been the under bidder. He wondered if there was any way that the notice party would 'carve up the site' with him, given his nearby land holdings. Liam O'Dwyer responded that he was not interested in any carve up of the property. Liam Carroll stated that he understood that we had bid approximately €20 million in relation to the capital payment part of our tender and that this was an increase on the original bid submitted by us. Liam Carroll indicated that he was particularly disappointed with the outcome, as he had been in communication with CIÉ for some years about the site, and considered the development of the site to be 'unfinished business' in terms of his development of the surrounding area. At the close of the meeting I indicated that, as we had no information on our status from the respondent, any dialogue would be premature. Liam O'Dwyer said that, in general, it was unlikely that we would do any deal with Mr. Carroll but that we would keep an open mind."

17. The next document that emerges from the papers is a protest to the respondent, by way of a solicitor's letter from the applicant, at the use of the best and final offer system. This letter, which is dated 27th March, 2006, reads:-

> "Our clients have consulted us with reference to a letter dated 13th March, 2006, received from Mr. John Hunt, materials manager of Dublin Bus. This letter requested parties to make 'your best and final bid for the project'. We believe that this letter constitutes a serious breach of the Tender Conditions. In particular, we would refer you to condition 5.3 which indicates that 'late Tenders received after the Tender Date and after the opening of under Tenders shall not be accepted by the Board under any circumstances'. We are also satisfied that this letter is a serious breach of the correct procedures which ought to have been adopted by you and adhered to in relation to this Tender. Any 'bids' which may have been received in response to this letter of 13th inst. should be disregarded. The purpose of this letter is to call on you to confirm, by return, to us that only such Tenders as were received before noon on 28th February, 2006 and in accordance with the terms of the Tender Document as furnished by you will be considered. If we do not receive such a confirmation by return, then our clients will have no alternative but to institute appropriate legal proceedings to compel you to adhere to the terms of the tender and if necessary to set aside any purported award in favour of any party. We would be obliged to hear from you as a matter of urgency."

18. To this letter, the solicitors for the respondent promptly replied that the best and final offer system was in accordance with condition 4.14 of the tender conditions.

19. On 7th April the full board of CIÉ met and approved the tender which their sub-committee had already evaluated as the winner. By a letter of the same date, the respondent indicated to the applicant that the tender evaluation process had been completed and that, on the basis of the published award criteria, its tender had not been selected for contract award. On the other hand, the notice party received a letter telling them they had been selected.

20. I have detailed these facts with some particularity because it is the case made by the respondent and the notice party that even if the procedure adopted by the respondent was contrary to national and European law, the delay in commencing proceedings by the applicant, and their apparent acquiescence in that procedure, disentitle them to relief. Leave was sought to commence judicial review proceedings on 23rd May, 2006, approximately six weeks after the formal notification of the of the award of the contract to the notice party. Since an issue as to delay and acquiescence depends, in part, on the respective knowledge of the parties and on the strength of their cases, (both the extension of time for judicial review, and the remedy itself, being discretionary) I must first deal with that.

21. The notice party have pleaded that they are now engaged in performing the contract in accordance with the timeframes enshrined in it. In accordance with the tender, the consideration of €20,050,000 had already been paid by them to the respondent then on 8th May, 2006, the date on which the contract was completed. This currently attracts interest at approximately €100,000 per month. If their affidavit remains correct, they will by this stage have lodged an application for planning permission and, as they say, discussions with architects, engineers, project managers, town planners, surveyors, mechanical and electrical consultants will now be at an advanced stage. This will involve an estimated outlay of approximately €1 million in addition to the monthly cost of the borrowing which continues to accrue.

Public Works Contracts

22. The award of public works contracts are governed by Counsel Directive 93/37/EEC of 14th June, 1993. There has been since been an amending and consolidating Directive which introduces a new element into the tendering process but which does not appear to effect public works concessions contracts; this is Directive 2004/18/EC of the European Parliament and Council of 31st March, 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Water, energy, transport and telecommunications sector contracts were covered by Directive 6/90/931/EEC. The consolidating legislation for most purposes is now the European Communities (Award of Public Authorities' Contracts) Regulation 2006, S.I. 329 of 2006. Article 1 of Council Directive 93/37 defines a public works contract as one:-

> "For pecuniary interest concluded in writing between a contractor and a contracting authority, as defined in (b), which have as one of their objects either the execution, or both the execution and design, of works related to one of the activities referred to in Annexe (ii) or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authorities."

23. Paragraph (c) defines a "work" in terms of the outcome of building or civil engineering or that which, taken as a whole, fulfil economic and technical functions. The Directive applies to State, regional and local authorities, bodies governed by public law and their associations. Since, as in the relevant sub-definition, the respondent and Córas Iompair Éireann, were established for the purpose of meeting public transport needs and have a legal personality for that end and are financed by the State, the Directive clearly applies to them.

