Neutral Citation [2016] IEHC 435

THE HIGH COURT

[2015 No. 21 JR]

IN THE MATTER OF THE REVIEW OF THE AWARD OF A PUBLIC CONTRACT PURSUANT TO THE EUROPEAN COMMUNITIES (AWARD OF CONTRACTS BY UTILITY UNDERTAKINGS) (REVIEW PROCEDURES) REGULATIONS 2010

AND ORDER 84A OF THE RULES OF THE SUPERIOR COURTS, AS AMENDED

BETWEEN

SOMAGUE ENGENHARIA S.A. & WILLS BROS LTD

APPLICANTS

AND

TRANSPORT INFRASTRUCTURE IRELAND

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 28th day of June 2016.

1. These proceedings concern the tendering process for the contract for the construction of an extension of approximately 5.6kms to the Dublin Light Railway, Luas. The applicants contend that the tender competition in respect of the contract was vitiated by a number of serious errors and breach of the rules relating to public procurement. The applicants are a joint venture established for the purposes of tendering for the contract, and came second in the competition.

2. The successful tenderer was Sisk Steconfer J.V., ("SSJV"), a joint venture formed by the Irish construction company, John Sisk and Son Limited and Steconfer S.A., a Portuguese based railway construction company.

3. The applicants claim *inter alia* that their tender had a significantly lower price than that of the winning bidder, and that the errors and breach of the rules on the part of the respondent had the effect that they lost the contract. The parties agreed that I would first try the substantive question and stand over issues of remedies and/or damages, if any.

4. The application is fully contested and is brought pursuant to the provisions of O. 84 A of the Rules of the Superior Court as amended.

5. This judgment deals with the substantive claim in the judicial review. I already delivered judgment on the 13th October, 2015 in relation to an application by the applicants to cross-examine the deponent of an affidavit sworn on behalf of the respondent: *Somague Engenharia S.A. & Wills Bros. Ltd. v. Transport Infrastructure Ireland* [2015] IEHC 723.

Background

6. The applicants are limited liability companies, the first applicant having its registered offices in Portugal, and the second in Foxford, County Mayo. Both applicants are involved in the business of civil construction and engineering contracting. The applicants formed a joint venture for the purpose of tendering for the contract the subject matter of this judicial review. The respondent contracting authority was the Railway Procurement Agency ("RPA"), the functions, assets and liabilities of which were transferred to Transport Infrastructure Ireland Limited on the 1st August, 2015. The respondent is a body corporate established pursuant to the Transport (Railway Infrastructure) Act, 2011 and has *inter alia* the function of providing or securing the provision of light railway and metro railway infrastructure in Ireland. The respondent is a contracting entity for the purposes of S.I. No. 50 of 2007 The European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 ("The 2007 Regulations") and is listed as a contracting entity in Annex IV of Directive 2004/17/EC (The Utilities Directive) which co-ordinates the procurement procedures of entities operating in the water, energy, transport and postal services. I refer to the contracting authority as the respondent in this judgment, unless for reasons of sense I require to refer to the RPA.

7. By public contract notice published in the Official Journal of the European Union on or about the 28th September, 2013, the RPA invited tenders for the design and construction of a light railway extension of Dublin's Luas light railway system of approximately 5.6 km in length. The new railway lines were to run through the city centre and inner city and were to link with the existing Luas Red and Luas Green lines. The estimated value of the contract was in the region of a hundred million euro. Interested parties were invited to complete a questionnaire to qualify for invitation to tender.

8. Further to the contract notice the RPA issued the Conditions of Tendering in or around the 3rd April, 2014.

9. Five candidates completed questionnaires in response to the OJEU notice. All were joint ventures between Irish companies and either Spanish or Portuguese companies. As all satisfied the prequalification criteria, all were invited to tender. The tenders were invited in accordance with the documents made available by way of an e-data room, which was opened to the tenderers on the 3rd April 2014. The documents provided to the tenderers incorporated by reference the Conditions of Tendering, the Works Requirements, and the Public Works Contract applicable to public building contracts of the relevant type.

10. The applicants submitted a tender for the contract in accordance with the competition rules on the 18th September, 2014.

11. The evaluation team comprised 11 people, each having experience and expertise in the areas relevant to the criteria under review. The evaluation process was done in some cases initially by sub groups of specialist assessors. The details of the individuals, their qualifications and expertise are set out in the affidavit of Tony Redmond, sworn on the 10th April, 2015.

12. The applicants were formally notified of the result of the competition by letter dated the 17th December, 2014 ("the debrief

letter"). The applicants sought a de-brief meeting with the RPA and two meetings were held, on the 23rd December, 2014 and a more formal meeting on the 7th January, 2015.

13. The reasons for the marks are to be ascertained from the letter and the reasons given at these meetings.

14. The applicants plead that the respondent breached certain Regulations and Directives relevant to the procurement process, including the, Utilities Regulations, S.I. No. 50/2007, Directive 2004/17, Directive 92/13EC (The Remedies Directive), European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (S.I. No. 131 of 2010), and the general principles of European law and national public law.

15. Because of the complexity of the facts, it is more convenient if I now outline the applicable legal principles in a procurement law judicial review.

The Directives
16. The principles of equality, non-discrimination and transparency are central to the philosophy of the Directives of encouraging open competition between citizens of, or companies registered in, Member States. The requirement of transparency is to ensure that persons engaging in a tender process know the evaluation criteria in advance of submitting a tender for a public works or utilities contract, and know how these criteria were applied by an evaluation team to an individual tender.

17. The Utilities Directive was transposed into Irish law by the Utilities Regulations.

18. Article 55 of that Directive sets out a number of objective criteria aimed at ensuring compliance with these principles in the process of the award of a contract, *inter alia* with a view to ensuring "the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied", and a means by which the tenders may be "compared and assessed objectively". Equality and transparency is required so as to enable a tenderer to formulate a proposal, and to ensure that the assessment of a proposal by the contracting authority was fairly and transparently done.

19. The Utilities Directive is one concrete realisation of the principle of genuine competition between entrepreneurs in Member States of the European Union. As with many European principles, this objective is required to be protected by the national courts by effective remedies equivalent to those that are available in other Member States. The Directive identified a number of general principles with regard to the process leading to the award of public contracts, namely non-discrimination, transparency of competition, proportionality, objectivity and effective judicial protection.

20. Article 10 of the Utilities Directive, is engaged in the present case as are the Utilities Regulations. Article 10 of the Utilities Directive requires as follows:

> "Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."

21. That provision that the criteria for the award of a contract should be sufficiently clear and apparent to enable tenderers to be compared and assessed objectively is found in national law in Regulation 24 of the Utilities Regulations

Judicial statements of the importance of the principles
22. The principles have been described as pre-eminent in *Fabricom SA (Belgium)* [2005] ECR 1-1559 Case C-21/03 where the CJEU gave the following clear statement of principle:

> *"26. ..it must be borne in mind that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition...*
>
> *27. Furthermore, it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."*

23. The importance of the principles in achieving the objective of competition was explained by the CJEU in *Universale-Bau AG & Ors.* [2002] E.C.R. 1-11617 Case C-470/99 as follows:

> *"91. The principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with …*
>
> *93. It follows … that the procedure for awarding a public contract must comply, at every stage, … both with the principle of the equal treatment of the potential tenderers and the principle of transparency so as to afford all equality of opportunity in formulating the terms of their applications to take part and their tenders."*

24. Finlay Geoghegan J. in *Gaswise Limited v. Dublin City Council* [2014] IEHC 56 endorsed this statement of law, as do I.

25. A contracting authority is obliged to comply with its own competition rules such that if a tender process requires certain information and identifies certain contract award criteria these must be considered, not ignored, and the contracting authority may not take into account other information or criteria which does not "*bear directly on the contract award criteria*": McCloskey J. at para. 48 of *Resource N.I. v. Northern Ireland Courts and Tribunals Service* [2011] NIQB 121.

The role of the court on review
26. This is a judicial review of the decision of the respondent to award a public works contract to SSJV, and not to the applicants. The role of the court is to act as a review and not appellant court, and the review includes considerations of whether there has been a breach of any of the applicable Directives, Regulations and the general principles of transparency and equality. The principles derive from European law and the approach of the courts is not to be equated with that adopted in domestic judicial review, although as noted by Fennelly J. in *SIAC Construction Ltd. v. Mayo County Council* 2002 IESC 39, [2002] 3 I.R. 148 there may not always be a difference in practice or in the end result.

