Neutral Citation [2013] IEHC 230

THE HIGH COURT

[2012 No. 918 J.R.]

BETWEEN

COPYMOORE LIMITED, CORK OFFICE MACHINE AND SUPPLIERS LIMITED, CUSKEN LIMITED, EMS COPIER SERVICES LIMITED, EUROTECH OFFICE EQUIPMENT LMIITED, INEST LIMITED, NORMAC LIMITED, MBE MALLOW LIMITED, O'ROURKE OFFICE SUPPLIES LIMITED, SHARP TEXT CORK LIMITED AND TOS LIMITED

APPLICANTS

AND

THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 29th May, 2013

Part A: Introduction

1. In these proceedings the applicants challenge the validity of a public service procurement process which resulted into the award of seven Framework Agreements with seven individual successful tenderers in February 2012 for what are known as "managed print services." "Managed print services" ("MPS") is an organisational concept whereby the document output of an organisation is outsourced to an external provider, so that responsibility for and management of the organisation's printing and imaging needs falls to that external provider. The Framework Agreements establish a contractual framework whereby the seven successful tenderers are invited to compete with each other through a series of min-competitions for the provision of managed print services throughout the public service.

2. The applicants further challenge the validity of a circular published by the Minister for Public Enterprise and Reform in July 2012. As we shall later see, the precise terms of this circular assume considerable importance for the purposes of this litigation, but for immediate purposes it is sufficient to say that the circular directed all public sector organisations to employ the successful tenderers for the supply of all managed print services. The tender had previously stated that the use of the Framework Agreements by the public sector organisations for such services was simply optional.

3. The applicants consist of eleven limited liability companies. Ten of these companies supply MPS to various public bodies, of which schools predominate. The other company, Normac Ltd., is engaged in the supply of consumables to the other ten companies, but does not directly supply print services itself. In that respect, its interest in the outcome of this litigation is probably more indirect than that of the other ten companies who are engaged directly in the supply of print services. But since nothing particularly turns on this – at least, so far as the facts of this case are concerned, given that the other ten companies are so engaged in such direct supply - I do not propose to differentiate between the eleven applicants for the purposes of either considering their standing to make this challenge or for the purposes of whether they can be regarded as "eligible persons" in a public procurement context.

4. The respondent is a statutory corporation whose powers have been clarified and amplified by the State Authorities (Development and Management) Act 1993 and the Commissioners of Public Works (Functions and Powers) Act 1996. It operates the National Procurement Services on behalf of the wider public sector.

5. On 19th July, 2011, the Offices of Public Works (as contracting authority) invited tenders from service providers to participate in a framework for the supply of many print services to a variety of local authority and public sector organisations. The appendix to the request for tender defined MPS as follows;-

> "Managed: framework members who are successful in mini competitions ("contractors") will take total responsibility for providing a wide range of printing and imaging solutions to meet the various MPS requirements of the clients…a choice of printer imaging devices will be required to meet the varying workloads of different clients. This will include, but is not limited to, the supply of all personalised, authenticated network print and imaging devices with secure print release (using proximity cards and scanners or PIN) the provision of all necessary software and toner, training and rationalisation of the organisations print and imaging fleet.
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> Print: contractors will provide day to day printing needs associated with the requirement of the clients. This will predominantly include standard A4 and A3 printing in both mono and colour using an array of printing – imaging devices capable of duplex printing, scanning, photocopying, faxing, collating and stapling. MPS does not include printing that is usually produced outside the office environment such as leaflets and posters.
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> Service: the service level requirement is at a minimum of 98% uptime must be maintained. The exact service level requirements will vary between different client organisations. Contractors will provide a nationwide on site service providing a single solution across single and multiple site client organisations with a broad national geographic spread."

6. Paragraph 1.4 of the request for tender stated that the object of the public procurement competition was:-

> "To conclude a multi supply or framework with a maximum number of framework members of seven ("framework member") to provide the services. The framework will be open to parties listed at para. 1.9 of this RFT [request for tender] ("clients"). Any framework agreement ("framework agreement") that may result from this competition will be for a term of two years with an option to the contracting authority at its sole discretion to extend the term on the same terms and conditions by a further two to a maximum of four years."

7. The tender envisaged that there would be an expenditure of approximately €100m. (excluding VAT) on managed print services by these public sector organisations over the two year initial term of the framework agreement. The tender further contemplated that successful tenderers would be then eligible to compete in various mini- competitions for the supply of MPS, the outcome of which

would result in the framework member which was successful in that competition would then enter into a service contract on the terms set out at appendix 6 to the request for tenders.

8. It is not in dispute that none of the applicants in these proceedings submitted tenders pursuant to the request for tenders. It is also accepted that none of them would have individually satisfied the €10m. turnover requirement, although it must be acknowledged that the tender expressly urged small and medium enterprises who otherwise would not have meet the threshold turnover criterion to come together to form consortia for the purpose of tendering.