24. The definition which causes the most difficulty is that related to a "public works concession contract". Article 1(d) defines it as the contract which is of the same type as a public works contract "except for the fact that the consideration for the work to be carried out consists either solely in the right to exploit the construction or in this right together with payment."

25. If one were to take a simple example of a public works contract, it might be the building of a bridge for the public roads network or the installation of a telephone system for public hospitals or the use of satellite time for public communication. Straightforward examples, for the purpose of contrast, of public works concession contracts might involve the building of a toll bridge which is then paid for through the collection of tolls from the public or the making of a computer network for the civil service, the control of which is sited in a public building, and which is used by the customers of the State on a pay on use basis calculation, rather than being paid for on construction. The essence of the difference is the mode of payment: in the concession contract the work is made to make a

return as it is being used and in the public works contract it is paid for on construction and due to the fact of its construction.

26. A third possibility emerges, and that is that the situation that I have detailed in those facts is, as has been argued, a mere sale of land. I wish to dismiss this straight away. If the applicant and the notice party were simply to purchase a portion of this land and to leave Bus Átha Cliath with the remaining portion of bare earth on which they could themselves construct their bus interchange, that would indeed by a sale of land. The contract particulars indicate clearly, however, that the contractor, be it the applicant or the notice party, is required to build a bus interchange on the street level and to construct parking and passenger bays, staff facilities and passenger related facilities. That is clearly a contract for public works but is it also a concession contract?

27. The recitals to Council Directive 93/37 do not assist in differentiating a public works contract from a public works concession contract. However, they make it clear that the negotiated procedure for awarding public contracts must be considered as exceptional. It is therefore allowed in only certain limited cases of public works contracts; Article 7.4. The open or restricted procedure for tendering is applicable in all other cases, including it is argued here, save where the tenders are irregular, where the works involved are carried out for the purposes of research or where the nature of the works make it impossible to give a prior overall price; Article 7.2

28. Under Article 11 the common advertising rules apply to public works concession contracts and the Directive specifies the form of the relevant notices and gives models as binding precedents.

29. In an attempt to differentiate the meaning of a public works contract from a public works concession contract I had cited to me the "*Guide to the Community Rules on Public Works Contracts"* published by the European Commission. The guide has no legal effect and announces itself as not necessarily representing "the official position of the Commission". Nonetheless, it is a considered document, the views in which are as valuable as those of the author of a textbook. It unexceptionally indicates that in the case of public works concession contracts the authority granting the concession is free to choose its procedure for the award, including negotiation. Apart from complying with the advertising rules the awarding authority must observe the principles of non-discrimination and transparency. Once criteria have been set through publication, the authority must apply them. Dealing with the issue of a public works concession contract the Commission indicates that it is the same as a public works contract except that the consideration is usually in the form of the right to exploit the works in question but it may sometimes be pecuniary also. At 7.1 the document offers these views:-

> "The key element in determining whether a public works contract or concession is involved is the form that the consideration takes. For the works to be classed as a concession, consideration must consist, at least in part, of the right to exploit the works, i.e. of the profit which the concessionaire, depending on his ability to manage the project, will gain from that right. It is of little importance whether the revenue from the management is handled physically by the awarding authority or by the concessionaire; what matters is that all or part of such revenue is paid to the latter in consideration for the works. Depending on the management terms prescribed by the awarding authority, the latter may grant the concessionaire a minimum income. However, were the authority to remunerate the concessionaire with fixed – e.g. monthly or annual – sums in consideration for the works and for the management activity, without such remuneration being in any way proportional to the management revenue, the contract would not be a concession but a public works contract, the scope of which included, in addition to the execution of the works, provision for the requisite services for managing the project. In such a case the 'right to exploit the works' would no longer be meaningful since the risk and benefit associated with the exploitation would in reality be retained by the awarding authority."

30. The criteria that can be extracted from this statement as an aid to identifying a public works concession contract involve firstly, that the party awarded the contract tends to be paid in the form of the exploitation of the public work, secondly, that such undertaking manages the project so as to generate income and thirdly, that the nature of this relationship should not be disguised through the authority remunerating the concessionaire so that it could no longer be said to be exploiting the subject matter of the contracts. It is perhaps too simplistic to say that a public works concession contract involves making something that provides a public service and which is made to pay by its use.

