

**THE HIGH COURT
COMMERCIAL**

[2006 No. 1865 P]

BETWEEN

**SMART TELECOM PLC
TRADING AS SMART TELECOM**

PLAINTIFF

**AND
RADIO TEILEFÍS ÉIREANN
AND BY ORDER GLANBIA PLC**

DEFENDANTS**Judgment of Mr. Justice Kelly delivered on the 26th day of May, 2006****Introduction**

1. Given the frequency with which the weather forecast predicts dreary wet weather, the enthusiasm of commercial enterprises to sponsor it may come as a surprise. This litigation is all about attempts to become its sponsor as broadcast by the first defendant (R.T.E) over the next two years.

Background

2. The current sponsor of the weather forecast on R.T.E is Eircom. Its contract expires in June, 2006.

3. On 5th April, 2006, R.T.E indicated that the weather forecast was available for sponsorship at a price of €1.25 million per annum for a minimum period of two years. Four parties indicated a willingness to sponsor the forecast on those terms. Two of these are known and the others not. One was the plaintiff (Smart) and the other, the second defendant, (Glanbia).

4. Faced with such an embarrassment of riches R.T.E sent an email (the R.T.E offer) to the four interested parties on the morning of 7th April, 2006. As this email is of crucial importance in this litigation I will set it out in full. It reads: -

"Thank you for your expression of interest in the Sponsorship of R.T.E television weather. As a number of companies have met the asking price of €1.25 million per year for a minimum two year deal, we are obliged, in the interest of fairness and transparency, to hold a competition.

We now invite you to submit your best offer in the form of a sealed bid. You need to clearly state what price you will commit to for this contract – per annum and in total for the two year period under negotiation. It is to be understood that your best offer is a gross figure, inclusive of agency commission. The contract will be awarded to the highest bidder. In the event of more than one identical highest offer, we will enter into a second round offer with these companies only.

Bids should arrive at R.T.E before the deadline of 4.00 p.m. today, Friday April 7th, 2006 and be addressed to Robby Hill, Purchasing Manager, Stage 7, R.T.E, Donnybrook, Dublin 4. Please include the reference 'R.T.E. Weather' clearly on the front of the envelope, along with your company name. You will receive confirmation that your bid has been received directly from the Purchasing Manager upon receipt.

All bids will be opened at a meeting with the Purchasing Manager and a company auditor. All companies will be notified of the result by 5.00 p.m. today. In the event of a second round being necessary, this will not take place until early next week.

Thank you again for your interest in this highly sought after property. Please acknowledge receipt of this email.

Kind regards

Gerry."

5. The signatory of this email was Mr. Gerry McGuinness who is R.T.E's sponsorship manager.

Smart's Response

6. Smart responded in two different ways. Both responses are short but neither are models of lucidity.

7. A subsidiary of Smart, called Smart Telecom Holdings Limited (Holdings) (which was not one of the four original interested parties) sent an email to R.T.E on 7th April, 2006. It was in the following terms: -

"We refer to your email of 7th April, 2006, requesting and soliciting offers in the form of a sealed bid for a two year deal in respect of sponsorship of R.T.E television weather. It is noted the contract will be awarded to the highest bidder with the result being notified by 5.00 p.m. today with no further bidding unless an identical highest offer is received.

We confirm our agreement to bid the sum of €1,5100,000 (sic) on behalf of our company."

8. On the same day, Smart, through its Chief Executive, Mr. Oisín Fanning also wrote to R.T.E in the following terms: -

"We refer to your email of 7th April, 2006, requesting and soliciting offers in the form of a sealed bid for a two year deal in respect of sponsorship of R.T.E television weather. It is noted the Contract will be awarded to the highest bidder with the result being notified by 5.00 p.m. today with no further bidding unless an identical highest offer is received.

We confirm our agreement to bid a sum equal to 5% above the highest priced bid received by you by (sic) any other business for the minimum two year deal."

Glanbia's Response

9. On 7th April, 2006, a company called OMD Ireland, on behalf of Glanbia, submitted a bid in the following terms: -

"On behalf of Glanbia Consumer Foods we wish to bid €1,595,500 per annum (gross of agency commission), minimum commitment two years, in respect of R.T.E weather, i.e. €3,191,000 for the two years."

