

**THE HIGH COURT
COMMERCIAL**

[2022] IEHC 54
[2021/556JR]

BETWEEN

WORD PERFECT TRANSLATION SERVICES LIMITED

APPLICANT

AND

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

JUDGMENT OF Mr. Justice Twomey delivered on the 2nd day of February, 2022

INTRODUCTION

1. This is a case in which the applicant, a supplier of Irish translation services ("Word Perfect"), challenges the legality of a State tender whereby the suppliers are obliged not to sell below a certain price for those translations (11 cents per word). Word Perfect also claims that a turnover requirement for tenderers should be *raised* rather than lowered.
2. It may seem surprising that a supplier would object to a minimum price below which it cannot sell its services and that it would object to a turnover being too low (since the more usual objection is that a high threshold requirement prevents smaller suppliers from tendering). However, Word Perfect relies on competition law to claim that if a group of *suppliers* sought to fix a minimum price it would be regarded as a breach of the EU general principle of free competition and that it is also anti-competitive for a purchaser to fix a minimum price below which he will not pay, in buying the services.
3. As regards the turnover requirement, Word Perfect, which is the leading supplier of Irish translation services to the State, claims that it is unlawful that smaller suppliers (with turnovers of just €40,000 or above) should be able to compete, in this tender for contracts with an annualised value of €23,000, with other more financially robust suppliers like Word Perfect (which has a turnover of €867,000), as this, it says, breaches the EU general principle of proportionality. Word Perfect also claims that the method of allocating the contracts (i.e. by rotation) to suppliers who are accepted onto the framework breaches the general principle of equality.
4. The State claims that it inserted these terms in the tender to increase participation by small and medium sized enterprises ('SMEs') in the tender process and to increase the quality of the Irish translation services.
5. However, a preliminary issue was raised regarding the eligibility of Word Perfect to challenge the legality of the tender in the first place. In this regard, it is not disputed that for an applicant to be entitled to challenge an *award* of a contract under a public procurement process, it must, save in exceptional circumstances, have submitted a tender for that contract. However, the question at issue here is whether the *same pre-condition applies where a challenge is made to the legality* of the tender documents, as distinct from a challenge to an *award* of a contract.

BACKGROUND

6. The background to this issue is that public bodies are obliged by the Official Languages Act 2003 to ensure that various public communications are translated into Irish. These services had been previously provided pursuant to the public procurement process under the 2016 Framework Agreement for the provision of those services (the "2016 Framework"), which framework expired on 3rd July, 2021.
7. The replacement framework for the public procurement of Irish language translation services (the "2021 Framework") is worth €10 million over its four-year term, and it is being challenged in these proceedings by Word Perfect.
8. This challenge (Record No. 2021/556JR) by Word Perfect to the 2016 Framework seeking tenders for Irish language *translation* services was heard by this Court during the week beginning 18th January, 2022.
9. A separate challenge, on different grounds, by Word Perfect to the framework seeking tenders for *interpretation* services (for foreign languages) was heard by this Court during the week beginning 11th January, 2022 (*Word Perfect v. Minister for Public Expenditure and Reform*, Record No. 2020/432JR). This other challenge was referenced by Word Perfect in these proceedings, in the context of its defence to the claim that it is not eligible to bring this challenge.
10. In those other proceedings, Word Perfect claims, *inter alia*, that the tender for interpretation services for foreign languages is also unlawful. One of the grounds that it relies upon is that the State is discriminating against it on the basis that it is too litigious. In this regard, that State has submitted that the Word Perfect has brought at least five challenges to other State tenders in recent years, in addition to the two current challenges to the Irish language translation services tender and the foreign language interpretation tender. As noted below, Word Perfect claims that the State has not challenged its eligibility to challenge the tender for interpretation services of foreign languages, and it claims that this fact supports its argument that the State should not be entitled to challenge its eligibility in these proceedings.

This 2021 tender for Irish translation services

11. Word Perfect challenges the Request for Tenders dated 12/05/2021 to establish a Multi Supplier Framework Agreement for the Provision of Irish Language Translation Services which was published on 15th May, 2021. This Request for Tender seeks tenders in respect of the translation of three lots, Lot 1 (Standard Text), Lot 2 (Technical Text), and Lot 3 (Legal Text).
12. The respondent is the Minister for Public Expenditure and Reform as the tender was issued by the Office of Government Procurement ("OGP"), which operates under the Minister. The tender is being issued for the benefit of numerous public bodies (e.g. an Garda Síochána, the Courts Service, the HSE, etc.) who are expected to utilise the 2021 Framework Agreement for obtaining Irish language translation services. In these circumstances, it is proposed to refer to the respondent to the proceedings as the "State".