31. In case C-324/98 *Telaustria Verlags Gmbh and Telefonadress Gmbh v. Telekom Austria AG* [2000] E.C.R. I-10745 the issue which arose before the European Court was whether public service concession contracts were excluded from the scope of Council Directive 25/50/EEC of 18th June, 1992 and Council Directive 93/38/EEC of 14th June, 1993. The court did not discuss how a public works concession contract may be differentiated from a public works contract. However, the opinion of Advocate General Fennelly offers valuable guidance on that issue. The parties and interveners had submitted to the court that a concession contract was indicated (a) through the beneficiary of the service being third parties (which I understand to be the public); (b) through the service involved being in the public interest; and (c) through the concessionaire assuming the economic risk related to the performance of the service. In case C-360/96 *Gemeente Arnhem and Gemeente Rheden v. BFI Holding BV* [1998] E.C.R. I-06821 Advocate General La Pergola had expressed the following approach at para. 25 of his opinion that:-

> "The view commonly taken, in the absence of a specific Community definition embodied in legislation, is that the distinction in Community law between service contracts and service concessions is based on a number of criteria. The first concerns the recipient or beneficiary of the service provided. In the case of a contract the beneficiary of a service is deemed to be the contracting authority, whereas in the case of a concession the beneficiary of the service is a third party unconnected with the contractual relationship, usually the Community, which receives the service and pays an appropriate sum for the service rendered. Under Community law, the service that is the subject of a service concession must also be in the general interest, so that a public authority is institutionally responsible for providing it. The fact that a third party provides the service means that the concessionaire replaces the authority granting the concession in respect of its obligations to ensure that the service is provided for the Community. Another characteristic feature of concessions is the remuneration of the concessionaire, which derives wholly or in part from the provision of the service to the beneficiary. This is connected with another important feature of service concessions in the community context, namely that the concessionaire automatically assumes the economic risk associated with the provision and management of the services that are the subject of the concession."

32. Advocate General Fennelly's opinion in case C-324/98 *Telaustria and Telefonadress* strengthens this view. At para. 31 he indicates that in his opinion the observations of Advocate General La Pergola had been implicitly accepted by the European Court. He then went on at paras. 30 – 31:-

> "In my view, the Community legislature has viewed the absence of, at least full, consideration passing from the granting entity to the concessionaire as constituting the essence of a concession. I agree that this represents a fundamental feature of a concession whose importance is not limited to those which are concerned with public works. This feature, to

> my mind, finds expression in the fact that the concessionaire itself must bear the principal, or at least the substantive, economic risk attaching to the performance of the service involved. If the national court is satisfied that the economic burden or risk has effectively been passed to the concessionaire by the grantor of the concession, then there must be a very strong presumption that the arrangement concluded between them amounts to a concession rather than a contract.
>
> To my mind, the single most important indication of whether economic risk is to be borne by the concessionaire will emerge from examining the nature of the exploitation in which the supposed concession requires it to engage. *Arnhem and Rheden* provides a strong indication that the court views the requirement to exploit the right ceded in order to obtain remuneration as the core of what constitutes a genuine concession. In response to an argument raised by France in its observations that the contracts at issue in that case (which concerned a joint venture between two Dutch municipalities to provide municipal refuse collection and road cleaning services through ARA, (a company set up expressly for that purpose)) could be regarded as a public service concession, the court declared, without finding it necessary to interpret that term, that it was clear from the underlying agreement 'that the remuneration paid to ARA comprises only a price and not the right to operate a service'."

Of importance too is the issue as to whether the service resulting from the exploitation of the work will be of benefit to the public generally.

33. In case C-272/91, *Commission v. Italy* [1994] E.C.R. I-01400, the complaint before the European Court was that the Italian Finance Ministry had failed to advertise its intention to award a contract in respect of the computerisation of the lottery in the Official Journal. The Italian Government defended the case by claiming that the proposed contract amounted to a concession by which the Finance Ministry would entrust a third party to carry out an activity relating to official authority. The court found a breach of Council Directive 77/62/EEC of 21st December, 1976, coordinating procedures for the award of public supply contracts, as amended by Council Directive 88/295/EEC of 22nd March, 1988. If the supply of the computer service was, as a matter of fact, a transfer by the Administration to a third party of an activity which formed part of the exercise of public authority, the relevant directives would not have applied as that would have indicated a concession contract. The court rejected that this had happened at para. 24 stating:-

> "As is clear from paras. 7 to 11 of this judgment, the introduction of a computerised system in question does not involve any transfer of responsibilities to the concessionaire in respect of the various operations inherent in the lottery. Moreover, it is common ground that the contract at issue relates to the supply of an integrated computerised system including in particular the supply of certain goods to the administration."

34. In every contract for the sale of land for the purpose of development, the risk passes to the purchaser. It is clear to me that a particular kind of risk is what is regarded as of importance in applying the definition of what is and is not a concession contract in the Directive. Nor is it indicative of a public works concession that the consideration for the purchase of the material which will enable the work to be done is discounted, or involves a positive payment to the public authority, by the developer. That consideration might merely describe an act of barter, or of part-barter and payment. The central test, it seems to me, hinges on the successful tenderer exploiting the work involved that meets the requirements of the contracting authority so as to make a return for itself. The Directive allows partial payment by the contracting authority where the operation of the resultant work or service is not likely to be profitable, as might be the case with either a toll bridge in a remote area or a partial postal service to off-shore islands. Fundamental to the definition, however, is the relating together of paras. (a) and (c) of Article 1 of Council Directive 93/37: to be a public works concession, the tenderer must execute, by whatever means, a work which is precisely that required by the contracting public authority and then use it to generate income. Many examples were placed before the court as to how the Upper Abbey Street bus interchange might be regarded as a public works concession. For instance, the right to build property above, below and to the side of the bus interchange was asserted to be an exploitation of work within the meaning of the definition. It was urged that a public bridge containing retail outlets for pedestrian users would also fit the definition. The Ponte Vecchio in Florence was urged as an example.