The 4.00 p.m. Deadline

10. All of the above responses were received prior to the deadline of 4.00 p.m. on 7th April, 2006.

11. During the morning of 7th April, 2006, an agent representing one of the other parties to whom the R.T.E offer had been sent, telephoned Mr. McGuinness of R.T.E. That person enquired whether a bid *"where the price being offered by the bidder was a specific amount over and above the highest fixed sum bid made by another bidder"* would be accepted. Although this enquirer did not use the term "referential bid" it is clear that was the subject of his enquiry. Mr. McGuinness conferred with two other officials in R.T.E and confirmed that such a bid was not permissible. An email was sent to that enquirer in the following terms: -

"Subject: Re: Weather Sponsorship

In relation to your question about 'type' of bid, the email requests that you clearly state what price you will commit to etc. This price must be a specific figure which is clear in isolation. Therefore it cannot be along the lines of 'best received bid plus €1K'.

I hope that is clear.

Gerry."

12. R.T.E did not inform the other bidders of this enquiry or the response thereto.

Events post 4.00 p.m.

13. All sealed bids which had been received were opened after 4.00 p.m. on 7th April, 2006. They included the bids from Smart and Holdings and Glanbia, to which I have already referred. There were also sealed bids from the other parties who had been invited to bid. All of the bids received were in fixed monetary amounts in Euro and specified the Euro amount bid per annum for each of the two years in question, save for the bids made by Smart and Holdings.

14. The bid from Holdings mentioned a sum of €1,5100,000 (sic) and did not indicate whether that was per annum or for the two year period.

15. Quite clearly this was not a bid which was made in accordance with the terms of the R.T.E offer. R.T.E would have been quite justified in regarding it as invalid. In ease of Holdings however it took a different course to which I will refer in a moment.

16. The Smart bid was considered invalid. This was consistent with the response made to the enquirer earlier in the day as to the unacceptability of referential bids.

17. Accordingly, Mr. Robert Hill of R.T.E telephoned the agent of Smart and stated that the referential bid was not valid and would not be considered because a clearly stated price per annum and for the two year term was required. He also sought clarification as to the figure that was in fact being offered by Holdings because on its face it was one of €15 million and did not indicate if the amount was per annum or for two years. The agent of that company, a Mr. Shanley, indicated to Mr. Hill that the figure was intended to be €1,510,000 per annum and that there was a typographical error in the relevant letter. Mr. Hill asked Mr. Shanley to email clarification of that to him. Accordingly, at 16.46 p.m. on 7th April, 2006, Mr. Shanley sent an email in which he stated as follows: -

"Bobby

Confirmation of our call earlier – Smart Telecom are bidding €1,500,100 per annum for a two year contract. Please confirm,

Regards.

Ciaran."

18. It is clear that this purported correction differs from the figure mentioned in conversation with Mr. Hill and refers to Smart rather than Holdings but in the event nothing turns on that.

19. R.T.E regarded this bid from Holdings as the only valid bid to emanate from the Smart stable. It regarded it as a valid bid notwithstanding the fact that it was of course open to question whether Holdings was entitled to submit a bid at all given that it was not one of the four parties to which the R.T.E offer had been extended.

20. In any event the bid from Holdings was not the highest bid (excluding the Smart referential bid). The highest bid came from Glanbia who offered €1,595,500 per annum with a minimum commitment of two years. That bid was accepted by R.T.E at 5.00 p.m. on 7th April, 2006.

Event's Post 5.00 p.m.

21. At 17.36 on 7th April, 2006, an email was sent to R.T.E by Mr. Fanning, the Chief Executive of Smart.

22. It read: -

"Dear Sirs

"We are the highest the (sic) bidder and unless we have an assurance that the contract will be awarded to us, we will be instructing our solicitors to issue specific performance proceedings to enforce the contract."

23. That email was responded to later in the evening by R.T.E in the following terms: -

"As you will be aware, the bidding process for this sponsorship required bids to clearly state the price the bidder was offering.

The referential bid submitted by Smart Telecom did not satisfy that requirement and was not a valid bid. In addition, a fixed price bid submitted by Smart Telecom (sic) was not the highest bid.

The party that did submit the highest valid bid has been informed that its offer has been accepted."

24. The contract was awarded to Glanbia. That was publicly announced by R.T.E on 27th April, 2006. These proceedings were instituted the next day.