9. The request for tenders was published in the official journal of the European Union on 20th July, 2011, with a stated deadline of 12th September, 2011. The respondents then published a contract award notice in the official journal on 1st March, 2011, which provided, *inter alia*, that the OPW had by a contract award decision of 8th February, 2012, decided to award contracts for managed print services to the seven parties listed in that contract award notice. Here it may be stressed again that the contract award simply determined eligibility on the part of the seven successful tenderers to compete in turn *inter se* for a variety of mini competitions which would then later be held throughout the public service for MPS over the next two years.

10. On 25th July, 2012, the Minister for Public Expenditure and Reform published a circular entitled "Circular 60/12 Public Procurement (Framework Agreements)" ("the 2012 Circular"). It may be observed that the 2012 Circular was, for the most part, perfectly general in nature and it stated:-

> "The public service reform plan identified procurement reform as one of a number of major projects. The implementation of mandatory arrangements in respect of centralised frameworks put in place by the national procurement service and the increased use of collaborative procurement arrangements across the public service are among the recommendation in the public service reform plan. The purpose of this Circular is to inform public bodies of the mandatory requirements to utilise central contracts put in place by the MPS, when procuring a range of commonly required goods and services such central arrangements are targeted as securing best value for money and facilitating contracting authorities to deliver services within their budgetary constraints."

The 2012 Circular went on to note that in some instances the "take up" of the National Procurement Services ("NPS") arrangements operated by the respondent have been low.

> "In order to increase the usage of NPS framework agreements and thereby secure best value for money, the government has decided that it should be mandatory for public service bodies to use the specified framework agreements."

11. Clause 4 of the Circular provided that these new mandatory arrangements came into force on 1st September, 2012. Appendix 1 of the Circular indicated that in the case of managed print services there were seven named suppliers that these arrangements were to be used by Central Government, Local Government, the Defence Forces, An Garda Síochána, the Prison Service, the Health Sector and all levels of the Education Sector including VECs.

12. For good measure a note to Appendix 1 of the 2012 Circular observed that:-

> "When opting for managed print service solutions it is mandatory to use this framework agreement."

13. The applicants contend that this circular had profound consequences for their business so far as their traditional customers were concerned. Many of them simply indicated that they could no longer do business with them as a result. The following letter from Ms. Eileen Horgan, the Procurement Officer, of the South Tipperary County Council to Mr. Eddie Davis of the sixth-named applicant, Eurotech Office Equipment Ltd., dated 19th October 2012 may be taken as representative. Having thanked Mr. Davis for the "good service that your company that your company has provided over the years", the letter writer went on to refer to the recent circular from the Minister which "makes it mandatory for all government agencies, including local authorities to use the NPS Managed Print Services framework". Ms. Horgan indicated that if the Council opted for MPS "we will not be in a position to hold an open tender."

14. These events gave rise to correspondence from the applicant's solicitors to the respondent in late October 2012 seeking an undertaking to the effect that, *inter alia*, a new tender would be organised in the wake of these developments. When the OPW refused to give these undertakings the present proceedings were commenced on 7 November 2012.

15. The issues arising in these proceedings are, as we shall now see, wide-ranging, but, broadly speaking, they can be divided into those concerning the tender itself (which are examined in Part B of this judgment) and those which relate to the validity of the circular itself (which are dealt with in Part C). The overall conclusions are then summarised in Part D.

16. Finally, a word about the structure of the judgment. As will be seen, many of the issues are interlocking and overlapping. The parties had helpfully prepared a structure and a summary of issues to be determined. While I have endeavoured to remain faithful to that structure, I found perforce nonetheless obliged to depart from it in places, particularly with regard to the sequence of the issues to be considered.

Part B: The Challenge to the Contract Award

17. The applicants object to the terms of the contract award, contending that it does not comply with the requirements of Part 13 of Schedule 5 of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006)("The 2006 Regulations"). While this is disputed by the respondent, it makes the more fundamental objection that the applicants are not eligible persons with standing to challenge the outcome of the tender competition. It is to that fundamental objection that we may first turn.

Question 1: Are the applicants "eligible persons" within the meaning of Article 4 of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 ("the 2010 Regulation")?

18. Article 4 of the 2010 Regulation provides:

> "For the purposes of these Regulations, a person is an eligible person in relation to a reviewable public contract if the person-
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> (a) has, or has had, an interest in obtaining the reviewable public contract, and
>
> (b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable public contract, of the law of the European Communities or the European Union in the field of public

procurement, or of a law of the State transposing that law."

19. The recitals to the 2010 Regulations show that it was intended to transpose the relevant Remedies Directives, namely, Directive 89/605 and Directive 2007/66 into our domestic law. Article 1(3) of the 1989 Directive (as substituted by Article 1 of the 2007 Directive) provides:

> "Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement."