35. I have been drawn back to the interdependence of the two parts of the definition. To be a public works concession the contractor must not only construct something, the contractor must also operate it for the public benefit in a manner that corresponds with the needs that are being met in favour of the public through the concession, and which otherwise would have had to have been met through a public service operated by the public authority itself. A public works concession contract must have the effect of drawing an economic benefit to itself, in whole or in substantial part, through payment for the service it thereby provides. I agree with Advocate General Fennelly that it is the economic risk attaching to the performance of the service that is borne by the contractor. This differentiates a public service concession contract from a public service contract. There the risk is different: it is the ordinary risk of the developer making a profit from having done the work.

36. That description cannot apply in this instance. In essence, Danninger are purchasing the right to construct a large hotel above and below a bus interchange which, as part of the building works, they will construct for Bus Átha Cliath. They will never assume the risk of the commercial operation of either the buses or the interchange of buses at that site. That is the service from which the public will benefit in the Dublin centre city area. Instead, having constructed the relevant bays, staff and passenger areas and the necessary public and staff facilities for the applicant, they will make no decision as to what service runs when, or how and, crucially, they will receive no payment for the operation of a bus service in the part of the building that is to be reserved to the respondent. Furthermore, in terms of the niceties of conveyancing, that reserved section incorporating the bus interchange, though constructed by the third party or applicant, will never pass into their ownership. The money to be paid to the respondent is a cost base figure and not one designed to yield a profit.

37. An estimate is provided in some of the documents relating to the maintenance of the reserved section of the building for such matters as general maintenance and the operation of the fans that will be necessary while these buses are moving in and out on an almost constant operation. I note that the applicant supplied an estimate in terms of the operating costs, in that regard, of a figure somewhere over €300,000. That is a cost figure. It is not the exploitation of the bus interchange.

38. I would therefore hold that this contract is a public works contract within the meaning of the relevant legislation.

Best and Final Offer

39. The text of Council Directive 93/37/EEC makes it clear that the negotiated procedure could not have been applied in this case. Article 7.4 provides that the contracting authorities are limited to the open procedure or the restricted procedure in awarding public works contracts. The text of the Directive does not mention a best and final offer system in setting out the procedures which are to be followed. It out-rules negotiation at any stage of the procedure; unless that procedure has been validly adopted from the start. It does not specifically indicate that a second round of tenders is an unlawful procedure. What is certain, however, is that any round of tenders must be subject to the rules set out in the Directive.

40. Directive 2004/18/EC of the European Parliament and Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts introduces, among other things, a new form of procedure which, according to recital 31, applies to "particularly complex projects" where it is "objectively impossible to define the means of satisfying" the needs of contracting authorities or "of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions". This procedure is described in Article 29 as taking the form of competitive dialogue. Its purpose is, as Article 29.3 states, "to identify and define the best means suited to satisfying the need of a contracting authority". That procedure may take place "in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document"; Article 29.4. That dialogue can continue until an apparent solution is found. The dialogue is then concluded and final tenders must then be sought on that basis. The tenders may then be further "clarified, specified and fine tuned at the request of the contracting authority", without changing the basic features "of the tender or the call for tender" where such alterations are likely to distort competition or have a discriminatory effect. The contracting authorities then assess the tenders received on the basis of the award criteria laid down in the contract notice or descriptive document and are obliged to choose the most economically advantageous; Article 29.7, Article 53.

41. It seems to this court that the ongoing dialogue procedure therein described is different to a tender procedure which involves two rounds of tenders which end with a best and final offer. In effect, in a competitive dialogue the parties are negotiating face to face as to their requirements, including the costs involved in each element, while simultaneously assessing economic advantage and performance. That is negotiation, something specifically allowed only in very defined circumstances under Council Directive 93/37.

42. In emphasis of this, I note a Statement of the Council and the Commission which concerns Article 5(4) of Directive 71/305 EEC, a predecessor of the Directive concerned in this case, made in the Official Journal of the European Communities 21.7.89 No. L210/22. This reads:-

> "The Council and the Commission state that in open and restricted procedures all negotiation with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the contents of their tenders or the requirements of the contracting authorities and provided this does not involve discrimination."

43. A negotiation involves parties communicating their requirements and how they may be met in terms of price, delivery and performance. The Council and the Commission have outlawed negotiation as to price because variations from tenders that are received are likely to distort competition and open up restricted or open procedures to abuse. That principle does not necessarily apply to engaging in a second round of tenders through the best and final offer system.