Automatic suspension of the 2021 tender process for Irish language translation services

13. There is a very significant difference between a challenge to the legality of the public procurement process and a challenge to most other decisions by a State body.
14. First there is no requirement that a judicial review of a public procurement process must first obtain the leave of the court, which is the usual requirement for challenging the actions of a State body.
15. Secondly and more significantly, unlike most other challenges to the actions of the State, once proceedings are instituted to challenge a public procurement process, regardless of the merits of the challenge, the consequences are hugely significant. This is because the whole tender process is effectively stalled since there is an *automatic* suspension on any contracts being signed pursuant to Regulation 8(2) of the S.I. No. 130 of 2010 European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (the "Remedies Regulations").
16. Thus, once Word Perfect instituted these proceedings, on the 11th June, 2021, to challenge the Request for Tenders in this case, the tender process for Irish language translations effectively came to a halt. In this case of course, what is being stalled is the statutorily mandated (under the Official Languages Act 2003) translation of documents into Irish, bearing in mind the status of the Irish language under the Constitution (Article 8.1). An example of the importance of what is at stake is illustrated by the fact that Acts of the Oireachtas must be printed and published in both Irish and English simultaneously. As noted below, this adds a degree of significance and urgency to this case.
17. The grounds for challenge can be summarised as follows:
 - (i) **Awarding of contracts to suppliers in a tender should not be done by rotation?**
18. First, Word Perfect claims that the terms of this Request for Tender are unlawful because they provide for contracts, which are worth between €25,000 and €100,000 and fall within Lot 1 (Standard Text), to be awarded by rotation to the suppliers who are admitted to the Framework.
19. This arises because under the 2021 Framework, the first contract in time to be awarded is awarded to the supplier who obtained first place in the competition to be admitted to the Framework, with the second contract in time to the next in line, and so on. If say there were 11 contracts and 10 suppliers admitted to the Framework, then the first placed supplier would get the 11th contract as the process repeats itself once the first round of contracts is complete.
20. In this regard, Word Perfect claims that if there were say ten suppliers admitted to the Framework and say 55 contracts awarded over the four-year period of the 2021 Framework Agreement, the supplier with the most marks would get 6 contracts of random value, while the second placed, third placed, fourth placed and fifth placed suppliers would also get 6 contracts of random value. As there are only 55 contracts, it would mean that the sixth to tenth placed suppliers would get 5 contracts of random value.

21. Word Perfect points out that there is no guarantee that the supplier in first place will get the highest value contracts. This is because, while the contracts are allocated to the suppliers in order of merit, in the sense that the first placed supplier will get the first contract to be awarded (and when the process is repeated it will always get the first contract on the second and subsequent rounds), nonetheless the value of each contract is random (save that they will be worth between €25,000 and €100,000).
22. On this basis, Word Perfect claims, *inter alia*, that the Request for Tender breaches the general principle of EU law of equal treatment, since it claims that a successful tenderer who is lower ranked in the competition could end up with contracts which are higher in value than those of a higher ranked tenderer, thereby unlawfully treating tenderers in different situations the same.
- (ii) State should not be permitted to put floor on price which it pays for services?**
23. Secondly, Word Perfect claims that the requirement in the Request for Tender that tenderers cannot go outside the price-range set out therein is unlawful, i.e. in Lot 1 the price range between which tenderers are permitted to bid is €0.11 to €0.15 per word for translation services.
24. It is not disputed that, if a group of *sellers* of services were to agree amongst themselves not to bid below a minimum price when submitting their respective tenders, this would be a clear breach of competition law.
25. However here one is dealing with an unusual situation, since one is not dealing with a *seller* of a service putting a floor on the price below which it will not sell the service. Instead it is a situation where the buyer of the service, the State, is saying it will not buy the translation services below 11 cents per word, since this is the minimum price, under the terms of the Request for Tender, that any supplier can charge for the service.
26. As noted below, the State claims that it is inserting this 'price-floor' in the Request for Tender in order to encourage greater participation by other suppliers and thus greater competition in the tender process.
27. While it may seem surprising that the seller, Word Perfect, would object to being required to charge a higher price for its services than it might otherwise, it claims that the 'price-floor' breaches the general principle of EU law of free competition since it prevents Word Perfect competing on prices below this figure, which it has obviously successfully done to date, as evidenced by the fact that it was the leading supplier of Irish translation services to the State under the 2016 Framework Agreement.
- (iii) Turnover requirement of €40,000 for tenderers is too low?**
28. Thirdly, Word Perfect claims that the turnover requirement of €40,000 is unlawful, as it is too low.
29. Again, it may seem unusual that a tenderer would claim that the turnover in a tender process is too low, since the usual complaint about the level of turnover in tender

documents is that it is too high and thus prevents smaller suppliers, who might otherwise be able to provide the services, from tendering.