27. Fennelly J. in *SIAC Construction Ltd. v. Mayo County Council* held that an error must be "*manifest*" , one that has clearly been made in order for a court to justify disturbing the decision of an authority, albeit that the word "manifest" should not be equated with

"*any exaggerated description of obviousness*". Fennelly J. explained at p. 176:

> *"I do not think, however, that the test of manifest error is to be equated with the test adopted by the learned trial judge, namely that, in order to qualify for quashing, a decision must "plainly and unambiguously fly in the face of fundamental reason and common sense." It cannot be ignored that the Advocate General thought the test should be "rather less extreme" Such a formulation of the test would run the risk of not offering what the Remedies Directive clearly mandates, namely a judicial remedy which will be effective in the protection of the interests of disappointed tenderers."*

28. He went on to say that the principles operative in domestic judicial review may be overly narrow to achieve this end:

> *"The courts must exercise their function of judicial review so as to make the principles of the public procurement directives effective. In the case of clearly established error, they must exercise their powers. The application of these principles may not, in practice, lead to any real difference in result between the judicial review of purely national decisions and of those which require the application of Community law principles."*

29. Implicit in this decision is a recognition that there can be in judicial review of procurement decisions, a standard or test which can differ from that found in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R 39, bearing in mind the wide margin of discretion allowed to national courts, provided the remedy is both effective and equivalent in the light of Community principles.

30. Clarke J. in *Greencore Group Plc. & Irish Sugar Ltd. t/a Greencore Sugar v. Ireland* [2007] IEHC 211, albeit in a different context but where European remedies were applicable, adopted the "manifest error test" but went on to say as follows:

> *"Where a decision maker has to evaluate complex evidence a wide margin of appreciation will be afforded to the judgment of that decision maker under either system."*

31. The two systems to which he referred were the remedies available under Irish and European public law.

32. This approach is consistent with that of O'Neill J. in *Clare Civil Engineering Ltd. v. Mayo County Council* [2004] IEHC 135 in which he considered extensively the judgment of Fennelly J. in *SIAC v. Mayo County Council*.

33. Further there is some authority for the proposition that a degree of scrutiny not always found in judicial review is required, and while the court engaged in a judicial review is not competent to substitute its decision on the facts for that of the contracting authority, the court's scrutiny is more intense and engages with a review of the evidence of how the evaluation process in fact occurred, at a level of detail different from that found in other types of judicial review. This was explained by McCloskey J. in *Resource (N.I.) v. Northern Ireland Courts and Tribunals Service,* at para. 35:

> *"Where, in any given case, a disappointed bidder's legal challenge focuses on the activities and deliberations of an evaluation panel, the evidence bearing thereon will, inevitably, be carefully and objectively scrutinised by the court. Any failure by the court to scrutinise with particular care the contents of relevant individual and collective marking frames would be in dereliction of the judicial duty."*

34. McCloskey J. emphasised the solemn nature of the evaluation process which he said had to be:

> *"…designed, constructed and transacted in such a manner to ensure that full effect is given to the overarching procurement rules and principles."*

35. What is also apparent from the authorities is that the court must look to whether an undisclosed or impermissible criterion could have, and not would have, made a difference to the end score, or whether to use the language of McCloskey J. it was "*operative or material*". This is apparent in *ATI EAC* [2005] E.C.R. 1-10109 Case C-331/04 at para. 28:

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

36. However, there is no question of permitting a margin of discretion when there has been a failure to respect the principles of equality, transparency and objectivity. Fennelly J. made this clear in *SIAC v. Mayo County Council* and O'Neill J. too, noted the distinction between a decision where the contracting authority had made an erroneous construction of a contract document, and one where the authority was making a decision on matters of fact:

> *"The decision of the respondent which is impugned in these proceedings was a decision to the effect that the applicant was guilty of zero rating, a conclusion based upon the respondents construction of the contract documents. The decision in question would appear to me to have been a decision as to facts based upon either a correct or an erroneous construction of the contract documents. In this context the range of appreciation of fact is quite narrow and therefore, range of discretion on the part of the decision maker correspondingly confined, and hence the existence or absence of error much more easily or clearly discernable than in a situation where the decision maker had to consider and weigh a broad range of, perhaps, conflicting factual material."*

37. That the contracting authority has no margin of appreciation where the principles of equality/transparency have not been respected emerges from the decisions of Fennelly J. in *SIAC Construction Ltd. v. Mayo County Council* and of Peart J. in *Fresenius Medical Care (Ireland) Ltd. v. Health Service Executive & Anor.* [2013] IEHC 414 where he said at para. 39:

> *"… [where] there has been an established failure to respect the principles of equality, transparency or objectivity, there can be no question of permitting the discretion or margin of appreciation to overlook it. In such clearly established circumstances the Court must act and quash the decision."*

The grounds

38. The applicants plead a large number of grounds in the first statement grounding the application for review, dated the 15th January, 2015, and which was amended on three occasions, the final version being dated the 6th July, 2015. Some grounds pleaded in the final version of the statement of grounds were ultimately not pursued at the hearing.

39. The main grounds on which the applicants seek judicial review can be identified as follows:

> a. That the respondent applied inapplicable and/or identified criteria to its qualitative assessment. This is alleged to have occurred in the assessment of the Red Line proposals;
>
> b. That the respondent wrongly applied certain identified and applicable criteria;
>
> c. That the respondent failed to apply certain identified and applicable criteria;
>
> d. That the respondent failed to adopt the negotiated procedure or to properly engage the MEAT process.

40. Other matters were raised, and these will appear in the course of the judgment.

The role of the court in the present case
41. In the present case, it seems to me that the applicants' case can be broken down into two broad arguments: that there was a breach of the general principle that impermissible criteria not be applied, or that the disclosed criteria be in fact engaged in the assessment of the tender submissions for the tie in of the Red Line. Manifest error in a more narrow sense is alleged with regard to the approach of the respondent in regard to the application of the criteria in the assessment and marking of the tender.

42. Different considerations might apply with regard to these two classes of errors, and if it can be shown that the contracting authority did apply an impermissible criterion, or failed to apply relevant criteria, then the error is one of substance and fundamental to the process, in respect of which no margin of appreciation can be permitted. If the error however was made in the way in which the respondent approached certain factual evidence before it, such error falls within the second class of error, namely it is one where a margin of appreciation will be afforded, and a degree of curial deference and judicial restraint is to be shown to the contracting authority as an expert body as explained by Clarke J. in *Greencore Group Plc. & Irish Sugar Ltd. t/a Greencore Sugar v. Ireland.*

Conditions of Tendering
43. The contract notice specified that the respondent had adopted a negotiated procedure in respect of the tender, and that it was adopting the MEAT (Most Economically Advantageous Tender) process. Fifty five per cent of the marks were to be awarded to a tender in respect of price, and the balance of 45 per cent in respect of identified qualitative criteria. It is asserted that the tender submitted by the applicants was awarded fewer marks than it ought to have scored and that SSJV was awarded more marks than were justified.

44. Two criteria were tested on a pass/fail basis and our qualitative award criteria were identified as follows in the Conditions of Tendering:

> a. Project management, which carried 20 marks, divided into 3 sub criteria: Design management (8 marks), interface management at the design stage (4 marks) and construction management procedures (8 marks).
>
> b. Methodology, which carried 25 marks, divided into 4 sub criteria: Traffic management strategy (8 marks), programme submissions (4 marks), Red Line tie-in method statement (10 marks) and communications strategy (3 marks).

45. The scoring system for the award criteria other than price were stated to be as follows:

Marks available	Description
100	Excellent. No reservation.
80	Very good submissions, with some minor reservations.
60	Good submissions with some reservations.
40	Poor submissions, with reservations.
20	Very poor submission, with major reservations.
0	Extremely poor submission.

46. The applicants argues that the respondent failed to properly apply the tender process in six of the seven sub-criteria, the criterion in respect of which no complaint is made being the first project management sub-criterion, design management.

47. In the first part of this judgment I deal with the means by which the respondent applied the criteria, and deal with them in sequence. The second part of the judgment deals with what is alleged to have been a wholly incorrect approach by the respondent to the Red Line proposal; and the final part deals with the argument that the respondent erred in not engaging after it had identified a preferred bidder.

The first criterion: project management (20 marks)
Project management sub-criterion: interface management at the design stage

48. Because the works in respect of which the tender was submitted involved the carrying out of works in Dublin City Centre, and would impact on various statutory authorities and others, including Dublin City Council, the Luas operator and property owners in the vicinity of the works, and because of the requirements of S.I. 9 of 2014, Building Control (Amendment) Regulations, 2014, the Conditions of Tendering required (at condition 4.2) that the tender would contain details of the procedures and systems proposed in respect of what was called "interface management at the design stage". The Conditions of Tendering required the tender document to:

> "… demonstrate the Tenderers understanding of their duties in respect of dealing with these stakeholders and describe how they propose to perform these duties."

49. Further, the tenderer was required to identify the person or organisation which would certify the works for the purposes of the Building Regulations, 2014.