44. There has been no ruling by any court, that I am aware of, either approving or out-ruling the best and final offer system in the context of an open or restricted procedure for the award of a public works contract. In *Resource Management Services v. Westminster City Council* [1999] 2 C.M.L.R. 849 the issue was mentioned in passing by Smedley J. of the English High Court. There, inviting revised tenders, the defendant advised one party that a certain element of the tender should be deleted. The procedure of having a second round was not condemned in the context of Directive 92/50, an analogous piece of legislation. In answer to an argument that before a second round could be held the matter had to be re-advertised in the official journal, Smedley J. stated at p. 860:-

> "It is not correct, in my view, to describe the letter of 21 January inviting a revised tender based on the TUPE Regulations applying as a variation of the contract amounting to a breach of the Directive, nor one which required starting afresh of the tendering process by a new advertisement in the Official Journal, as is alleged in para. 13 of the plaintiff's amended statement of claim. The meetings on 7 January were not, in my judgment, a change of procedure from restricted to negotiated procedures but simply an opportunity for the defendant to clarify any apparent ambiguities or discrepancies which may have appeared on the face of the documents then submitted. That is precisely what happened when it appeared that the plaintiff's original submission had led to double counting of prices … in my judgment, inviting the then tenderers, namely the plaintiff, In-House Team, Pannell Kerr Foster and Psec to submit alternative tenders based upon the discussions which had taken place between the defendant and the tenderers the defendant was not giving an unfair advantage to the in-house team."

45. Similarly, this issue again came up tangentially in the High Court judgment of Murphy J. in *Advanced Totes Limited v. Bord na gCon and Autotote Worldwide Services Limited* [2004] IEHC 495. At p. 46 Murphy J. comments:-

> "In relation to the re-tendering on price, I have no doubt that parties who did tender could not have been prejudiced nor adversely affected by the re-tendering which would be likely to involve an increase in price. It is also doubtful whether they would be prejudiced by the omission of Galway which was notified to have been awarded to one of the tenderers. It does seem to me that some flexibility is permitted so long as there is equality of treatment and transparency. The re-tendering process did [not] seem to me to lack such characteristics."

46. In the resolution of this issue, the observations of Professor Sue Arrowsmith in the 1996 and 2005 editions of her book *The Law of Public Utilities Procurement* have been of assistance. In the 1996 edition she emphasises that tenders cannot be used as the basis for negotiation. This is undoubtedly correct. The purpose of prohibiting negotiations is that competition can be distorted through abuse and the transparent nature of the tender process reduces the discretionary element that facilitates abuse. At p. 248 she indicates that an alternative approach "which would preserve transparency but give authorities greater flexibility" would be to allow for a second stage of the procedure with revised bids submitted according to a second formal deadline. The disadvantage, which she regards as important, is that contractors may be squeezed in relation to price and thus ultimate performance may be jeopardised.

47. *Resource Management v. Westminster County Council* makes it clear that the principles of equal treatment and transparency rule out any variation that is applied only to one party. Both principles would apply both after the tenders have been received and in relation to any second round that might be permitted. The principles would be infringed where one tenderer had specialist knowledge, especially as to price. If a second round procedure by way of best and final offer is to be allowed, equal treatment must clearly be applied to all parties; Case C-87/94, *Commission v. Belgium* (1996) ECR I-2043. Favouring one party with inside information as to requirements or as to price would infringe the principles of equal treatment and transparency and make the award of any subsequent contract, through a best and final offer system, unlawful. That would also apply, however, to the first round. The difference is that if there is to be a best and final offer round after the first round of tenders has been opened, the information as to the preliminary price already offered may be corruptly shared. That does not necessarily decide the issue, however. Corruption may be easier with a second round but a first round does not necessarily exclude it either.

48. In the 2005 edition of her work, Professor Arrowsmith notes, at p. 545, that the regulations/directives do not deal expressly with whether a best and final offer system, conducted in accordance with equality and transparency is allowed. She offers this view:-

> "There is a stronger argument for allowing revisions in a second tendering round than through informal discussions, since a second tendering round can offer a transparent process providing equal opportunities for revisions to all tenderers. On the other hand, the possibility still offers some opportunity for abuse. Thus entities may decide to hold a second tendering round simply because a favoured tenderer has not succeeded in the first round, and/or could give favoured tenderers prior information on the first round tenders. However, they cannot guarantee that favoured tenderers will succeed in the second round, thus reducing the opportunities for, and likelihood of, abuse. The better view is that a second round is permitted, given that the Directives/Regulations do not expressly prohibit this, that opportunities for abuse are limited and that the commercial benefits are significant. However, it should be necessary either to state in advance that a second round will be held or to justify why a second round is needed even though not provided for in advance – for example, because of a justified need to change the specifications or because of the inadequacies of the first tenders. That a second tendering round is permitted in principle is supported by the fact that when no tender offers reasonable value for money, the procuring entity may use the negotiated procedure: if it be anomalous to permit this more flexible procedure but not to allow a new round of tendering under open/restricted procedures."