20. Article 4 of the 2010 Regulations accordingly constitutes one of these "detailed rules" which has been established by the State and which requires proof that the applicant for review must be able to show either an interest or that it has suffered (or, at least, may suffer) harm as a result of the contract award.

21. In this context it is impossible to overlook the fact that the applicants did not submit a tender. This issue was examined in some detail by the Court of Justice in Case C-230/02 *Grossmann Air Service* [2004] E.C.R. I-1829. Here the applicant company sought to have a contract award set aside, contending that the tender for the supply of non-scheduled passenger air transport service for the Austrian Government was discriminatory and tailored to suit the interests of the winning tenderer. Grossman Air had not, however, submitted a tender and the first question considered by the Court was whether the company could be considered in these circumstances to be an eligible person. The very fact that no tender had been submitted by the party seeking a review was regarded by the Court of Justice was well nigh dispositive:

> "In that sense, as the Commission pointed out in its written observations, participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision."

22. The Court did, however, allow that there might well be circumstances where the tender terms were so discriminatory that it would be pointless to insist on the party seeking review to have submitted a tender even though it knew it was bound to be unsuccessful:

> "However, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated.
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> On the one hand, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications.
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> On the other hand, it is clear from the wording of Article 2(1)(b) of Directive 89/665 that the review procedures to be organised by the Member States in accordance with the Directive must, in particular, set aside decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications ... . It must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated.
>
> *Absence of proceedings against the invitation to tender*
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> In this case, Grossmann complains that the contracting authority imposed requirements in respect of a contract for non-scheduled air transport services that only an air company offering scheduled flights would be in a position to fulfil, which had the effect of reducing the number of candidates capable of providing all the services required.
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> It is apparent, however, from the file that Grossmann did not seek review of the contracting authority's decision determining the specifications of the invitation to tender directly, but waited until the decision to award the contract to Lauda Air was notified before asking the Bundesvergabeamt [Federal Procurement Authority] to set that decision aside."

23. The Court of Justice then proceeded to pose the question of whether an entity which has neither submitted a tender nor challenged the award criteria which are said to be discriminatory can be said to be an eligible person with an interest in the outcome:

> "The national court therefore asks, essentially, whether Article 1(3) of Directive 89/665 must be interpreted as meaning that it precludes a person who not only has not participated in the award procedure for a public contract but has not sought any review of the decision of the contracting authority determining the specifications of the invitation to tender either, from being regarded as having lost his interest in obtaining the contract and, therefore, the right of access to the review procedures provided for by the Directive.
>
> This question must be examined in the light of the purpose of Directive 89/665. In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community level, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 33 and 34, Case C-470/99 *Universale-Bau and Others*[2002] ECR I-11617, paragraph 74, and Case C-410/01 *Fritsch, Chiari & Partner and Others* [2003] ECR I-6413, paragraph 30).
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> It must be pointed out that the fact that a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his view discriminate against him, in so far as they effectively disqualify him from participating in the award procedure for the contract at issue, but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that those

specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665.

Such conduct, in so far as it may delay, without any objective reason, the commencement of the review procedures which Member States were required to institute by Directive 89/665 impairs the effective implementation of the Community directives on the award of public contracts.

In those circumstances, a refusal to acknowledge the interest in obtaining the contract in question and, therefore, the right of access to the review procedures provided for by Directive 89/665 of a person who has not participated in the contract award procedure, or sought review of the decision of the contracting authority laying down the specifications of the invitation to tender, does not impair the effectiveness of that directive.

Having regard to the foregoing, the answer to the first and third questions must be that Articles 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded."

24. One might, of course, observe of these passages that the Court of Justice had merely stated that the 1989 Directive *did not preclude* national authorities from holding that entities which neither submitted a tender nor challenged discriminatory tender criteria during the process should not be regarded as eligible persons. Yet the clear implication of the decision in *Grossmann Air Services* is that the Directives positively preclude such entities from being regarded as eligible persons and I think in order to remain faithful to the underlying sentiments of the judgment that the decision must be read in this fashion.

25. It may also be observed that the Court of Justice applied these principles in Case C-129/04 *Espace Trianon* [2005] E.C.R. I-7805 in holding that that a Belgian procedural rule which required that all members of a tendering consortium must challenge the validity of a contract award if such challenge is to be regarded as legally admissible did not unlawfully limit the availability of such an action contrary to Article 1(3) of the Remedies Directive. Here the Court again (at least) strongly implied that only persons who participated in the tender process have an interest in challenging the tender award. As it was the consortium which tendered (and not its individual members), if all members of that consortium did not maintain the challenge, it could not be said that the individual members had a continuing interest in maintaining the legal challenge to the outcome of the award.