30. However, in this case, Word Perfect, which has a turnover of €867,000 claims that the turnover of €40,000 is too low and that it breaches, *inter alia*, the general principles of proportionality, under EU law. In this regard, it claims that the purpose of the turnover requirement is that service providers are sufficiently financially robust to perform contracts. Thus, Word Perfect seems to be claiming that tenderers will be entitled to participate in the tender process for translation services, and thus compete with Word Perfect for the work, even though their turnover means that they are not, in Word Perfect's view, sufficiently financially robust to provide the services.

State's defence to these three claims

31. In reply to these three grounds of challenge, the State claims that the use of the rotation system, the price-floor and the turnover requirement of €40,000 arose from a detailed review of the operation of the 2016 Framework Agreement and a consultation process with, *inter alia*, the various State buyers of the Irish translation services. Arising from this analysis, the State sought to improve on the experience of the 2016 Framework Agreement.
32. In particular, the State claims that these three terms of the Request for Tender are justified in order to improve the quality of the translation services into Irish, as the consultation process raised a concern that low prices from a cost-competitive tender process impacted on the quality of the translation. The State also claims that these terms are required to enhance competition by facilitating a greater number of suppliers in the 2021 Framework Agreement.
33. In relation to increasing the participation of other suppliers, the State was in particular concerned that in recent years one supplier, Word Perfect, was overwhelmingly winning all the contracts under the 2016 Framework (a circa 70% share), which was not representative of its share of the general market for Irish translation services (a circa 11% share). Combined with this was its concern that there was a diminishing number of suppliers seeking contracts under the 2016 Framework. This is because, between 2017 and 2021, the number of suppliers had gone from an average of four suppliers down to two suppliers (one of which was Word Perfect) competing for the contracts being awarded under the mini-competitions under the 2016 Framework Agreement.
34. In relation to quality, the State claimed that the price-floor signalled to the market that it was not focused solely on price, but also on quality and on an increased participation by numerous suppliers. Accordingly, the State claims that the three disputed terms are aimed at ensuring that in four years, at the expiry of the 2021 Framework Agreement, there would be several suppliers for the next Framework Agreement, and not just two suppliers or perhaps only one supplier of Irish translation services to the State at that stage.

State also claims that Word Perfect does not have standing to bring the challenge

35. As previously noted, in addition to these substantive defences to Word Perfect's claim that the Request for Tender is unlawful, the State also claims that Word Perfect is not entitled to challenge the Request for Tender in the first place, since it did not submit a tender for the competition under the 2021 Framework Agreement and so is not an 'eligible person' under Regulation 4 of the Remedies Regulations. Regulation 4 transposed into Irish law Article 1(3) of the Council Directive of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public work contracts (89/665/EEC) (the "Remedies Directive").

Urgency of resolving the challenge to this tender process

36. In view of the statutorily mandated, and constitutionally supported, obligation upon the State to translate documents into Irish, combined with the expiry of the 2016 Framework on 3rd July, 2021, the State sought to have the automatic suspension lifted, as it had come into effect on the 11th June, 2021 when the proceedings were instituted.
37. In the High Court on 23rd September, 2021 McDonald J. permitted the State to conclude the Multi-Supplier Framework Agreement and so he lifted the suspension of the tender process for Irish language translation services.
38. Word Perfect appealed and on the 12th November, 2021, the Court of Appeal reached the contrary conclusion to McDonald J., since it held that the balance of justice favoured keeping the automatic suspension in place.
39. It is clear from that judgment that, in deciding whether to leave the automatic suspension in place, the Court of Appeal was influenced by the fact that the hearing on the substantive challenge to the terms of the Request for Tender was listed for hearing on the 11th January, 2022.
40. In fact, as previously noted, a completely separate challenge, by Word Perfect, was heard on that date, to do with a different tender process by the State (*Word Perfect v. Minister for Public Expenditure and Reform*, Record No. 2020/432JR) challenging a Framework Agreement for *Request for Tenders dated 27/05/2020 to establish Four Single Supplier Framework Contracts for the provision of Interpretation Services (excluding Irish Language Services)* . That hearing lasted a week and accordingly the hearing of the challenge to the tender for Irish language translation services in this case commenced on the 18th January, 2022 and it also lasted a week and finished on the 21st January, 2022.
41. However, the crucial point is that when the Court of Appeal was deciding in November 2021 to leave the automatic suspension of the State's tender in place, until the challenge to the Request for Tender was before this Court, it was aware that the hearing was due to proceed in January. Thus, if the Court of Appeal left the suspension in place (which it did), it knew that from the date of the delivery of the Court of Appeal judgment in November 2021, it was only a matter of weeks of court-sitting time until the *hearing* of the challenge in January 2022.