50. The applicants were awarded 60% of the available 4 marks (2.4 marks) and the winning tender 100% of the marks (4 marks). The applicants challenge the marks awarded in two aspects: that the winning tender ought not to have been awarded full marks on account of a number of errors alleged to have been present in its tender, and that the marks awarded to the applicants were too low.

51. The first argument is that the winning tenderer did not identify in its tender document the person or organisation that would fulfil the certifying role. The respondent says that the lead architect of SSJV (Claire White) was identified as having a certifying role, and her *curriculum vitae* was set out, albeit SSJV did not separately identify Ms. White or any other person or organisation in response to condition 4.2.2 of the Conditions of Tendering, but in another part of the submission.

52. It is argued that the respondent wrongly, deemed the submission to be an adequate response to the requirements of 4.2.2, and thereby fell into error in having regard to irrelevant information and failing to require the information to be present in each part of the tender document.

53. Second, it is argued that SSJV was unjustifiably awarded full marks when it submission was described as "good" or "very good" only, and not "excellent" in the debrief letter.

54. It argued that the respondent thereby breached the requirement of equal treatment.

55. That inequality resulted from the fact that the evaluation team looked at all relevant parts of a submission is not borne out by the uncontroverted evidence that the evaluators had regard to the entire submission of each tender. There is nothing in the Conditions of Tendering in my view that mandates a different approach that might support an argument that there was an error of process. Further the uncontroverted evidence is that RPA did consider another unrelated part of the tender submission of the applicants in the evaluation of their Red Line submission with regard to railway safety, and the applicants do not seek to argue that this was an incorrect approach. The requirements of equality do not operate one way only.

56. The second complaint can be dealt with briefly. The language of the debrief letter is not to be interpreted as requiring the degree of exactitude and care as might be required in a contract or a piece of legislation. The evaluation score sheet showed that the assessors regarded the SSJV submission as excellent, with no reservations. No error in ascribing full marks can therefore be said to exist.

57. I consider that no manifest error is shown to have operates in the assessment of the tenders under this sub-criterion.

Project management sub-criterion: construction management procedures

58. The tender was required to describe the process for communicating design information, technical queries and responses thereto between the design team and the construction management team, as well as how, and by whom, the plan would be developed in the course of construction. The document was to describe programme and quality management processes and procedures proposed to be implemented during the construction stage.

59. The applicants argue that there has been a manifest error in the evaluation process under this sub-criterion in a number of respects.

60. First, it is argued that notwithstanding that the response to this sub-criterion was required to be limited to five pages, the respondent permitted SSJV to submit a response longer than the length permitted, incorporating by reference to another part of the tender an organisational chart outside the five-page limit.

61. The second complaint relates to an alleged breach of equality of treatment in evaluation. The evaluation report showed that the submission of the applicant was considered to be "inadequate" in a number of respects, in that certain matters were not fully addressed, such as how queries would be dealt with and routed to the relevant design team member, and how promptness in response was to be achieved. It was considered that the statement that a weekly meeting would be held to discuss ongoing issues was also inadequate. The submission by SSJV on the other hand was regarded as "comprehensive, clearly described and illustrated". SSJV was awarded the maximum marks under this sub-criterion. The argument is that the description of this aspect of the tender of the applicants in the letter of the 17th December, 2014 as "inadequate", was a breach of equality.

62. With regard to the first argument the respondent points to the fact that the applicants' own submission was also longer than five pages and that all of the tender submissions with regard to this sub-criterion were roughly the same length. The affidavit evidence is that the evaluation team did not deduct marks from any tenderer for exceeding the five page limitation, and had this occurred, both the applicant and the winning bidder would have lost marks. The required equality of treatment is therefore said to have been achieved.

63. I cannot doubt this uncontested assertion of fact, and I accept accordingly that no inequality of treatment resulted from the fact that none of the tender submissions lost marks on account of the excess length of their respective tenders. Accordingly, no operative breach of the Conditions of Tendering has occurred.

64. The RPA identified specific and not generalised inadequacy in the information provided by the tender of the applicants, and the debrief statement makes it clear that the evaluation team considered that the tender could have further addressed a number of identified factors. It was also noted that only two pages were provided with regard to construction management inspection and test plans, which had merely stated that these would be discussed at a weekly meeting before approval and distribution. "Poor organizational charts" were also noted.

65. I consider that no clear or manifest error of assessment is shown by the characterisation of this part of the tender as "inadequate", as these observations in the debrief statement point to concrete criticisms and evidence of the concerns also to be found in the evidence of the evaluators and the lead evaluation sheet. The process of evaluation therefore was detailed and it cannot be said that marks were lost for generalised unfounded concerns. I also consider it relevant that certain positive factors in the tender of the applicants were noted by the assessors and are mentioned in the debrief statement. The process shows itself to be considered and to have fully engaged the elements and both positive and negative factors in the submission.

The second criterion; methodology (25 marks)
Methodology sub-criterion: traffic management strategy

66. 8 marks were available and the applicants scored 6.4 marks (80%) and the winning bidder 4.8 marks (60%). Tenders were required to address traffic management by means of construction sequence drawings, traffic management proposals and a detailed description of how the tenderer intended to maintain access to properties and ensure traffic flow during the construction works, (condition 5.1). Account was to be had to the traffic management requirements identified in the Works Requirements, and to provide detailed information as to the traffic management equipment to be used and how arrangements were to be verified and checked. The

applicants complain that the reservations expressed by the respondent which resulted in it losing marks under this sub-criterion were wrongly applied. The marks were lost under a number of headings. It is convenient to set these out in sequence.

Heras Fencing
67. Under the sub-heading "methodology", the tender submissions were required to set out a traffic management strategy, identifying the type of traffic management equipment, barriers etc. proposed to be used (condition 5.1).

68. The Conditions of Tendering required the tender proposal to ensure that fencing and barriers would be "sufficiently stable to carry any site boundary branding" requested by the employer. Condition 5.1.2 required that specific hazards would be isolated from the works using "suitable" containment or protection barriers, and that the containment barriers should be capable of withstanding "the pressure of pedestrians pressing against them". There was also a general provision in section 7.9 of the Works Requirements that the site be "secure and safe", and a further requirement that barriers be suitable for branding purposes.

69. Guidelines for the Control and Management of Roadworks in Dublin City published by the Department of Transport (2nd Ed 2010), and adopted by the National Roads Authority, deal with the suitability of certain type of containment barriers for the delineation of temporary pedestrian routes from general road works. "containment barriers" were required under the Guidelines when excavations were to exceed 300mm, and the Guidelines required compliance with IS EN 1317.

70. Condition 8.19 of the Works Requirements expressly required that traffic management proposals should comply with the requirements of the Guidelines, and section 5.1 of the Conditions of Tendering required tenders to take account "in particular" of the specific traffic management requirements of section 8.

71. The applicants proposed the use of porous fencing type one full height mesh fencing, known as "Heras fencing", along the pedestrian side of the track works. The respondent argues that the appropriate type of fencing was type 2 full height mesh fencing with traffic protection, know as "MASSguard fencing", the type proposed by all other tenders.

72. It is clear from the evaluation report that the marks lost by the applicants in respect of traffic management strategy were partially lost as a result of the proposal to use the Heras type fencing. Eoin Gillard had particular responsibility to assess the traffic management proposals in the tenders. His notes identify a view that Heras type fencing on the footpath side was "not permitted". In the debrief letter it was said that "Heras type fencing is only suitable for short duration works and is not suitable for branding purposes".

73. The applicants argue that the use of Heras fencing is in conformity with the Works Requirements and the Guidelines and with the international standard, and that marks ought not to have been deducted in respect of any proposal that complies with those Guidelines.

74. Some disagreement is apparent in the affidavit evidence with regard to the applicability of IS EN 1317 as para. 3.6 of this European standard adopted in July, 2010, sets requirements for protection barriers to function as a "combined vehicle/pedestrian parapet". The applicants argue that this standard was unjustifiably imposed to the fencing type proposed by it in respect of barriers which were to protect pedestrians only. The applicants further argue that the Heras type fencing complies with the UK BSE requirements in respect of protection for pedestrians including in high winds. It is argued that the respondent by rejecting the proposal to use Heras fencing impermissibly and without transparency imposed a mandatory undisclosed requirement.

75. I reject that contention, because I consider that the correct approach is for me to consider whether the respondent had adequate material on which it could come to the decision it did, and whether there is a manifest error in the deduction of marks. I consider that there was no manifest error and that the respondent was entitled to deduct marks for what it regarded as unsuitable fencing, when the type of fencing proposed was expressly prohibited in relation to certain areas of excavation (below 300mm), and in the light of the Works Requirements and the general obligation that barriers be secure to propose fencing of greater stability than that provided by Heras. Further, I accept that the fact that the manufacturer's brochure for Heras indicated it was not suitable for branding was sufficient to justify the "reservation" expressed by the evaluation team as to this type of barrier. I consider that it was not a manifest error for the respondent to deduct marks for the proposed use of Heras fencing and that the view of the evaluation team was founded in evidentially sound judgment.