49. This court's views as to the advantages and disadvantages of a best and final offer system, such as used in this case, are not determinative insofar as they are based only on opinion. It can be right, however, in considering this issue to attempt to list the advantages and disadvantages that a best and final offer tender system might involve. This is done with a view to determining whether any answer can be identified based on the potential that the best and final offer system may pose for the infringement of the principles of equality and transparency and with a view to enhancing competition; all foundational of principles of European law.

50. By disallowing a best and final offer system, it would mean that technical defects in what otherwise would be good tenders could not be cured. That approach might mean that the more competitive bid would fail without good reason. Proper tenders would, however, be encouraged. The most obvious difficulty with the system is that of leaks of information. No matter how carefully the tender documents are opened, they will need to be copied within the contracting authority and the ensuing discussion is likely to lead to wider knowledge thereby giving rise to the temptation, on someone's part, to share information with a favoured party. Even without sharing information, a second round might, to a lesser extent, be regarded as anti-competitive since the favoured party might increase its bid; but so might the other tenderers. As Professor Arrowsmith suggests in the first edition of her book, the constant squeezing of bidders might ultimately lead to collapse in the provision of the work needed, which would not be in the public benefit, because of over keen pricing.

51. The advantages of the second round of tendering system would be as follows. The contracting authority would not have to go back to the first step, supposing it did not meet the legislative criteria for invoking the negotiated procedure. Complex tenders which were deficient as to detail might be rectified; thereby allowing a positive advantage in terms of competition. Competition might also be served through a better price emerging in the second round. In this regard, it might reasonably be supposed that more commercial knowledge is held by tenderers than by public and local authorities where the subject matter of the works are of a specialist nature. In competition terms, this allows the rebalancing of expertise in favour of the public whereby a second round will favour the public service through the authority being granted a keener price. In making a first offer, and thereby coming within the parameters of those tenderers who might be considered for a final round, those with commercial knowledge as to the works proposed will not tend to overstretch themselves knowing that if a re-tender is sought there has to be at least another competitive bid.

52. The safeguards in relation to this system have to be emphasised. If a re-tender is sought it should be flagged in the tender document circulated to the qualifying parties. Equality of opportunity, once a reasonably competitive price is offered, requires that those tenderers who are asked to resubmit should have an equal opportunity in terms of putting forward their best and final offer in the second round. Since that is what happened here, I could not hold that this process is unlawful.

Delay and Acquiescence

53. Out of respect to the parties the issues as to delay and acquiescence will also be dealt with, notwithstanding that the applicant has failed to obtain an order from the court that the process of tendering by the respondent was unlawful.

54. Council Directive 89/665/EEC of 21st December, 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts emphasises the urgency that is necessary both in making available a remedy for review and moving to exercise that remedy. This regulation was brought into force by S.I. 309 of 1994, the European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No. 2) Regulations, 1994, which designates the High Court as the reviewing body. The recitals to the Directive include the following:-

> "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 measures must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law; … whereas, since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorised to take interim measures aimed at suspending such a procedure or the implementation of any decision which may be taken by the contracting authority; whereas the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently…"

55. Article 2 of the Directive requires Ireland to make provision whereby an application may be brought to suspend an award procedure "at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned". Apart from suspending the procedure, the court has the power to set aside a decision that is taken unlawfully and to award damages "to persons harmed by the infringement". S.I. 374 of 1998, the Rules of Superior Courts (No. 4), (Review of the Award of Public Contract), 1998, emphasises the urgency of these kind of applications by inserting O. 84A into the Rules of the Superior Courts. In addition to O. 84, which is the mechanism whereby judicial review may be sought and which specifies that an application must be brought promptly, this rule emphasises speed as well. Time limits are set in O. 84 of six months in respect of the remedy of *certiorari*, and three months otherwise, though these times may be extended. Even within that scheme, parties who fail to act promptly may be debarred from a remedy especially where third party rights are involved. Order 84A sets a time limit of three months and emphasises the necessity for prompt action in the following sub-rules:-

> "4. An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the

court considers that there is good reason for extending such period;

5. The notice of motion, statement grounding the application and verifying affidavit must be served on the contracting authority which has decided to award or has awarded the contract and on all other persons directly affected by the review proceedings and it shall be returnable for the first available motion day after the expiry of ten days from the date of service thereof unless the court otherwise directs;…

9. At any time after the issue of the originating notice of motion an applicant for review may make any interim or interlocutory application to the court for the taking of interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority. In this rule interlocutory application includes an application for an order under O. 31 or O. 39, r. 1."