42. It is clear from para. 148 of the Court of Appeal's judgment (delivered by Barniville J.) that this very short time-frame was a factor in that court's decision not to lift the suspension, and so to continue to prevent the State completing the tender process for Irish language translation services because of Word Perfect's challenge.

43. Barniville J., in delivering the judgment of the Court, stated at para. 177:

"I am quite satisfied that the approach which best minimises the risk of injustice is to keep the automatic suspension in place *until the conclusion of the trial*, with the continuation of the suspension thereafter *to the date of judgement in the High Court being a matter for the trial judge*, and that it would create a serious injustice for [Word Perfect] if the suspension were lifted at this stage." (Emphasis added)

44. The Order duly drawn up reflected this portion of the judgment since it provides that:

"[T]he automatic suspension on the conclusion of the Framework Agreement with the successful tenderers which arose under Regulation 8(2) of the Remedies Regulations will remain in place *until the conclusion of the trial in the High Court* which is listed to commence on 11 January 2022 with the *continuation of the suspension thereafter to the date of judgment being a matter for the trial judge*." (Emphasis added)

It is also relevant to note that at para. 148 of the judgment it is stated:

"[...] it does seem realistic to think that it should be possible for the trial to take place and for judgement to be delivered by the end of the Hilary term in 2022."

45. Thus, it seems that if a decision were not to be taken by this Court, regarding the lifting of the suspension *immediately* after the conclusion of the hearing in this case in January 2022 (which was envisaged by the Court of Appeal as being one option regarding the lifting of the suspension), the Court of Appeal anticipated that a decision regarding the lifting of the suspension would be taken by 8th April, 2022 (the end of the Hilary Term) and so approximately 2½ months from the end of the hearing on 21st January, 2022.

46. Against this background, counsel for the State referred in his closing submissions to these circumstances giving rise to an *unusual* situation, which should be taken into account by this Court at the end of the hearing when deciding how best to proceed, particularly in relation to the State's claim that Word Perfect was ineligible to bring this challenge in the first place. He submitted:

"So, we do invite the Court, Judge, to make a decision on this eligibility issue, if it feels it's in a position to do so, in advance of the other issues in the case, having regard to the terms of the order of the Court of Appeal, which I mentioned at the beginning, because I didn't want to spring it on you at this stage, that *the Court of Appeal, very unusually, put in* – and it was deliberately put in by, Mr. Justice Barniville said he'd drafted it and put it in – which was to *give the Court, this Court, at the conclusion of the hearing, the option of making a decision as to whether the suspension* on entering into the contract should remain in place.

And if the Court feels it's in a position to give a decision specifically *on this eligibility point, which doesn't involve any contested questions of fact, but just a determination of law* and which we say really is now just crystal clear given the *Copymoore* case and the Court of Justice judgment, then we would invite the Court to do so and, of course, in that way lift the – we would invite the Court to lift the suspension at that point, *to allow the other tenderers who did put in tenders, to allow the decision to be made in respect of the appointment of other winning tenders to this tender.*" (Emphasis added)