26. What, then, are the implications of *Grossmann Air Services* for the present case? The applicants did not submit a tender and nor did they take action at the time to challenge criteria – such as the €10m. turnover requirement - which they might have maintained were discriminatory. They only took action once they realised that the contract award had exclusionary effects so far as their business was concerned and this was prompted, not by the terms of the tender or the subsequent contract award itself, but rather following the promulgation of the 2012 Circular which made the use of the seven successful contractors mandatory for MPS within the wider public service.

27. Putting matters another way, it is clear that the applicants would have been content not to apply for the tender provided that they could continue to compete for business with their traditional customers (such as schools, VECs and smaller public sector organisations). Their real objection was that the use of the successful contractors under the framework agreement was subsequently made mandatory by the 2012 Circular. Viewed thus, the objection is really to the subsequent promulgation of the 2012 Circular, as distinct from the contract award itself.

28. Accordingly, if one stops to subject the applicants' case to closer analysis. It will be seen that it is fundamentally an administrative law challenge wrapped up in a challenge to a procurement award. The objection is, therefore, really to the *economic consequences of an executive act* as opposed to the contract award *per se*. Indeed, in all strictness, the challenge to the validity of the 2012 Circular should probably have been commenced in separate plenary proceedings, since - again in strictness – it does not properly fall within the parameters of a challenge to the validity of the contract award as such in the manner provided for by Ord. 84A. I do not propose, however, to find against the applicants by reason of an ultra-technical objection based purely on the form of the proceedings which has caused no prejudice whatever: see the comments of O'Donnell J. to this effect in *McGowan v. Labour Court* [2012] IESC 21.

29. None of this to say that that the applicants do not challenge the contract award itself. But the objections to the contract award can nonetheless be fairly described as something of an afterthought and, if you will, opportunistic. This should not be viewed in any respect as a criticism of the applicants, but rather again to say that the fundamental objection is directed at the exclusionary effect of the executive action as communicated in the 2012 Circular. If, in order to win that particular challenge (*i.e,* to upset the Circular), it were necessary for them to go further and actually have the contract award itself set aside they would – understandably from their perspective – have no difficulty in advancing such a claim.

30. Once the nature of these disparate – if nonetheless overlapping - claims are understood, this serves to put the proceedings into a wider perspective. It means, objectively, that the applicants must presumptively be regarded as not constituting "eligible persons" as that term must be understood in the light of *Grossmann Air Services*, since they did not submit a tender nor challenge its terms in legal proceedings prior to the actual award.

31. It is true that there may well be cases where an entity can challenge the contract award without having participated in the tender, but these cases are exceptional. Thus, for example, in *Ryanair v. Minister for Transport* [2009] IEHC 171 the successful bidder did not take up the contract and the applicant (which had not participated in the tender) maintained that the Minister was then obliged to organise a fresh tender in which it would be eligible to participate. While Finlay Geoghegan J. held that the applicant had no standing to make some generalised complaint about the conduct of a tender in which it had not participated (such as, for example, a complaint that the principle of equal treatment of tenderers was not observed), she did hold that the applicant had standing to make the case that the Minister was then obliged in these special circumstances to organise a fresh tender.

32. Similarly different considerations may apply where, for example, the failure properly to advertise the tender has prejudiced potential tenderers so that they fail to submit a bid. As Arrowsmith, *Law of Public and Utilities Procurement* (London, 2005) observes (at 1368):

"…it is clear, as accepted in [*R. v. Avon C.C., ex p. Terry Adams Ltd.* [1994] Env. L.R. 442] that standing can exist even when the claimant has not bid, if this has been caused by the purchaser's breach of the rules, such as an unlawful failure to advertise the contract or the use of unlawful specifications."

33. Yet it must also be acknowledged that the question of whether a particular entity satisfies the test of eligibility cannot always be determined in the abstract or by reference to some a priori formula such as whether a tender has actually been submitted. As the judgment of Finlay Geoghegan J. in Ryanair demonstrates, allowance may sometimes have to be made for the nature of the tender irregularity alleged before this question can be completely determined.

34. What, then, are the nature of the irregularities alleged here? It is this question to which we may next turn.

Question 2: Is the Contract Award Notice in compliance with Parts 13(g), (k), (p) and/or (q) of Part 13 of Schedule 5 to the European Communities (Award of Public Authorities' Contracts) Regulations 2006?