Traffic lights
76. The applicants proposed temporary traffic lights at certain locations during the works construction. Directions issued by Dublin City Council for the control of traffic during road works require, in almost all cases, that a contractor use temporary traffic lights connected to the main traffic light control system operated by the Council, rather than radio controlled or individually controlled traffic signals, the use of which might lead to a degree of traffic uncertainty or unnecessary disruption. The Council's Guidelines provide at paragraph 4.5 that the use of temporary traffic signals is "generally" not permitted, but provides for the relaxation of the prohibition on the obtaining of advanced permission from the roadwork control unit.

77. The evaluation report showed that the applicants lost marks owing to the proposal to use radio controlled temporary traffic lights. The applicants argue that in fact its submission did provide for temporary relocated traffic lights, and that radio controlled lights were proposed in a small number of locations only, in respect of which it was incorrect to deduct marks as the Conditions of Tendering contained no express prohibition on the use of radio controlled traffic lights. It was not until the publication of revised Works Requirements in December, 2014, and not relevant to the assessment, that there is found is an express note that Dublin City Council "do not permit the use of temporary traffic signals".

78. Some dispute on the affidavit evidence is apparent with regard to whether the tender submitted by the applicants did in fact indicate the use of temporary standalone traffic lights. Part of the difficulty is caused by the legend on the drawings by which the traffic lights symbol identifies "relocated traffic lights". Confusion was also said to have arisen because the applicants provided with their tender promotional material for a traffic lights system designed by GKTM, a self-contained system capable of being operated by remote control.

79. The evidence of Brian Farren, Contracts Manager of the applicants, is that the RPA misinterpreted the drawings, and that what were proposed were relocated traffic lights rather than temporary ones. Tony Redmond, the lead evaluator, in his first affidavit suggests that the apparent contradiction between the reference in the drawings to relocated traffic lights and the reference in the written submission to temporary traffic lights was a concern to the respondent.

80. Each of the 90 drawings submitted by the applicants contained a legend which used the traffic light symbol to identify a "temporary traffic light relocated". It is suggested by the applicants that of the ninety drawings, only four drawings propose the use

of non hard-wired temporary pedestrian lights, and these were to govern pedestrian crossings only. In essence what the applicants argue is that as the drawings were clear, and as only four of the ninety drawings, a small number on any reckoning, proposed radio controlled temporary traffic lights, that the respondent fell into manifest error in failing to properly consider the drawings, and in requiring an accompanying written statement to itself deal in substance or at length with the traffic lights, was incorrect.

81. A narrative written statement was required to accompany any plans and drawings submitted with a tender. The Conditions of Tendering required each plan and drawing to "have a detailed description of how the Tenderer intends to … ensure that traffic flow is maintained at all times" and there was a requirement for an accompanying methods statement. The second replying affidavit of Tony Redmond points to the fact that the narrative submission of the applicants provides two pages only on proposals for maintaining traffic and pedestrian flow, and in that document the traffic signals referred to were temporary rather than relocated traffic lights. However Mr. Redmond points to what he describes as "confusion caused by the use of the same symbol at Duke Street" and also complains that no information was provided with regard to extra traffic lights which were said to be required on one drawing, 1971-A3-001. Another, drawing No. 1971-A5-003 submitted by the applicants shows temporary traffic lights in various locations including, for example, on Nassau Street and Duke Street.

82. There is some lack of clarity in the debrief letter of the 17th December, 2014 where it criticises the use of radio controlled temporary traffic lights, but seems to then identify the problem as an absence of "temporary traffic lights" . The question is whether it can be said that the respondent fell into manifest error in the marking of the submission of the applicants in regard to the use of traffic lights. It is correct that radio controlled traffic lights or ones not connected to the main Dublin traffic grid were not absolutely prohibited, but I do not consider that the RPA marked the applicants as if the use of hard wired lights was mandatory. I consider that the reservation which led to the loss of marks arose from the concern that temporary lights were proposed, that some confusion was caused by the brochure submitted by the applicants with its tender, and that the approach of the RPA was the exercise of a considered expert opinion on the correctness or desirability of the use of radio controlled lights in the light of the fact that their use was only exceptionally permitted by Dublin City Council. I am not satisfied that there was a manifest error of assessment in the light of these concerns.

Methodology sub-criterion: Programme submissions

83. The Conditions of Tendering required the tenderer to provide a programme of works to demonstrate the envisaged timing and methodology for each activity required to complete the works. It was required that sufficient detail be furnished such that no activity would exceed ten days' duration. The format of the tender programme was to be that of a Gantt chart.

84. The submission of the applicants proposed a date for substantial completion within 34 months of commencement and this is broken down in a schedule identifying the different areas in which works were to be conducted.

85. Four marks were available for this sub-criterion and both the applicants and the winning bidder achieved 3.2 marks, denoting a "very good" submission. It is argued that the respondent fell into manifest error in awarding the winning bidder 3.2 marks when the respondent describes that tender as having "a good understanding" and not a "very good understanding" of the complexity of the works. The winning bid was described as "good" in the debrief document, although it was described in the lead evaluator sheets as "very good".

86. The debrief letter of 17th December, 2014 commented that the level of detail submitted by the applicants was not sufficiently robust to engender confidence in the ability of the contractor to carry out the works in a timely manner. The two periods proposed for the Broadstone structural works, 18 months plus 5 months for associated works, was described as appearing to be "a long period for a building of this size". The applicants argue that the evaluator thereby applied an undisclosed criterion in making reference to the allocated time for a specific building.

87. The timeframe for the Broadstone structural works and the completion of the depot building seems to be the main concern with regard to the submission of the applicants. The respondent argues that the evaluation team was entitled to take into account what is regarded as an excessively long lead-out time for these works and that that could have a consequential impact on the timeframe for other works.

88. I accept the argument of the respondent that the tender documents were required to identify "the allocated time for each activity", and that accordingly it was proper for the evaluation team to assess the time allocation for each individual element of the works in the context of the works as a whole. It was in those circumstances not a manifest error for the respondent to consider that a proposal that suggested that the works of the Broadstone was as long as suggested might have a knock on effect and the reason for requiring an individual tenderer to identify the length of the proposed length of each individual phase was to enable the evaluator to assess whether the proposed overall timeframe was realistic having regard to the individual elements of that timeframe.

89. Therefore, it seems to me that there was no error of assessment by the evaluation team in taking the Broadstone works into account in assessing the overall submission under this sub-criterion. It must be recalled also that the reservation with regard to the Broadstone works was given in the context of what was regarded as a very good submission and while the timeframe for the Broadstone works did result in a loss of some marks, the overall programme timing was regarded as very good.

90. In the tender of the winning bidder a number of what were described as "minor discrepancies" were noted. The complaint is that the tender submitted by SSJV identified 3 (out of 58) construction areas where the plan seemed to commence works prior to approval. Having referred to the fact that clause 4.7.7 of the contract required all works to be approved by the respondent before implementation, this error is one which the applicants argue ought to have been picked up by the evaluation team and ought to have been given some weight.

91. I accept the argument of the respondent that the error, if there was one, was found in a very small percentage of the submission. I consider that as the notes of the evaluator, Vincent Carroll, who evaluated this part of the proposal, show that he did take account of the discrepancy, and accordingly it is not arguable that the discrepancy did not have a bearing on the score awarded to SSJV.

92. There was also some note of criticism with regard to the dates and a criticism that the contingency activity on installations, testing, and commissioning was not correctly tied in. It is argued that the contingency period proposed by the applicants was misunderstood and that the evaluator did not correctly interpret the sequence of electrification of cables and as a result the applicants should not have lost marks for an alleged incorrect "tie in".

93. I consider that there was no manifest error made by the respondent in awarding SSJV the same mark as the applicants in that

both were assessed as having submitted "very good" submissions. While different language was used in the debrief letter, the language used in the evaluation report is identical for both submissions, namely both were described as "very good". The reasoning is to be ascertained from the totality of the evidence and that the use of the words "good" in the debrief letter does not wholly express the view of the RPA with regard to the tender of SSJV. As I pointed out at paragraph 56 above, the language is not to be construed as if it were legislation or formal contractual documentation.

94. The applicants also lost marks by reason of its submissions for programme contingency. The overall programme for the works allowed for a programme contingency of 20 working days. The applicants submitted two contingency periods, 20 days and zero days. They did so because it was argued that the Public Works Contract provided a zero days' contingency. However, the Public Works Contract contains general conditions for all public works, and expressly provides at condition 1.3.1 that the Works Requirements are to prevail when they "provide otherwise". In those circumstances I consider that the argument of the applicants fails to have regard to the established rule, and the express contractual provisions, that special conditions are to prevail over general conditions in the case of conflict. The respondent was in my view entitled to deduct marks on account of its reasoned view that the programme contingency did not adequately address its requirements.