The Reliefs Claimed

25. The principal relief claimed by Smart is an order for specific performance of the contract allegedly entered into by it with R.T.E. As an alternative, damages in lieu of specific performance are claimed. In addition an injunction is sought restraining R.T.E from taking any steps to award a contract for the sponsorship of the R.T.E weather forecast to Glanbia.

26. Smart also seeks a declaration that R.T.E was in breach of contract in failing to inform it that a referential bid would be invalid. A further declaration is sought to the effect that the conduct of the tendering process by R.T.E was rendered invalid and void because one bidder was told that referential bids were invalid whilst Smart was not.

The Issues

27. The parties agreed that the following issues arise for decision.

1. Was the referential bid (dated 7th April, 2006) submitted by Smart a valid bid in response to the R.T.E offer?
2. Is R.T.E obliged on foot of Smart's said bid to award the sponsorship contract for R.T.E's television weather service for two years from June 2006 to Smart?
3. If the referential bid was not valid and/or R.T.E is not obliged to award the sponsorship contract to Smart, is R.T.E obliged to re-tender the contract by reason of its failure to inform Smart that referential bids would not be acceptable in circumstances where R.T.E had informed another tenderer of that position?
4. Is Smart entitled to a declaration that R.T.E acted in breach of contract in failing to inform Smart that referential bids would not be acceptable in circumstances where it had informed another tenderer of that position?

28. I will answer these questions in turn.

Question Number 1

29. In law, an invitation extended by an invitor to prospective contractors seeking tenders from them is normally regarded as an invitation to treat. A response to such an invitation constitutes an offer which the invitor is free to accept or reject.

30. If, however, in extending the invitation the invitor states that the contract will be awarded to the highest bidder the position at law is different and contractual rights may flow from such an invitation.

31. All parties to this litigation accept, and in my view correctly, that the R.T.E offer was not an invitation to treat. Rather it was an offer which could ripen into an enforceable contract in favour of the highest bidder who accepted it in accordance with its terms.

32. Both Smart and Glanbia contend that they are the parties which respectively made the highest bid in accordance with the terms of the R.T.E offer.

33. In order to decide which contention is correct it is necessary to see whether the R.T.E offer permitted the making of a referential bid. If it did, then clearly the Smart offer exceeds the Glanbia offer by €159,550 (being 5% in excess of the €3,191,000 offered by Glanbia).

Referential Bid

34. It is quite clear that nowhere in the R.T.E offer are referential bids expressly prohibited.

35. Such being the case, I must construe the R.T.E offer so as to ascertain whether its provisions, read as a whole, permit of the making of referential bids. In attempting to ascertain the intention of R.T.E I must do so by reference to the language used by it.

36. I will carry out this exercise without reference to any of the authorities cited. They are of little value in attempting to ascertain the true intention of R.T.E. That must be done by a consideration of the words used by it in the R.T.E offer. Nonetheless, I will in due course consider relevant authorities insofar as they may have a bearing on the issue.

37. The following elements of the R.T.E offer appear to me to be relevant.

1. The offer was made to a limited number of interested parties. Those parties were selected because they had each indicated a willingness to pay €1.25 million per year for the sponsorship.
2. The R.T.E offer was made in the interest of fairness and transparency and was described as a competition.
3. Each party was invited to submit its best offer.
4. The offer was to be in the form of a sealed bid which was to be opened at a specific time and in the presence of *inter alia* an R.T.E auditor.
5. The price was expressly required to be stated both as to its totality and per annum. Specific directions were given as to the way in which the best offer was to be quoted, namely as a gross figure inclusive of agency commission.

6. R.T.E undertook to award the sponsorship to the highest bidder. This is a matter of crucial importance and is of course the principal element of the R.T.E offer which translated it from being an invitation to treat into an offer with contractual consequences if properly accepted.

7. The offer anticipated more than "one identical highest offer" in which case R.T.E undertook to "enter into a second round offer with these companies only".

38. It is clear that a number of consequences flow from the above. First, R.T.E sought to extract the best price which each bidder was prepared to pay for the sponsorship. They were expressly asked to submit their "best offer". It is impossible to know whether a referential bid is the best offer which a bidder is prepared to make.

39. Secondly, each bidder was asked to clearly state what price it would commit to per annum and in total for the two year period. Not merely that, but the best offer was to be a gross figure inclusive of agency commission. This suggests to me that R.T.E wished to have actual figures quoted. This is entirely consistent with the idea that each bidder should make its best offer.