35. The criteria which must be contained in the actual contract award notice are specified in Part 13 of Schedule 5 of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006)("the 2006 Regulations"). Part 13 is in the following terms:

> "13. The following is the information that a contracting authority must include in a contract award notice notifying the award of a public contract:
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> (a) the name and address of that authority;
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> (b) the kind of award procedure chosen;
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> (c) in the case of negotiated procedure without prior publication of a contract notice, the justification for the use of the procedure;
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> (d) in the case of a public works contract, the nature and extent of the contract and the general characteristics of the work to be carried out;
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> (e) in the case of a public supply contract-
>
> (i) the nature and quantity of products to be supplied, where appropriate, under the contract, and
>
> (ii) the relevant nomenclature reference number;
>
> (f) in the case of a public service contract-
> (i) the category and description of the service, and
>
> (ii) the relevant nomenclature reference number, and
>
> (iii) the quantity of services purchased;
>
> (g) the date on which the contract was awarded;
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> (h) the criteria for the award of the contract;
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> (i) the number of tenders received;
> (j) the name and address of the economic operator to whom the contract was awarded;
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> (k) the price or range (minimum and maximum) of prices to be paid under the contract;
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> (l) the value of the tender or tenders retained, or the highest tender and lowest tender taken into consideration for the award of the contract;
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> (m) if part of the works to be carried out, or part of the products or service to be supplied, under the contract is to be subcontracted, the value and proportion of the contract that are likely to be subcontracted;
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> (n) the date of publication of the tender notice in accordance with the technical specifications for publication in Schedule 6;
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> (o) the date on which the contract award notice is sent for publication in the Official Journal of the European Union;
>
> (p) the name and address of the body responsible for conducting appeals arising from the award of the contract and, where appropriate, mediation procedures;
>
> (q) precise information concerning the deadline for lodging such appeals, or if appropriate, the name, address, telephone number, fax number and email address of the service from which that information can be obtained."

36. The applicants challenge three aspects of the actual contract award notice of February 28, 2012. First, it is said that the notice does not specify the actual date on which the contract was itself awarded. Clause V.1 of the notice merely specifies the "date of contract award decision" as 8 February 2012, as distinct from the date of the decision to award the contract. Second, the notice does not specify the price or prices to be paid under the contract and is, in fact, completely silent regarding the price or range of prices. Third, while the notice itself specifies that the High Court is the body responsible for the appeal procedures, the deadline for lodging such appeals (or, more strictly, applications for review) was not specified.

37. It is, however, important to stress in this regard that the contract notice constitutes formal notification of the actual award of the contract and its terms. While this is doubtless an important document in the context of the procurement process, it is nothing as critical as the original request for tender documentation. This is naturally because the latter documentation is the benchmark by reference to which factors such as equality of tenderers and the possible presence of discriminatory criteria can be measured. An omission of a critical detail at this point might later prove fatal to the entire tender process.

38. This point is illustrated by the decision of the Court of Justice in Case C-241/06 *Lämmerzahl GmbH* [2007] E.C.R.-8415. In that case the City of Bremen had organised a tender for the supply of computer software suitable for handling cases in the field of adult social services. The contract itself contained no detail or indication of the estimated value of the contract or its quantity or scope.

Following queries from *Lämmerzahl*, the contracting authority proved to be evasive as to the number of its employees who might be licensed to handle this software and it simply informed it that it should submit a global tender price.

39. Following its unsuccessful tender, *Lämmerzahl* sought a review on the ground that the contract notice should have specified a price. The Court of Justice held that the failure to specify a price amounted to a breach of the requirement of the Public Work Directive 93/36. The German courts had, however, ruled that as the applicant company could and should have raised this point at an earlier stage, it was now time barred from raising this point subsequently. The Court of Justice disagreed saying:

> "In the case at issue in the main proceedings, the applicant, in addition to lack of information concerning the value of the contract and wrong choice of the award procedure, relies on irregularities affecting the financial presentation of the successful tender and the tests carried out on the software proposed. However, an irregularity in the financial presentation of a tender can be discovered only after the opening of the envelopes containing the tenders. The same consideration applies to the tests of the software proposed. Irregularities of that type can therefore occur only after the limitation period fixed by a rule such as that at issue in the main proceedings has expired.
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> It is clear from the order for reference that, in its decision of 7 November 2005, the Hanseatisches Oberlandesgericht in Bremen applied the time-bar rule at issue in the main proceedings in such a way as to extend it to all decisions capable of being taken by the contracting authority throughout the procedure for the award of a public contract.
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> Such an application of that time-bar rule makes it virtually impossible for the person concerned to exercise the rights accorded him by Community law in respect of the irregularities which can occur only after the expiry of the time-limit for submitting tenders. Accordingly, it is contrary to Directive 89/665, in particular Article 1(1) and (3)."

40. The present case is, however, very different. In *Lämmerzahl* the failure to state the price in the original request for tenders was capable of causing real prejudice, since, on that company's argument, the failure to do so – coupled with the City of Bremen's evasive reply to its queries – distorted the proper financial evaluation of the candidates, thus (implicitly) infringing the equal treatment of tenderers. One can thus appreciate that the nature of the irregularity would only become manifest once the envelopes of the potential tenderers were opened and the tenders were then actually evaluated.