95. The loss of marks for details of electrification and decommissioning during and at the end of the works was said to have arises by reason of what the evaluation team considered to be dangerous and inefficient energising and testing of the system. As that assessment was made as a result of an expert professional view there is no basis on which I consider that there arises a clear error and a degree of deference to the stated concerns must guide my assessment.

Methodology sub-criterion: communication strategy

96. The tender documents were required to describe how it was intended to develop and implement a communications strategy with third party stakeholders and the general public during the works. Three marks were available and both the applicants and the winning bidder scored three marks (100%). The argument of the applicants with regard to this sub-criterion is that SSJV ought not to have been awarded 100%.

97. SSJV in its submission made reference to its prior experience of other light rail projects and major infrastructure projects in Dublin city and it nominated a PR firm with experience in these types of public works. It is argued that the respondent fell into manifest error in taking account of this experience of SSJV as the Conditions of Tendering did not identify that prior experience of the tenderer itself or its constituent company was to be assessed at all. It is argued in those circumstances that an irrelevant factor was taken into account in evaluating the winning tender document, and that, while prior experience might have been a relevant factor in the initial weeding out of tenderers, it was no longer a matter to be taken into account at the assessment of the merits of a tender.

98. The respondent points to the fact that reference to prior experience contained in the submission of the winning tender was a single sentence in a four-page submission and that no reference was made to this by the evaluation team. I do not accept this argument and the debrief statement referred to the "record on other major projects" identified by the winning bidder, and to "wide ranging experience on significant project", of the proposed PR company. It seems to me that the respondent might have given some weight to previous experience in assessing the winning tender and that of the applicant. I have no evidence of how, and to what extent, the relative merits of the identified prior experience of both the applicants and the winning tender might have guided the deliberations. I note however, that both submissions were described as excellent for reasons which were fulsome and that the excellence was linked to the detail in the strategy rather than with regard to the prior experience that might have informed the strategy.

99. No operative error has been identified in those circumstances.

Methodology sub-criterion: Red Line tie-in

100. The arguments and evidence with regard to the assessment of the submission of the applicants under this sub- criterion was central to the claim. The respondent is alleged to have applied impermissible and undisclosed criteria in its assessment. Accordingly, for the reasons outlined above, the approach I take is to critically assess the process and the evidence of the criteria actually engaged, and no degree of deference to the expert evaluation team is appropriate if impermissible criteria were in fact applied.

101. Tenderers were required to submit a document, maximum 30 pages in length, to deal with how the existing Luas Red Line at the O'Connell Street and Marlborough Street junctions were to be tied in to the new Luas cross-city line. The method statement was expressly mandated to include a clear description of the proposed "construction methodology", the works proposed to be carried out, traffic management, phasing plans for each phase of the works, proposed mitigation measures to deal with the anticipated impact of the works on existing Luas operations, and management of what was described as "external interfaces", including engagement with the operators of the Luas line, and with Luas maintenance staff, the method by which the contractor would isolate the existing Luas line and when and how it would take possession of parts of that line for the purposes of the construction and completion of the works. The applicants challenge the evaluation of its submission on a number of fronts, many of which relate to the professional judgment of the evaluation team, and there was a particular focus on the approach of one member of the evaluation team, Marcello Corsi.

102. The assessment of the tender of the applicants under this sub criterion was the focus of much argument and evidence at the hearing. The total marks available were 10 marks, the applicants scored 4 marks, and the winning bidder 8 marks. It is apparent from these marks that the loss of six of the available marks had a significant bearing on the overall total marks they achieved.

103. Following my judgment delivered on the 13th October, 2015, Marcello Corsi was cross examined on the fifth day of the hearing. Mr. Corsi is the track design manager employed at the relevant time by the RPA, now Transport Infrastructure Ireland. He is a chartered civil engineer with international experience in railway and light rail planning, design and construction testing and commissioning. He was one of the three persons involved in evaluating the Red Line tie-in method statement in the procurement process. Pat O'Donoghue was the lead evaluator.

104. Cross examination of Mr. Corsi was directed to be confined to three issues: the methodology disclosed in Mr. Corsi's working notes; the test applied by him in evaluating the tenders; and the interplay between his working notes and the factors identified by him in those notes and the disclosed competition criteria.

105. A particular criticism the evaluation team made of the submission of the applicants was its proposal for joining the new floating mat with the existing one at the Marlborough Street/Abbey Street junction and the extent of the existing track required to be dismantled along Marlborough Street. Another technical error said to have been apparent from the drawings was what was said to be

an alleged failure to deal with track geometry issues that arose from the topography of O'Connell Street.

106. The debrief letter of the 17th December, 2014 considered that while the interface management in the applicant's submission was "well considered", that it contained "very poor construction methodology which was generic and general in nature with no geometric analysis and no description of switches and crossings". The next part of the letter bears repeating:

> "Misunderstood scope for Marlborough tie-in, excessive track removal (including the existing emergency cross over, as indicated on submitted traffic management drawings Phase 3 (Drawing No. JC1971-RTE-03) and Phase 4 (Drawing No. JC1971-RTE-04). No description of new floating track system tie-in with existing in Marlborough. The Tender evaluation team felt that the proposed programme for tie-in works could have further examined opportunities for minimising shut down of the existing operation of Red Luas lines and the following issues could have been considered further in the submission. Safety case considerations, including the RSC interface and the Apis process plus protection of existing ducting Infrastructure, pits/chambers, tables and equipment."

107. The proposed construction methodology of SSJV was described as "clear", and while the geometrical modification was said to "lack detail", and to require further analysis, it was described as "detailed". The methodology was described as showing "very good understanding of the track geometrical issues at the two junctions." Pat O'Donoghue, the lead evaluator, summarised the view of the evaluation team of the SSJV submission as a "very good submission with only minor reservations".

108. The submission of the applicants was described as "poor submission with reservations". There was identified "a very poor construction methodology", and that there was no "geometrical analysis", and that the submission misunderstood the scope for the Marlborough tie-in, that excessive track removal was proposed and that there was no description of the new floating track system tie-in with the existing. Other matters, less in focus in the litigation, were also identified as unsatisfactory.

109. The precise details of the complaints levied against the respondent with regard to the marking of this sub criterion will appear later in the judgment, but in summary the argument is that the respondent failed to observe the requirement of transparency and equality in that undisclosed sub-subcriteria were applied to the tender. In particular it is suggested that Mr. Corsi developed a matrix which tested undisclosed factors and that the four subparagraphs contained at para. 5.3 of the Conditions of Tendering were wrongly treated as sub-sub criteria.

110. A specific complaint is made that Mr. Corsi impermissibly evaluated the track design in the submission of the applicants when this was not an award criterion or sub criterion, the Conditions of Tendering being based on works which were already designed by or on behalf of the respondent.

111. Reliance is placed on the judgement of the CJEU in *ATI v. ACTV Venezia SpA* Case C-331/04 that not merely must all criteria be expressly mentioned in the contract documents to which a tenderer responds, but that where there is to be weighting it must be expressly mentioned:

> *"where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope"*

112. In that case the contracting authority, after the tender process had completed but before the envelopes were opened, determined to set sub-criteria and give weightings, neither of which was disclosed in advance, on the preliminary ruling it was held that a court must ascertain whether the decision applying such weightings or adopting sub-criteria could be said to have "altered the criteria" set out in the contract documents and that if it did it would have been contrary to Community law. Secondly, the court said that it would be contrary to law if the decision to weight and to apply undisclosed sub-criteria could have affected the preparation of tenderers and finally that the decision to apply weightings could give rise to discrimination against one of the tenderers which would also be contrary to Community law.

113. I turn now to examine the evidence of Mr Corsi

The evidence of Mr. Corsi

114. Tony Redmond procurement manager of the RPA exhibited in his second replying affidavit sworn on the 8th July, 2015, confirmed as accurate by Mr Corsi in his second affidavit of the 9th July, 2015, a document called an "initial evaluation personal matrix" prepared by Mr. Corsi. This one page document with 8 shows eight headings in respect of general methodology, preparation, track geometry analysis, track construction methodology, traffic management, special track works investigation, Red Line length and Red Line shut down.

115. The approach of Mr. Corsi and his use of what he described as "an initial evaluation personal matrix" for his evaluation of the Red Line tie-in proposal was the focus of cross examination and the applicants complain that that the analysis carried out by Mr. Corsi was impermissible, as he in effect applied a number of sub-criteria which were not disclosed, as the headings in his matrix did not mirror the sub criteria listed in condition 5.2 of the Conditions of Tendering.