40. Thirdly, the R.T.E offer was addressed solely to the four interested parties and envisaged that the bidding was to be on a confidential basis. Each bid had to be sealed. All of the bids were to be opened together in the presence of both the purchasing manager of R.T.E and an R.T.E auditor. All of the offers would therefore remain confidential until all of them were opened together at that meeting.

41. Fourthly, R.T.E committed itself to accept the highest bid received.

42. Fifthly, the R.T.E offer envisaged the possibility of more than one "identical highest offer". In such event a second round offer was to be made. The reference to "identical highest offer" in my view excludes referential bids, because, by their nature, they will always be higher than the highest price bid.

43. Finally, the R.T.E offer was made "in the interest of fairness and transparency". Only Smart ever had the opportunity to acquire the sponsorship with its referential bid. None of the other bidders had any prospect of securing the contract. Their bids would be used solely for the purposes of determining the price which Smart had to pay. In addition, Smart through its subsidiary, Holdings, took the precaution of making a fixed bid thereby diminishing, if not obliterating, any risk which it would have.

44. All of these factors appear to me to indicate that it was never the intention of R.T.E that referential bids would be permissible. The terms which I have identified are inconsistent with the making of a referential bid.

45. The matter can also be tested by reference to the following. It is clear that R.T.E were engaged in a serious business enterprise and wanted to obtain the best price for their product. They decided to go through a process which would produce that in a fair way and within a limited period of time.

46. It is not to be inferred that they wished to engage in a process which would not give such a result or, worse, would produce absurdities. If the R.T.E offer permitted the making of referential bids, the ability to produce a good commercial result was diminished and the possibility of absurdities abounded.

47. What, for example, would have been the result had all of the bidders made referential bids? The whole process would have been rendered nugatory. What if more than one had made referential bids? Confusion would ensue. These considerations further militate against the notion that referential bids were permissible.

48. In these circumstances I am of opinion that the terms of the R.T.E offer, when properly construed, did not permit of the making of a referential bid.

49. I now turn to a consideration of the relevant authorities with a view to testing whether my approach to the matter has been correct or not.

50. In my view the authority which comes closest to the facts of this case is the decision of the House of Lords in *Harvela Limited v. Royal Trust Company* [1986] A.C. 207.

The Harvela Case

51. In this case Royal Trust invited Harvela and Sir Leonard Outerbridge to submit offers by sealed tenders by a specified deadline to a named party who undertook not to disclose the sealed tenders before the deadline. The tenders were to be a single offer for all the shares of a company that were held by Royal Trust and were for sale. Royal Trust bound itself to accept the highest offer that complied with the terms of the invitation. Before the invitation expired, Harvela and Sir Leonard made the offers which resulted in the litigation. Harvela offered US\$2,175,000. Sir Leonard offered US\$2,100,000 "or US\$101,000 in excess of any other offer which Royal Trust may receive which is expressed as a fixed monetary amount, whichever is the higher". Royal Trust purported to accept Sir Leonard's offer. Harvela challenged that decision. The case went to the House of Lords where the principal speech was that of Lord Templeman.

52. His Lordship analysed the difference between a sale by auction and a sale by fixed bidding. He said: -

"Where a vendor undertakes to sell to the highest bidder, the vendor may conduct the sale by auction or by fixed bidding. In an auction sale each bidder may adjust his bid by reference to rival bids. In an auction sale the purchaser pays more than any other bidder is prepared to pay in order to secure the property. The purchaser does not necessarily pay as much as the purchaser was prepared to pay to secure the property. In an auction a purchaser who is prepared to pay US\$2.5 million to secure a property will be able to purchase for US\$2.2 million if no other bidder is prepared to offer as much as €2.2 million.

In a fixed bidding sale, a bidder may not adjust his bid. Each bidder specifies a fixed amount which he hopes will be sufficient, but not more than sufficient, to exceed any other bid. The purchaser in a fixed bidding sale does not necessarily pay as much as the purchaser was prepared to pay to secure the property. But any bidder who specifies less than his best price knowingly takes a risk of being outbid. In a fixed bidding sale a purchaser who is prepared to pay \$2.5 million to secure the property may be able to purchase for \$2.2 million if the purchaser offers \$2.2 million and no other bidder offers as much as \$2.2 million. But if a bidder prepared to pay \$2.5 million only offers \$2.2 million he will run the risk of losing the property and will be mortified to lose the property if another bidder offers \$2.3 million. Where there

are two bidders with ample resources, each determined to secure the property and to prevent the other bidder from acquiring the property, the stronger will prevail in the fixed bidding sale and may pay more than in an auction which is decided, not by the strength of the stronger, but by the weakness of the weaker of the two bidders. On the other hand, an open auction provides the stimulus of perceived bidding and compels each bidder, except the purchaser, to bid up to his maximum.