41. It is otherwise here. Even if the contracting authority did breach the terms of the 2006 Regulations by, *e.g.*, failing to state the price, this did not actually prejudice the applicants in the slightest. Here again the true nature of the applicant's objections must be recalled. The applicants knew about this tender and elected consciously not to participate. Their concern is really a different one, namely, that in the wake of the 2012 Circular, they were (*de facto*) no longer free to compete for business with their traditional public sector customers.

42. In these circumstances, by analogy with the reasoning of Finlay Geoghegan J. in *Ryanair*, the applicants must be held to have no standing to make generalised complaints about a feature of the tender process in which they did not participate where the irregularities alleged could not possibly have prejudiced them.

Conclusions on the first two questions

43. In summary, therefore, it can be said that, generally speaking, an applicant who wishes to challenge the outcome of a tender award must have participated in that process in order to be accounted an "eligible person" for the purposes of the 2010 Regulations with standing to challenge that award. Exceptions may, however, have to be made for special cases such as where the failure to advertise properly may have resulted in a potential tenderer not submitting a tender.

44. In the present case the applicants consciously did not submit a tender even though they knew of the competition. In the light of *Grossmann Air Services* it must be presumed that they are not eligible persons, absent such exceptional circumstances. There are, however, no such exceptional circumstances in the present case because, unlike the facts of *Lämmerzahl*, the applicants' complaints in relation to the contracts' award notice in February 2012 could not, even if well founded, have possibly prejudiced them.

45. The applicants' challenge to the validity of the tender awards must accordingly fail by reason of the fact that they are not "eligible persons" and, in any event, they were not prejudiced by any of the alleged irregularities of which they have complained. In these circumstances, it is really unnecessary to consider any time-related issues.

Part C: The Validity of the 2012 Circular

46. As I have already indicated, at the heart of the applicants' objection in the present case is that the 2012 Circular now makes the use of the framework agreement mandatory for a range of public services, including, of course, MPS. This is, I think, of critical importance because paragraph 2.3 of the tender itself stated:

> "*…clients are not bound to enter into any new contract* or other contractual agreement with the Framework Member as a result of the entering into this Agreement. *Clients are not and will not be under any obligation to avail of this Framework*. This Framework Agreement *does not confer exclusivity on Framework Members and there is no guarantee that clients will use the Framework*. The use, if any, by clients of the framework and the timing of same *will be at the discretion of each client*." (emphasis supplied)

47. The applicants make three distinct challenges to the validity of the 2012 Circular. First, it is contended that the Circular amounts to an unlawful amendment of the tender. Second, it is suggested that the Circular is *ultra vires* the powers of the Minister and the respondent. Third, it is said that the Circular has exclusionary effects which are anti-competitive in nature and that it is accordingly unlawful on that account. As the parties have agreed to leave over the competition law ground of challenge pending the outcome of this judgment on the other matters issues raised, I can pass from this issue for the moment.

48. It may also be noted that the 2012 Circular was actually published by the Minister for Public Enterprise and Reform, albeit that the practical implementation of the circular itself largely falls on the shoulders on the respondent, at least so far as the MPS Framework Agreement is concerned. Strictly speaking, the Minister ought to have been a party to at least this part of the litigation since it was the validity of the circular promulgated by him which is under challenge. But since no issue has, however, been raised by the respondents on this point, I will proceed nonetheless to consider the vires issue.

Question 3: Does the 2012 Circular amount to a de facto amendment of the tender or is otherwise contrary to EU law?

49. The applicants contend that the 2012 Circular amounts to a *de facto* amendment of the contract award in that in contradistinction to Clause 2.3 of the tender documentation – which, as we have just seen, stated that the use of the Framework

Agreement by the prospective public sector clients was not mandatory – the 2012 Circular mandated the use of the Framework Agreement in all cases, subject only to certain exceptions not here relevant. If, following the closing date for submission, the tender had been amended in this fashion so as to specify that, henceforth, its use was to be mandatory by the relevant public sector organisations, there could be no doubt but that this would amount to a material and impermissible amendment of the tender which potentially prejudiced not only all unsuccessful tenderers, but also those who might have tendered under such circumstances, but did not do so.

50. The leading authority on the point is Case C-454/08 *Pressetext Nachtrichtenagentur GmbH* [2008] E.C.R. I-4401. Here the Court of Justice articulated the test of materiality in the public procurement context in the following terms:

> "In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract ….
>
> An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.
>
> Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Article 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part, services listed in Annex IA thereto, restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract.
>
> An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract."

51. By any standards, any alteration of the tender to provide that the use of the successful Framework Agreement contractors was now to be mandatory throughout the entire public service when it had been heretofore optional would have amounted to a significantly material change in the sense conveyed by the Court of Justice in *Pressetext*. There is absolutely no doubt but that it would have significantly influenced the thinking of the applicants as to whether they should have endeavoured to participate in the tender process even if this required some of them to form a consortium for this purpose. Just as importantly, such an amendment would have materially altered the scope of the tender by appreciably extending the range of its practical operation. It would, moreover, have altered the economic balance of the contract, since the successful tenderers would now know that they enjoyed an *exclusive* right to tender in a series of mini-competitions for lucrative public sector contracts whereas heretofore the use of the Framework Agreement had been merely *optional*.