116. The affidavit evidence of Tony Redmond, the procurement manager, was that the notes used by Mr. Corsi were not "intended to be or interpreted as evaluation criteria". Mr. Redmond says that Mr. Corsi's matrices were not treated as criteria but were "only notes, splittings from wider aspects of the proposal into more manageable, technical aspects". He said they were "not used for the final assessment".

117. Mr. Corsi's proposed score of the submission of the applicants was 20, but a consensus was reached among the 3 members of the team at their final evaluation meeting with the result that the score given was 40. Mr. Corsi confirmed this in his affidavit, and in his oral evidence.

118. Mr. Corsi in cross examination confirmed the Red Line tie-in was regarded by him as important, and gave tenderers the opportunity "to come out with new methods of building something". He describes the Red Line tie-in process as being "a complex technical field" and says he assessed the submissions in that context. Mr. Corsi suggested that tenderers were being asked to "put out your brain" and explain to him how it was proposed to approach such a complex junction and phase, and that an experienced tenderer would have known that from a technical point of view these construction works were "the most demanding" part of the works, such that every contractor would know that "paramount importance" had to be given to the description of how it was proposed to deal with the tie-in and the positioning of switches and crossings.

119. With regard to his personal matrix, he described it as "the first stage" he engaged in order to take "an ordered approach to my

hand notes". He explained the preparation of a personal matrix as arising from the fact that evaluators were not permitted to electronically transmit information out of the tender room, and that he had to in those circumstances taken his own notes when assessing the tenders. He says in all he attended at the tender room on 10 occasions. He confirmed also that his personal notes were not transmitted to any other person and were personal to him. He confirmed that he checked his e-mails and was quite sure of this.

120. Mr. Corsi described in detail his assessment of the submission of the applicants and his concern that some of it was a "copy and paste taken from somewhere else" and that much of the detail was completely non-specific.

121. He described in detail too, the purpose of the tender evaluation meetings at which the three person team dealing with assessing the Red Line tie-in methodology as well as Tony Redmond were present, as an "exchange of views". Meetings were held for several hours on a number of days following which he further read and assessed the tenders. He confirmed in particular that the final score of 40 was not an average but a consensus reached by all of the evaluation team and that he was "happy to compromise".

122. I consider it fair to say that Mr. Corsi's main criticism of the tender submission of the applicants was that it portrayed what he perceived as an error or lack of understanding of the technical requirements of the tie-in, that the extent of the track intended to be realigned and rebuilt on both the west and east sides of Marlborough Street showed "excessive track removal", and that the submission showed a failure to understand the extent to which the O'Connell Street topography was "a roller coaster" which presented particular geometric difficulties. His view was that the drawings furnished by the applicants showed works which were "not technically feasible", and "not acceptable in railway terms". He considered the submission of the applicants as very poor, having regard to what he saw as these technical defects in geometric analysis, regarded by him as so fundamental as to show an absence of technical knowledge or expertise, and a lack of proper engagement with the technical requirements of the works.

123. The extent of the dismantling and reconstruction of the existing Red Line track was set out in the Conditions of Tendering, the Works Requirements, and the Reference Design Drawings prepared by the respondent. Tenderers were required to show the extent of the Red Line to be dismantled and reconstructed and to have regard to the floating mat and the presence of the existing emergency crossover. The Works Requirements required the dismantling of 47 metres of eastbound and 38 metres of westbound track at Marlborough Street. The works of dismantling and reconstruction required to keep in place the existing emergency crossover (an apparatus which allows 2 tracks to cross each other) installed on a floating mat system at Marlborough Street/Abbey Street. The technical solution proposed by the applicants showed in the view of the respondent an error in methodology, which had an impact on traffic management proposals and the duration of the works.

124. The applicants proposed a dismantling of (47 + 38) metres on both eastbound and westbound lines, so that the dismantling and reconstruction proposed was double what was required in the respondent's drawings. This was regarded by Mr. Corsi as "contrary to good engineering and construction practice". His view was that it would severely impact on the existing operation of the Luas, on road traffic, would have unnecessary environmental impact and would severely impact on the duration of the works.

125. Mr. Corsi also said that a visual inspection of the complex vertical alignment on O'Connell Street would show vertical curves or "bumps" on the camber of O'Connell Street on which it would not be possible to install switches and crossings as these are flat elements and the topography required a wide or long angle to correctly resolve the curves.

126. The applicants assert that it was not apparent from the Conditions of Tendering that tenderers were required to submit a geometric analysis or design. They argue that Mr. Corsi's evidence points to him having given weight to the geometric analysis, and that neither that factor nor the weighting said to have been given to each was disclosed in the Conditions of Tendering. Condition 5.3 of the Conditions of Tender does not identify track geometry as an element and insofar as that element came into the process it was present much earlier at the pass/fail stage, a threshold that the applicants passed. It is suggested that Mr. Corsi wrongly assessed the track geometry, and insofar as he was entitled to do so, he placed too much emphasis on that factor and misapplied the disclosed weightings.

127. The respondent argues that in order to correctly define the extent of the works and deal with the existing crossover some geometric analysis was required, and that it was the fact that a technically unfeasible solution and an incorrect scope of works was proposed, that resulted in the low mark awarded to the applicants.

Analysis of the evidence of Marcello Corsi

128. The core question to be addressed by me is whether Mr. Corsi did in fact apply undisclosed sub-subcriteria. He was clear as to the purpose of his matrices, that they were prepared as personal working notes in order for him to professionally evaluate the submissions. Further, Mr. Corsi was a member of a team, and in his evidence, both on affidavit and under extensive cross examination, he accepted that he had been prepared to, and did in fact, compromise in achieving a consensus mark, and that his personal notes and matrices were for his use only.

129. In his oral evidence I consider Mr. Corsi showed that had engaged in detail with the individual tenders and had intelligently evaluated and re-evaluated his approach to the material submitted, which is in part reflected in the way in which he changed his initial or later scores after further consideration or discussions including with his colleague Peter Kolar, a senior track designer in his team and at the meetings with the evaluation team.

130. Mr. Corsi suggested that every good tenderer and contractor "should know" that "paramount importance has to be given to the description of how you install the track and within the track how you are going to deal with the switchings and crossings" He said he would have expected "huge emphasis on those aspects". The applicants place particular emphasis on this description of Mr. Corsi given in the course of his oral evidence where he on various occasions used the expression "paramount importance" or referred to the track element as being "significant".

131. I accept Mr. Corsi's evidence that the exercise he personally engaged was to score each of the tenders "relative to each other", and that this was his own working method or the way with which his knowledge and professional judgement understood and assessed the submissions. I consider that it was not improper for Mr. Corsi at the early stages of the evaluation process to break down the elements of a submission in the light of his own personal experience and knowledge, and to assess them in such a way that would enable him to distinguish between the various tenders in aspects where some distinguishing feature could be found. This, it seems to me, is consistent with the marking system, which provided for various scores over a range of 20 points and the submissions were not marked in such a way that led to individual marks out of 100. The scoring method provided for a range, and therefore what was envisaged was a mark where numerical precision was not required to be achieved. It was the assessment and discourse that occurred at the evaluation meetings that led to the mark, and Mr. Corsi was entitled to use a methodology in the form of a matrix if that was the way in which he professionally could best understand and assess the submissions.

132. A lawyer, or a person with a different skill, might not have assessed the submission by means of a matrix, but Mr. Corsi's engineering expertise led him to take that approach, described in some detail as a personal approach to enable him to deconstruct the elements of the submissions so as best to understand and work with them in the way in which he could best do so. I accept his evidence that the method employed was not that employed by the team evaluation process, and that the matrix was for his own understanding only, and that his engagement with the technical details of the tenders evolved over the process.

The approach to interface management of Mr. Corsi
133. Mr. Corsi in his evidence said that he evaluated all of the tenders as having similar or broadly similar submissions with regard to interface management and he evaluated all of these as "neutral". I do not consider Mr. Corsi meant by this that he did not make an assessment of interface management, but rather that in taking an overall view of a submission his focus and concentration was on the other elements, as no difference could be discerned by him between the various tenders with regard to interface management as they were "very similar". The applicants suggest that this factor points to an error apparent in the approach of Mr. Corsi and that it was not permissible for him to leave out certain parts of the submission or treat them as "neutral". Mr. Corsi's matrix did not include a column for interface management, but I accept his evidence that this was because there was nothing in his evaluation of each of the tenderers that would have changed his approach or informed his marking of the tenders, and not because that factor was ignored by him or the evaluation team.

134. Even if Mr. Corsi did himself take the view that in approaching each of the tenderers no difference could be discerned between their submissions with regard to interface management, the question for the court is whether the evaluation team as a whole, i.e. the three technical members of the evaluation team and Mr. Redmond as Chair of the process, treated interface management as either neutral or irrelevant. The evaluation reports point to the evaluation team having applied its mind to, and to have assessed, the approach of each tender with regard to interface management and I reject the suggestion that Mr. Corsi's approach found its way into the ultimate assessment.