56. In *SIAC Construction Limited v. National Roads Authority* [2004] IEHC 262, Kelly J. delivered a definitive analysis of the role of O. 84A and of the previous case law as to the application of delay in this kind of case. An argument was made to him that time only begins to run from the decision to award the contract. He rejected that argument and stated as follows:-

"It is clear that national authorities are obliged to ensure that the Remedies Directive in full is implemented. Such implementation cannot be confined to decisions to award a contract, or the award of a contract, but must extend to other decisions taken in respect of contract award procedures. It follows, therefore, that O. 84(A) in order to be in accord with applicable community law, must be interpreted as applying not merely to a decision to award a contract, or award of a contract, but also to decisions taken by contracting authorities regarding contract award procedures.

Such being so, it follows that complaints of the type which are sought to be advanced here concerning the procedures followed must be brought at the earliest opportunity and, in any event, within three months from the date when grounds for the complaint first arose. Proceedings cannot, and ought not to be, postponed until the decision to award, or the award of, the public contract has been made. If that were so the complaint concerning, for example, the negotiated procedure where grounds first arose in August, 2001 would not be the subject of proceedings until 2004. Such a result in the light of the authorities cited would be absurd …

I think it appropriate to summarise what I perceive to be the logical consequences of the arguments made by the applicant to the effect that it is entitled to delay commencing its present claim until after a decision to award or the award of the public contract has been made. Such an approach means that procurement challenges in this State are limited to the decision to award a contract or the award of a contract. That would mean that a prospective tenderer who considers that the tender procedure has been breached in an unlawful manner is precluded from challenging that decision and has to wait until the ultimate award of the contract or the decision to do so. That interpretation would mean that this State had failed in its obligations under European Law. It would undermine completely the requirement of rapidity laid down not merely by the Remedies Directive, but also by the decisions of the European Court of Justice and, indeed, by the Supreme Court.

I am, therefore, satisfied that whether O. 84A or O. 84 is applicable, the obligation on the applicant in the present proceedings was to bring the proceedings at the earliest opportunity or promptly and, in any event, within three months from the date when the grounds for the application first arose."

57. The applicant's argument in relation to delay is that time ran from the date when it was officially notified that it had not been awarded the contract; the 7th April, 2006. The respondent and the notice party, on the other hand, had variously argued that since the notice required by Directive 93/37 appeared in the Official Journal on the 14th September, 2005, that time should run from that date. Alternatively, but since the tender documents containing clause 4.14 were received by the applicant, and other interested parties, on the 3rd January, 2006, that time should be reckoned from that point. I note, however, that in sending in the tender documents, the applicant did so through its solicitor on the 28th February, 2006. That letter raises a number of detailed legal queries which are expressed to be "in addition to the conditions in the tender". The effect is to vary the contract, should the tender by A have been accepted on those terms, in favour of conditions sought by the applicant. The subsequent chronology also indicates that the applicant did in fact respond to the letter from the respondent seeking a best and final offer. That requirement was made by the respondent on the 13th March and the applicant filed certain variations to its tender, but not one as to price, on the 16th March, 2006. There is no hint in these papers that any of the parties had been told, prior to sending in their best and final offers, what the position of any of the others was. It is instructive to note that it was only after some kind of informal indication had apparently been received by the applicant following on the opening of the best and final offer envelopes that it chose to become disturbed as to the legality of this process, and that was on the 24th March, 2006. There then followed the letter of complaint as to the process dated the 27th March, 2006.

58. In *South Midlands Construction Limited and CLG Developments Limited, trading as the Veolia Water Consortium v. Fingal County Council* [2006] IEHC 137, Clarke J. dealt with a preliminary issue as to whether an application to overturn the award of a public services contract was out of time. Often, the issue in these cases is as to when the applicant for judicial review could reasonably be said to have known of the defect in the tendering process. That can happen when the contract is unlawfully awarded, or it can happen on enquiry being made, perhaps inspired by information leaking out, after the award of the contract or it can occur at an earlier time. The court is therefore obliged to try to determine when the knowledge of the defect in the procedures came to the attention of the applicant; to consider what responsibility there is for delay thereafter; and to ask whether a reasonable excuse has been offered to the court in that respect. The matter is therefore a balancing process as the judgment of the Supreme Court in *Dekra Éireann Teoranta v. Minister for Environment and Local Government* [2003] 2 I.R. 270 makes clear. After analysing that, and other authorities in his judgment in the *Veolia* case, Clarke J. continued:

"5.1 The first matter relied upon by Fingal for the contention that time begins to run as of the date of the occurrence of the matter complained of (irrespective of knowledge) it is to refer to the words of the rule itself. The rule speaks of it being necessary to bring the proceedings within three months from the date "when grounds for the application first arose". Thus, it is said, the clear wording of the rule requires that time starts to run when grounds existed irrespective of whether knowledge of those grounds was available to any applicant.