Thus auction sales and fixed bidding sales are liable to affect vendors and purchasers in different ways and to produce different results. The first question raised by this appeal, therefore, is whether Harvela and Sir Leonard were invited to participate in a fixed bidding sale, which only invited fixed bids, or were invited to participate in an auction sale, which enabled the bid of each bidder to be adjusted by reference to the other bid. A vendor chooses between a fixed bidding sale and an auction sale. A bidder can only choose to participate in the sale or to abstain from the sale. The ascertainment of the choice of the vendors in the present case between a fixed bidding sale and an auction sale by means of referential bids depends on the presumed intention of the vendors. That presumed intention must be deduced from the terms of the invitation read as a whole."

53. The exercise prescribed in the latter part of this quotation is precisely the one which I have conducted. I have sought to deduce R.T.E's intention from the terms of the R.T.E offer read as a whole.

54. Lord Templeman went on to identify three provisions which he said were only consistent with the presumed intention to create a fixed bidding sale and which were inconsistent with any presumed intention to create an auction sale by means of referential bids. He said: -

"By the first significant provision, the vendors undertook to accept the highest offer; this shows that the vendors were anxious to ensure that a sale should result from the invitation. By the second provision, the vendors extended the same invitation to Harvela and Sir Leonard: this shows that the vendors were desirous that each of them, Harvela and Sir Leonard, and nobody else should be given an equal opportunity to purchase the shares. By the third provision, the vendors insisted that offers must be confidential and must remain confidential until the time specified by the vendors for the submission of offers had elapsed; this shows that the vendors were desirous of provoking from Sir Leonard an offer of the best price he was prepared to pay in ignorance of the bid made by Harvela and equally provoking from Harvela the best price they were prepared to pay in ignorance of the bid made by Sir Leonard."

55. All of these elements have been identified by me as being present in the R.T.E offer. They point inexorably to the conclusion which I reached and which is fully supported by the same conclusion reached by Lord Templeman in the *Harvela* case.

56. Later in his speech Lord Templeman identified four consequences which might arise if referential bids had been permitted in the *Harvela* case. They are identified at pages 231 and 232 of his speech. They can be summarised as follows: -

(a) If referential bids were permissible there was a danger, far from negligible, that the sale might be aborted. The shares could only be sold if at least one bidder submitted a fixed bid and the other bidder based his referential offer on that fixed bid.

(b) If referential bids were permissible, there was a possibility that one bidder would never have an opportunity to buy.

(c) The vendors object of provoking the best price that Harvela and Sir Leonard were each prepared to offer in ignorance of the rival bid was frustrated.

(d) He said *"if referential bids were permissible by implication, without express provision in the invitation for that purpose, and without any indication in the invitation of the nature of the referential bids which would be acceptable, the results could have been bizarre"*.

57. He then gave an example of such bizarre results. It is not necessary to set it out here in detail save to comment that his Lordship was dealing with a two bidder process. The results would be even more complicated and potentially more bizarre in the case of a four bid contest, as in the instant case.

58. These four consequences are similar, if not identical, to the ones which I have identified as ones which might occur if the R.T.E offer were construed as permitting referential bids.

59. It appears to me that the conclusions which I have reached concerning the inappropriateness of referential bids in the context of the R.T.E offer are supported by the unanimous views of the House of Lords in the *Harvela* case.

60. In explaining his conclusions Lord Templeman followed a number of other decisions which are worthy of mention. The first was *South Hetton Coal Co. v. Haswell Shotton and Easington Coal and Coke Co.* [1898] 1 Ch. 465. In that case, the owner of a coalmine proposed to receive sealed tenders from two parties who were competing to purchase. The vendor undertook to accept the highest "net money tender". One of the competitors purported to offer "such a sum as will exceed by £200 the amount...offered... by the other proposing purchaser". That approach was rejected by the Court of Appeal. Lindley M.R. said: -

"Does the offer fairly answer the description of what the liquidator had bound himself to accept – in other words does it answer the description of being 'highest net money tender I receive'? It appears to me obviously not. Whether it was a tender at all depended...not upon the construction of that letter, but upon whether other people tendered. That is not what the liquidator wanted, and that is not what he bound himself to accept."