The role of the team
135. The evaluation team consisted of eleven individuals with experience and expertise in each of the relevant criteria under review. Each area under review was assigned a lead evaluator and a number of members of the team. Each of the members of the evaluation team was identified by name and qualification/role in the process. The final award decision was made by the team and no member of the team had the power to award a final mark even in regards to an area in which he or she had a particular competence.

136. It is important in my view to an assessment of the process that the evaluation committee did not itself allocate to each of its members a specialist role and each member of the team was evaluating the entire tender. Mr. Corsi had a particular skill and knowledge in track design and construction, but he was a member of a team which did assess and weigh the relevant interface submission. His description of the evaluation process as a whole, both of his own personal analytical approach, and that of the team as a whole, describes a fulsome, engaged, flexible and analytical approach to the entire tender. The team did not act by merely processing the individual scores of its members, but engaged in dialogue from which evolved an agreed score such that the end result was not formulaic but was the result of a dialectic and analytical process. I am satisfied that this is so, and I am satisfied therefore not merely that Mr. Corsi's personal notes did not lead him to fall into error, but also that his personal approach was modified and evolved through the dialogue and process of the evaluation team. That is to my mind the key to the assessment process, and the assessment has been shown to my satisfaction to have been an analytical and not formulaic process and was sufficiently robust in terms of fairness and transparency.

The well informed and diligent tenderer
137. The role of an expert evaluator must be seen in the context of the legal principles. Finlay-Geoghegan J. in *Gaswise v. Dublin City Council* noted that the test of transparency must be considered from the point of view of "*reasonably well informed and normally diligent tenderer*". She adopted the approach explained by McCloskey J. in *Clinton (t/a Oriel Training Services) v. Department of Employment and Learning & Anor* [2012] NIQB 2, that while the court was to occupy the shoes of the "*hypothetical tenderer*" such a tenderer was to be assumed to be

> *"well, but not necessarily fully, informed and usually careful and attentive, but not invariably a paragon of diligence. …In other words, the Siac hypothetical tenderer is a terrestrial, rather than celestial, being, hailing from earth and not heaven. … the court's attention must focus very much on the "industry" concerned, in which the professionals and practitioners are not lawyers."*

138. The CJEU in *European Dynamics Luxembourg SA & Ors. v. O.H.I.M* Case T-299/11 also explained the objective test as a requirement of transparency

> *"In addition the principle of transparency, which is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority, implies that all the conditions and detailed rules of the award procedure must be drawn in a clear, precise and unequivocal manner in the contract notice or tender specifications in order, first, to enable all reasonably well-informed and normally diligent tenderers to understand their precise scope …."*

139. As Finlay Geoghegan J. explained, the well informed and normally diligent tenderer would not be approaching a tender document as a lawyer but rather as a tenderer from the relevant industry. In a case such as the present case, the tenderer would approach the question from the point of view of a professional practitioner with engineering experience and knowledge.

140. The test is objective, but the reader is a person who can be expected to have knowledge and understanding of the area of expertise in which the tender is made, and to have diligently considered the requirements of the works.

Conclusion on the evidence
141. The English High Court (Silber J.) considered, *inter alia*, the contention by a contracting authority that certain undisclosed sub criteria were merely "*scoring machinery*" in *Letting International Ltd. v. Newham London Borough Council* [2008] EWHC 1583 (QB). As Silber J. correctly said:

> *"In determining what a contracting authority must disclose, the focus of a court must be on substance and not on labels or on form. The five quality award criteria, plus premises, were broken down into 28 separate elements, and tenders were marked against them. They were clearly in the nature of sub-headings which was the term used in ATI or sub-criteria as explained in Lianakis as they were exactly what sub criteria are."* (para. 82)

142. The court went on to say that in the light of the jurisprudence of the CJEU *"all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance"* must be disclosed

regardless of the labels attached, and whether some might have been described as scoring machinery or scoring methodology rather than sub criteria as such (para. 83)

143. I adopt that general approach, and consider that the court will not afford a contracting authority deference if it has in substance applied the incorrect test to a tender proposal.

144. The Conditions of Tendering required each tenderer to submit a document "describing their proposed method for constructing the tie-in of the new cross-city line with the existing Luas Red Line at the O'Connell Street and Marlborough Street junctions". I consider that the applicants are incorrect in their assertion that the tender proposal was in these circumstances not required to deal at all with methods of construction on account of the fact that the project is largely a predesigned project with comprehensive works requirements. There was, in my view, on a true construction of the Conditions of Tendering, a requirement that the method for constructing the tie-in be described. The reasonably diligent tenderer is for the purpose of the present case to be assumed to be a tenderer with knowledge, expertise and sufficient information with regard to railway design and building, who would have known that as an a *priori* matter, the engineering elements of the proposed construction methodology should not contain errors, and the proposal was required specifically "to show the extents of the existing Luas Red Line which the tenderer proposes to dismantle and reconstruct". Some element of design was required and although the project was pre-designed, the detail in the design was not at a level that did not call for some engineering input and some design choices were to be made in proposing the manner of the tie in.

145. I consider that the reasonably diligent tenderer would have understood that the nature of dismantling and construction work, and the quality of the proposals from an engineering, and indeed geometric point of view, would have a bearing on how the tender would be assessed.

146. It must be also borne in mind that the Conditions of Tendering described the assessment process as being a "qualitative assessment", and that the assessment would be carried out by experts in the relevant field, and not by a machine, even a well tempered or programmed machine, and it was never intended to be such.

147. I am satisfied that the exercise engaged by Mr. Corsi in preparing his own notes and in breaking down the material in a manner that met his own intellectual engagement with the material, did not involve the application to the process of undisclosed sub-sub criteria, or the ignoring of those mandated. I am satisfied in particular that he prepared notes for his own personal engagement in order to fully understand the particular elements of each individual tender, and he clearly describes them as personal notes and confirmed that they have not been part of the evaluation team's notes. I am satisfied that when Mr. Corsi came to mark the tenders he did so as a member of a team, and the final score was reached on an assessment in accordance with the competition criteria and not by reference to the particular breakdown used by Mr. Corsi for the purposes of his own personal, individual and professional judgement of the facts.

148. Furthermore, I consider that it was disclosed to prospective tenderers that they were required to submit a construction methodology. I accept Mr. Corsi's evidence that he was not looking for a detailed design, but that in evaluating the construction methodology, he had to look to some extent at the degree of understanding, or flawed understanding, showed in an individual submission. It is the case that on a predesigned project, a tender submission had little or no scope to input design proposals, but some engineering element, which in my view has to mean some construction geometry, was required in identifying the methodology. This, it seems to me, is a key to understanding what was required in the Red Line tie-in method statement. It is a matter for the court to interpret what was meant by Condition 5.3 of the Conditions of Tendering, and I consider that the respondent is correct that as the Red Line tie-in sub-criterion did require the tender proposal to identify how the tie-in was to happen, there was to that extent required to be an element of design and geometry. There were limits on the design, in particular in Marlborough Street because of the existing floating mat and the existing switches and crossings, but a proposal identifying a construction methodology which includes how the tie-in was proposed to be done must contain some element of engineering. Once that is so, it seems to me that the engineering proposals must at the least show an understanding of the project which is consistent with the overall requirements of the contracting authorities.

149. I also regard it as highly significant that Mr. Corsi, in using his own personal matrix, did not award marks for each of the identified sub-divisions and accordingly no marks from that matrix came to play a part in the final evaluation assessment. Mr. Corsi did propose a mark which expressed his view that the submission was overall poor, and he used the disclosed marking system, not by allocating individual marks for the various headings in his matrix. In that regard I consider it as highly significant that Mr. Corsi prepared a total of four documents, and that by the end of his professional engagement with the material he had addressed the proposals by reference to the disclosed sub-criteria and carried out his final evaluation in the light of those and not of the broader range of matters identified in his matrix documents. Mr. Corsi under cross examination said that when it came to the evaluation meeting what the members of the team did was to focus on Condition 5.3 of the Conditions of Tendering. I accept his evidence that this was so and I have also had the uncontroverted evidence both of Bernard Kernan and Pat O'Donoghue, the other members of the team, each of whom agreed that the approach described by Mr. Corsi was the approach taken by the team.

150. I am satisfied too that the applicants are incorrect to characterise the process engaged by Mr. Corsi as one where he decided personally the relative weight that he would give to each of the elements in the Red Line tie-in sub criterion. Mr. Corsi expressly said in reply to this proposition that he did not break down the various elements of his matrix and score each submission against that matrix, but that he took a "overall approach" to a personal reading and evaluation of the submission. As a member of the team he was entitled and required to have a personal reading and evaluation. He confirmed that he took an "overall approach to the methodology that came through at the end with a single number", and that the various elements in his matrix, and indeed the approach to the various disclosed sub-criteria, were not treated separately as such but were dealt with as part of the overall approach in team discussions.