52. It is at this point that we encounter an issue of some novelty. The contract has not, of course, actually been amended by the respondent. Instead, what has happened is that the Government (though the auspices of the Minister for Public Sector and Reform) has subsequently determined that the use of the Framework Agreement tenderers should be mandatory and, in the wake of the 2012 Circular, it has fallen to the respondent to carry out this instruction. It is true that in all strictness a circular of this kind cannot alter or vary legal rights. But it would be unrealistic not to regard the circular as effectively instructing all public sector organisations to treat the Framework Agreement as mandatory. Nor can this change be regarded as a purely theoretical one, since there is clear evidence that in the wake of the distribution of the 2012 Circular that many of the the applicants' suppliers informed them that they could no longer do business with them by reason of the fact that they were now obliged to use the tenderers who had been successful in the Framework Agreement tender process.

53. It is, of course, true to say that the scope, operation and value of many public procurement contracts may be incidentally affected by the enactment of legislation or other public regulation. Thus, for example, the profitability of a catering contract awarded through the public procurement process might be significantly affected by the enactment of new food hygiene legislation by the Oireachtas. But such legislation and regulation is almost invariably expressed in perfectly general terms and, where disadvantageous, this must usually simply be tolerated by a particular tenderer as part of the cost of doing business.

54. The present case is, however, somewhat different. While parts of the 2012 Circular are general in nature, key parts of it are specifically directed to the use of the MPS Framework Agreement itself. Critically, by making the use of the Agreement mandatory, the 2012 Circular effectively alters the terms of the entire tender process in a far-reaching way. In these circumstances, it behoves the courts to ensure that the Minister cannot do indirectly that which the Office of Public Works would be precluded from doing directly.

55. In these very particular and unusual circumstances, I feel compelled to hold that the 2012 Circular is ultra vires as incompatible with EU law inasmuch only as it makes the use of the MPS Framework Agreement *mandatory*. If it were otherwise, it would mean that key objectives of the EU's public procurement regime could (and, in the present case, would) be compromised indirectly by means of administrative regulation published shortly after a particular tender award which the contracting authority was itself implementing, even if – was is doubtless the case here – this was a consequence which was not foreseen, much less intended. Absent such judicial control the entire basis of a procurement award could be entirely distorted by administrative regulation of this kind.

56. The matter would have been entirely different if the request for tender for the MPS Framework Agreements had stipulated that the use of such Framework Agreements was mandatory for the entire public service.

57. The Minister can, of course, exercise the executive power of the State in Article 28.2 of the Constitution in order to give general directions to the public sector and may naturally generally do so by means of circular. But just as a circular may not alter or vary the general law, so too a circular may not compromise rights or entitlements deriving from European Union law. Yet by making the use of the MPS Frameworks Agreements mandatory, it has entirely distorted the assumptions on which the entire tender process for those Agreements was based, thus inadvertently undermining a key objective of Directive 2004/18/EC. It is for this single reason that I have concluded that the 2012 Circular is invalid and ineffective insofar as it makes the use of the MPS Framework Agreement mandatory throughout the public sector.

Question 4: Do the applicants have the necessary standing to advance this claim and, if so, has the claim been brought within time?

58. There can really be very little doubt but that the applicants have the requisite standing to advance the claim that the 2012

Circular is invalid insofar as it made the use of the Framework Agreement. This is not affected in the slightest by reason of my earlier conclusion to the effect that they had no standing to make the complaints which they did regarding the operation of the tender process once they had elected not to participate in that process. Here it may be recalled again that the applicants' grievance is not with the Framework Agreement tender as such, but rather with the fact that the use of the successful Framework Agreement contractors was made mandatory by means of the 2012 Circular. As we have already seen, the applicants have been plainly affected by reason of the fact that the use of the Framework Agreement has now been made mandatory in the manner just indicated.

59. There remains the question of whether the applicants are within time. In this regard it should be noted that the 2012 Circular does not, of course, amount to an administrative decision which affects legal rights. Indeed, the 2012 Circular is not like a contract award or a planning permission or a vast myriad of other administrative decisions which actually or potentially affects legal rights, precisely because it does not decide anything. In that respect, it is akin to an Act or the Oireachtas or a statutory instrument the validity of which is most naturally challenged in separate plenary proceedings rather than in judicial review proceedings, precisely because in those cases where the validity of the statute or regulation is the only issue at stake, there is no administrative decision which is amenable to being quashed. This is so even if there is no fixed rule in that regard and even if again the courts not infrequently declare a law to be invalid in judicial review proceedings: see, *e.g.*, the judgment of O'Donnell J. in *McGowan v. Labour Court* [2013] IESC 21.