61. Lord Templeman said of this decision that it was *"decided by a powerful court, has stood unchallenged for over 80 years and was binding on the Court of Appeal in the present case"*.

62. He also cited with approval a decision of the New York Court of Appeals in *SSI Investors Limited v. Korea Tungsten Mining Co. Limited* [1982] 449 N.Y.S 2d173. He said as follows: -

"The majority judgment at pages 174-175, succinctly and cogently summarised the reasons for rejecting referential bids as follows: -

"The very essence of sealed competitive bidding is the submission of independent, self contained bids, to the fair

compliance with which, not only the owner, but the other bidders are entitled...To give effect to this or any similar bidding practice in which the dollar amount of one bid was tied to the bid or bids of another or others in the same bidding would be to recognise means whereby effective sealed competitive bidding could be wholly frustrated. In the context of such bidding, therefore, a submission by one bidder of a bid dependant for its definition on the bids of others is invalid and unacceptable as inconsistent with and potentially destructive of the very bidding in which it is submitted'."

63. In my view those considerations are equally applicable in the present case.

Conclusions on Question 1

64. I hold that on the true construction of the R.T.E offer the making of a referential bid was impermissible. That finding is supported by reference to the wording of the offer itself and by high judicial authority from England and Wales and from New York. I find those authorities persuasive and in my view they are supportive of the conclusion which I have reached.

65. Furthermore, I am of the view that there is much to be said for the opinion of Lord Templeman to the effect that where referential bids are sought there ought to be an express provision in the invitation permitting such bids to be made. Patent unfairness results unless that is done. Such unfairness would be inconsistent with the object which was sought to be achieved in the R.T.E offer.

66. The first question is therefore answered in the negative. The referential bid submitted by Smart was not a valid bid in response to the R.T.E offer.

Question Number 2

67. In the light of the answer to the first question, this question is also answered in the negative. R.T.E is not obliged to award the sponsorship contract to Smart.

Questions 3 and 4

68. I propose to deal with both of these questions together. It is important to bear in mind the response which was made to the query from the third party bidder. It read: -

"In relation to your question about 'type' of bid, the email requests that you clearly state what price you will commit to etc. This price must be a specific figure which is clear in isolation. Therefore it cannot be along the lines of 'best received bid plus €1K'.

I hope that is clear."

69. That email did no more than indicate what the true position was to the enquirer. It was a response to a question which did not alter in any way the R.T.E offer. Indeed it specifically referred back to the R.T.E offer.

70. As this response was no more than a reiteration of the existing terms, I can see no basis upon which it was necessary to communicate the same information to all of the other bidders.

71. If, in response to the query, R.T.E had introduced an alteration to the terms of the R.T.E offer, different considerations would apply. However what was communicated was nothing more than a reiteration of the existing terms. There was, in those circumstances, no obligation to communicate to any of the other bidders. R.T.E should not be obliged to re-tender the contract.

72. There was no breach of contract (or indeed of any other obligation which might have been owed to Smart by R.T.E) in failing to notify it and other tenderers of the enquiry and the response to it. Accordingly, there will not be any declaration in favour of Smart in this regard.

73. As a postscript I would like to add that there was nothing unfair or inequitable in the way in which R.T.E dealt with Smart and Holdings. For example it could have rejected Holdings bid on a number of bases.

74. First, the R.T.E offer had never been extended to it. Secondly, the figure cited was, in the way in which it was set out, entirely unclear. Thirdly, it did not comply with the terms of the R.T.E offer in that it did not specify the price per annum and in total for the two year period under negotiation as was required. Instead of taking this perhaps technical, but entirely legitimate, attitude R.T.E overlooked these lacunae and afforded Holdings an opportunity to clarify its position. It then considered its bid.

75. R.T.E is not obliged to re-tender the contract. Neither is Smart entitled to a declaration that R.T.E acted in breach of contract. There was no breach. Questions 3 and 4 will therefore be answered in the negative.

Conclusion

76. Having regard to the answers given to the foregoing questions this action is dismissed.