A straightjacket?

151. Counsel for the applicants has suggested that the correct approach to the procurement process is to treat it as a "straightjacket" and that the authorities point to a requirement that the contracting authority must operate within a narrow and defined field. That description is rejected by the respondent, and counsel points to the fact that the evaluators are selected to evaluate a submission on the basis of their skill and knowledge and that it is neither required nor intended that evaluators approach the assessment process with minds that are a *tabula rasa.*

152. I do not find the description useful or accurate if by the word "straightjacket" is meant that no intelligent analysis is permitted in evaluation. A qualitative assessment does require an expert and analytical interrogation of a tender proposal, and as the nature and professional expertise of the evaluation team is known to potential tenderers, a submission may be tailored to that expertise. The task of qualitative assessment is not the application of a formula but the exercise of professional intelligent and expert critique.

Conclusion on this ground
153. Accordingly for the reasons stated I consider that the evidence does not point to the application of any undisclosed or impermissible criteria or sub-criteria and I reject the claim of the applicants.

Negotiated Procedure
154. The Conditions of Tendering provided that the contracting authority was using the so called "negotiated procedure" in the assessment of tenders. The contract was of a type known as MEAT. Condition 3.5 of the Conditions of Tendering entitled "negotiations" stated:-

> "This tendering process has been conducted under the negotiated procedure. Post Tender and post tender submissions RPA may enter into negotiations with one, some or all of the Tenderers in order to achieve the most economically advantageous tender to RPA for the Contract. RPA reserves the right to request those Tenderers who have been invited to tender to submit a Best and Final Offer (BAFO) in accordance with the procedure to be determined by RPA."

155. The applicants came second in the competition and say that their price was significantly lower than that of the winning bidder, SSJV. The applicants scored an overall score of 85.2 and the winning bidder a score of 89.59. It is accepted that the applicants submitted the lowest price tender and received the maximum 55 marks available in respect of price. The difference between the applicants and the winning bidder was a mere 4.39 marks, a difference which the applicant says raises a requirement that the respondent would engage Condition 3.5

156. The applicants assert that the respondent breached the rules of the contract by effectively abandoning the negotiated procedure and that in doing so it breached the general principles of transparency and equal treatment. The applicants argue that the respondent fell into manifest error and unlawfully failed to engage in negotiation after it had identified its preferred tenderer and in order to iron out some of the difficulties which were identified in the applicants' tender documents.

157. In the *London Underground Public Private Partnership* case, the European Commission giving a decision on notification under Article 88(3) of TFEU by the Government of the United Kingdom N264/2002, described the negotiated procedure as being "*by its nature flexible*", but that it had to be fair to all tenderers (para. 86).

158. An obvious problem arises if a contracting authority does negotiate with some only of the persons who submit a tender and if, for example, this has the consequence that the approach of the contracting authority might change. Should that happen, the principles of transparency and equality might be infringed from the point of view of other tenderers not invited to those negotiations who could fairly say that they had not been given an opportunity to amend their submission or improve their submission, or that an inequality had crept into the process because the contracting authority had negotiated with some only of the tenderers.

159. This is apparent from the judgment of CJEU in *Nordecon AS v. Rahandusministeeerium* Case C-561/2012, where on a preliminary ruling the court considered that where the negotiated procedure to be used to adapt the tender submitted by the tenderers:-

> *"Accordingly, even though the contracting authority has the power to negotiate in the context of a negotiated procedure, it is still bound to see to it that those requirements of the contract that it has made mandatory are complied with. Were that not the case, the principle that contracting authorities are to act transparently would be breached and the aim mentioned in paragraph 36 above could not be attained."*

160. The paragraph 36 referred to was the obligation of transparency to preclude any risk of favouritism or arbitrariness on the part of the contracting authority.

161. Thus it seems to me that a court in considering an argument whether negotiations by a contracting authority ought to occur, must carefully examine the risks to the overriding principles of transparency and objectivity.

162. The applicants argue that the contracting authority erred in not negotiating once it was clear that it proposed the lowest price and because there were fewer than 5 marks between them and the winning bid. The matter comes down, it seems to me, to two separate questions: was the contracting authority obliged to negotiate; and if it had a discretion, could it be said that the discretion not to negotiate with the applicants as the loosing bidder be said to be either unlawful or irrational.

163. I answer the first question by reference to the Conditions of Tendering and consider that on a proper interpretation of those conditions that the respondent was not obliged to negotiate and had a discretion to consider to do so or not. In that, I consider the statement of principle contained in Arrowsmith *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (Vol. 1, 3rd Ed., 2014) at para. 9.69 to be correct:-

> "Another issue that arises is whether there is an obligation to negotiate it in a negotiated procedure with a notice. The use of the word "shall" in Art. 30(2) of the 2004 Public Sector Directive, quoted above, might be read as indicating that it is necessary in every case to provide for negotiations after initial offers have been submitted by the invited participants. This would, however, be a curious rule, since to require negotiations in situations in which it turns out they are not necessary is contrary to the directive's principle of transparency. It is more consistent with the transparency principle to allow the use of negotiated procedures for cases in which negotiations may be needed, but to allow the authority to decline to hold negotiations if that appears unnecessary (for example, when it feels it can choose the winner solely based on the initial offers submitted)."

164. Ms. Arrowsmith considers in the light of the judgment of the English High Court (Blackburne J.) in *BFS Group Ltd. v. Secretary of State for Defence* [2006] EWHC 1513, which concerned a negotiated procedure, and where Blackburne J. concluded that the argument that a duty to negotiate existed to be "*exceedingly weak*", that no general duty to negotiate existed, and would arise only when a duty is specifically indicated in the procurement documents.

165. It seems to me that this must be correct, and in the context of the terminology used in the Conditions of Tendering the contracting authority had a power to negotiate but was not required to do so, and had not committed itself to negotiate. The applicants are incorrect in arguing that the respondent manifestly erred in not returning to the applicants either to negotiate further elements of its tender or to negotiate between the two top rated submissions for the purposes of achieving a best and final offer.

166. The second argument made by the applicants is that the contracting authority acted irrationally in failing to enter negotiations with the two top bidders, and it seems to me that that is an argument that must fail, albeit that the discretion is a discretion to be exercised by a public authority and must be exercised in a reasonable manner. The test the applicants would have to meet is the test

explained in *O'Keeffe v. An Bord Pleanála*, i.e. that the failure to exercise the discretion in favour of conducting a negotiation was plainly and unambiguously wrong and not in accordance with fundamental sense and reason. In circumstances, therefore, where a contracting authority decided not to opt to contract with the bidder who offers the lowest price and when it has reserved onto itself the power to negotiate, it must engage its discretion in a rational way.

167. I consider that having regard to the difficulty I explained above, namely that the entering into post tender negotiations with two of the bidders would leave a contracting authority wide open to complaints from other tenderers that they have not been afforded equal treatment or that the post tender process lacked transparency, that there was no irrationality in the decision of the RPA not to enter further discussions or negotiations with the applicants.

168. There was a difference in final marks of 4.39 between the winning bidder and that of the applicants, although it is clear that the applicants proposed the lowest price.

169. The applicants assert that the negotiated procedure imports an obligation on the contracting authority to, at least, apply its mind to whether it might engage post tender negotiations. It is argued that the applicants relied on the fact that there would be a "best and final offers" round having regard to the terminology used in the Conditions of tendering. It is said that irrationality arises because the obligation on the contracting authority was to obtain the most economically advantageous tender. I consider that argument not to be correct, although it might in other circumstances fall for consideration where the contracting authority committed to accepting the lowest price tender, not found in the present case.

170. I was handed a sealed envelope which contained the bid price of the winning bidder, and counsel for the applicants suggests that I ought to consider the contents of that envelope in order to understand the extent of irrationality which she says is apparent from the fact that the respondent did not seek to engage further post competition negotiations.

171. I consider that it is not appropriate for me to consider the contents of the sealed envelope, which I return unopened, because this competition was not intended to be awarded on the basis of a best price offer. No benefit can be gained from my knowing the bid price of SSJV as the applicants lost marks on qualitative and not quantitative criteria. It is sufficient therefore for me to be aware that the applicants bid price was lower than that of the winning bid.

172. I conclude that the respondent was not under a duty to negotiate with the applicants and that there was no irrationality in its refusal to do so.

Conclusion

173. For the reasons stated and because the exercise I engage is a review of the decision of the respondent in the light of the legal principles outlined in this judgment, I propose making an order refusing the applicants the relief sought.