60. In *McGowan* Hedigan J. held that the applicants were out of time to challenge the constitutionality of the Part III of the Industrial Relations Act 1946 in judicial review proceedings in part because they had not commenced their challenge to the validity of a registered employment agreement within the three months stipulated by Ord. 84., r. 21 and in part because it was preferable that the constitutional issue be litigated in separate plenary proceedings. The Supreme Court took a different view, with O'Donnell J. noting that as the relevant agreement was "still in full force and effect", the court should not decline to hear the challenge either by reason of considerations of time or the actual form of the proceedings.

61. One could apply this reasoning by analogy to the present case. The 2012 Circular is still in force and it has continuing effects. The applicants' challenge to the validity of the Circular is not - strictly speaking, at any rate - within the scope of Ord. 84, precisely because no *administrative decision* is sought to be quashed or prohibited. In these circumstances, the Ord. 84 time limits do not apply even by analogy to such a challenge. This is unlike, for example, the position regarding a claim challenging the validity of an administrative decision such as a compulsory acquisition order which is raised by counter-claim in proceedings by plenary summons rather than by means of judicial review. In such cases, the judicial review time limits do apply, if only by analogy: see *Shell E & P (Ireland) Ltd. v. McGrath* [2013] IESC 1.

62. In *Shell*, Clarke J. held that it was ultimately the *nature of the claim* rather than the *form of the proceedings* which determined whether particular time limits should apply to a given claim. In the present case the claim challenges the validity of what is in effect an executive regulation, somewhat akin to a statutory instrument. If the applicants had sought to challenge the validity of the circular in plenary proceedings seeking a declaration to this effect, then, subject, of course, to pleas of laches, acquiescence etc., no formal time limit of the kind contained in either Ord. 84 (three months) or Ord. 84A (thirty days) would apply in respect of such a claim. If this is indeed the nature of the claim, then the fact that for reasons of forensic convenience the claim has been wrapped up in Ord. 84A proceedings attracting a much shorter time limit (albeit one subject to the power to extend time) should not mean that this time limit also applied to such a claim. It is for these reasons that I must conclude that the applicants are not precluded by a time-bar from challenging the validity of the 2012 Circular.

Part D: Conclusions

63. It remains only to summarise my principal conclusions.

A. As the applicants did not participate in the MPS Framework Agreement and as they were not prejudiced by such irregularities (if any) as were contained in the contract award notice, they cannot be regarded as "eligible persons" within the meaning of the 2010 Regulations with standing to raise these issues.

B. The applicants' real objection, however, is to the fact that the 2012 Circular had the effect of making the use of the MPS Framework Agreements mandatory throughout the public sector. The tender documentation had previously stated otherwise. The change brought about by the 2012 Circular accordingly had far-reaching implications for their business, since they were now effectively locked out of key public sector markets.

C. Had such change been brought by about by a formal contract amendment, it would have been unquestionably material within the meaning of the decision of the Court of Justice in *Pressetext*. Unlike legislation or regulations which is perfectly general in its terms, the 2012 Circular nonetheless effectively altered the terms of the tender in all but name.

D. In the particular and very special circumstances of this case, I am driven to the conclusion that the 2012 Circular is ultra vires as incompatible with EU law inasmuch only as it makes the use of the MPS Framework Agreements *mandatory*. If it were otherwise, it would mean that key objectives of the EU's public procurement regime could (and, in the present case, would) be compromised indirectly by means of administrative regulation published shortly after a particular tender award which the contracting authority was itself implementing. The matter would have been entirely different if the request for tender for the MPS Framework Agreements had stipulated that the use of such Framework Agreements was mandatory for the entire public service.

> The Minister can, of course, exercise the executive power of the State in Article 28.2 of the Constitution in order to give general directions to the public sector and may naturally generally do so by means of circular, but this may not compromise rights or entitlements deriving from European Union law. Yet by making the use of the MPS Frameworks Agreements mandatory, it has entirely distorted the assumptions on which the entire tender process for those Agreements was based, thus inadvertently undermining a key objective of Directive 2004/18/EC. It is for this single reason that I have concluded that the 2012 Circular is invalid and ineffective insofar as it makes the use of the MPS Framework Agreement mandatory throughout the public sector.

E. The applicants have the necessary standing to challenge the operation of the 2012 Circular, even if they have no standing as such to challenge the outcome of the tender process. They are also within time in making this claim.

F. In summary, therefore, the applicants' challenge to the contract award fails and, subject to any competition law argument which has been held over pending the outcome of this judgment, must otherwise be dismissed. The applicants'

claim that the 2012 Circular is *ultra vires* insofar as it makes the use of the MPS Frameworks Agreements mandatory throughout the entire public sector is, however, well founded and they are entitled to a declaration to this effect.