5.2 Secondly reliance is placed by Fingal on the jurisprudence of the English courts. In *Keymed (Medical and Industrial Equipment) Ltd v. Forest Health Care (NHS Trust)* [1998] E.U.LR. 71 the court had to consider the similar (but not identical) provisions governing the United Kingdom time limit. Langley J. held that the wording of the relevant time limit provision did not permit the importation of a requirement for knowledge of a breach before time begins to run. It was held

that "grounds":-

> "first arise when they exist and not when their existence or occurrence is known to those who may wish to pursue them, and who might of course know of grounds at different times. The existence of the power to extend time, to the exercise of which questions of knowledge are plainly material, itself provides a mechanism for dealing with cases of the type to which I have referred…
>
> Nor do I see anything so inherently surprising or unacceptable in provisions which require a plaintiff to act promptly where he does know of a breach, but which also is a strict time (subject to extension) for proceeding when he does not, as to justify straining to give the words used a meaning which I do not think they can naturally bear."

The reasoning in Keymed has been applied in subsequent decisions in The United Kingdom: see for example *Matra Communication v. The Home Office* [1993] 3 R.E.R. 562; *Jobsin Internet Services v. Department of Health* [2002] 1 C.M.L.R. 44; and *Holleran v. Severn Trent Water Limited* [2004] E.W.H.C. 2508.

5.3 There can be little doubt but that, as the courts in England have held, the use of the phrase "when grounds… first arose" seems to clearly imply that time begins to run when the complained of act on the part of the awarding authority actually occurs irrespective of knowledge. It does not seem to me that the reference in the English Regulation to "grounds for the bringing of the proceedings" differentiates that rule from the Irish requirement which refers to "grounds for the application". On what basis might it then be said that time does not begin to run until the applicant had knowledge. In this regard a number of arguments are put forward on behalf of Veolia. I propose addressing them in turn.

5.4 Firstly it is contended that within the legal order of the European Union, time begins to run against persons seeking to challenge administrative decisions from the time that the relevant decision is communicated to the person concerned provided that the potential challenger is furnished with an appropriate account of the contents of the measure notified and other materials necessary to consider a challenge. See for example C-6/72 *Europemballage & Continental Can v. Commission* [1973] E.C.R. 215; *Olbrechts v. Commission* [1989] E.C.R. 2643 and *Commission v. Socurte* [1997] E.C.R. 1. However I did not understand counsel for Fingal to argue to the contrary. It may well, therefore, be the case that within the legal order of the European Union questions of absence of reasonable knowledge are dealt with by determining that time limits do not begin to run until the potential challenger to the matter concerned has appropriate knowledge."

59. In this case I am strongly influenced by the fact that the applicant had both the tender documents and the capacity to seek legal advice from January, 2006. In submitting a tender on the 28th February, 2006, significant legal requirements were added to the existing conditions. I would not hold that time began to run as and from the 3rd January, 2006, when the tender documents were received, because I would regard it as reasonable that legal advice might be obtained in relation thereto. One month seems to me to be more than adequate time in which to seek such advice. Given that there is both an opportunity and, pursuant to O. 84A an obligation, to bring proceedings "at the earliest opportunity", I would hold that an interim application should have been made shortly thereafter. That interim application would have challenged clause 4.14 of the tender conditions and should have sought interlocutory relief.

Equality of Treatment

60. Finally, I am also influenced by the fact that no actual prejudice has been suffered by the applicant in this case. There is no suggestion of corruption by the respondent or the notice party. All the parties to this second round of tendering had an equal opportunity. The applicant was in as good a position as the notice party and was satisfied to follow the best and final offer procedure. It so happened that the applicant did not win. Insofar as there is a suggestion that some information leaked out from the respondent, on the facts before me this did not happen while any of the contractors were considering what to put as their best and final offer. It happened after the deadline for receipt of those offers and when the envelopes had been opened and evaluated. Further, it seems that whatever the applicant heard it was merely an indication as opposed to more definite information. At that stage, the circulation of that limited information did not make any difference to the process.

Result

61. In the result, the contract described in this case is a public works contract within the meaning of Council Directive 93/37. The State body considering the award of a contract within the scope of the Directive was obliged, in this case, to use the open or restricted procedure. There is no principle of National or European law which forbids a State body from requesting a best and final offer from qualified tenderers once the chosen procedure has been followed. The requirements of equal treatment and transparency, however, require that by the tender documents, notice should be given to prospective tenderers that a best and final offer may be sought following on the receipt and preliminary evaluation of tenders.

62. National and European law requires that parties who are given knowledge of a potential defect in tender procedures should move to seek the relief of the High Court at the earliest opportunity. Where the tender documents themselves display a defect in procedure, parties should not wait until the matter is decided by the award of the tender but proceed at the earliest opportunity to seek interlocutory relief.

63. There is nothing on the facts of this case that suggest that the procedure adopted by Bus Átha Cliath did not give all the parties contending for this contract an equal chance to meet the published specifications and offer the highest price. While the procedure questioned in these proceedings was lawful, it also had the merit of being circulated to all the parties for their information and of having been applied to them equally. The residual argument that there was a lack of transparency and an appearance of discrimination is therefore dismissed.