47. On this basis, it seems to this Court that it is clear that the Court of Appeal, in reaching its decision to prevent the State completing its tender process for Irish language translations (by re-imposing the suspension that had been lifted by McDonald J.) did so, in part, because it felt that after the hearing of the action (which was going to be only weeks after the Court of Appeal judgment), this Court might be in a position to make a decision at that stage regarding the lifting of the suspension, since it would at least have heard all the evidence, which the Court of Appeal had not.
48. Accordingly, there is a clear reference in the judgment and in the Order to the possibility of a decision being made at '*the conclusion of the trial*'. It seems that this prospect was a factor in balancing the injustice to the State of not being able to complete the tender for Irish language translation services on the one hand, against the injustice to Word Perfect of allowing the tender at that stage to complete even though it had not had its claims of illegality heard on the other hand. Taking account of, inter alia, this factor, the Court of Appeal decided that the balance of justice favoured Word Perfect and so the State should continue to be prevented from completing the tender process.
49. As is clear from the foregoing submission from counsel for the State, it was his view that it was very unusual that the High Court was being asked to consider lifting the automatic suspension immediately after the hearing concluded. It is clear from his submission that he felt that this unusual approach was taken because of the particular circumstances of this case, namely the urgency of the State being able to finalise the 2021 Framework Agreement for Irish translation services in light of its statutory and constitutional obligations. Accordingly, he has invited this Court to lift the suspension immediately/as soon as possible after the hearing has completed (on the grounds of ineligibility), if this Court believes it is possible for it to do so, now that it has heard all the evidence.
50. For this reason, counsel for the State invited this Court to deal separately with the issue of eligibility since, if this Court were to find that Word Perfect did not have standing to make this challenge, this would determine the case, without this Court having to delay matters further by having to consider the substantive claims regarding the rotation system, the price-floor and the allegedly low turnover.

Dealing with the eligibility issue as a stand-alone issue now?

51. It seems to this Court that there are good reasons why this approach should be taken in this case.

52. First, it is clear from the Court of Appeal's decision that the fact that a decision might be taken by the High Court very soon after the Court of Appeal's decision, and possibly as soon as the hearing was completed (on the 21st January, 2022), was a factor in its decision to deprive the State of the ability to finalise its tender process for Irish language translations beyond 12th November, 2021 (the date of the Court of Appeal judgment).
53. Secondly, one is dealing with a matter which is clearly urgent and important, since the State is subject to statutory and constitutional obligations to provide public documents in the Irish language. Even though its pre-existing tender process ended on 3rd July, 2021, the existence of Word Perfect's challenge means that the State cannot finalise the tender process under the 2021 Framework Agreement as of 21st January, 2022, when this hearing ended (It should however be noted that the Court of Appeal observed in relation to the urgency of this matter that many public bodies did not use the previous Framework and that some contracts remain in existence into 2022 and beyond).
54. Thirdly, there is the issue of the best use of the very limited court resources. In this instance, if there is a *prospect* that a preliminary issue, such as eligibility, can determine a matter, without the Court having to devote scarce time and resources to the substantive issues in a case, then it seems to this Court that there is merit in this approach being adopted.
55. Indeed, the importance of this approach is particularly significant at the present time, as was highlighted by the fact that the pressure on the Commercial Court at the moment is such that cases, which were listed for hearing during the week beginning 24th January, 2022, had to be adjourned due to unavailability of judges due to court commitments, which is almost unprecedented in the Commercial Court. In this regard, this Court, in considering how best to utilise court resources has to balance the interests of Word Perfect as a plaintiff in this case seeking the assistance of the courts (and of course the State as a defendant), with the interests of other litigants who seek the assistance of the courts.
56. Fourthly of course, the eligibility issue is a discrete legal point which does not involve any contested facts and does not involve a detailed consideration of the numerous affidavits and expert evidence provided to the Court regarding the substantive claims in this case. Accordingly, it is a matter that, *prima facie* at least, might be able to be dealt with more quickly than the other issues in the case.
57. On this basis, this Court concluded immediately after the completion of the hearing in this case that it should consider solely at this stage the eligibility issue. This is also because if it turned out that this Court were to conclude that Word Perfect is ineligible to bring the challenge, then this would have two advantages.
58. First it would shorten the period of suspension from the end of the hearing on 21st January, 2022, to a period of days (and the injustice to the State of being subject to that suspension unnecessarily *if* Word Perfect was held to be never eligible to bring the challenge). This is compared to the situation if the State had to wait until all the evidence

is reviewed and a judgment is delivered on all the substantive grounds of challenge in addition to the eligibility issue, which the Court of Appeal estimated might take 2½ months – thus a shortening of the period of actual injustice to the State by some two months (on the basis that Word Perfect is found to be ineligible to challenge the tender process).

59. Secondly, it would eliminate the need for court resources to be devoted to an analysis of all the evidence and the preparation of a judgment on the substantive claims. It is however accepted that this amounts to a possible, rather than *guaranteed*, saving of court resources. This is because if an appellate court were to take a contrary view to this Court, it would then be necessary for this Court, at that stage, to devote resources to the analysis of the evidence on the substantive issues and the delivery of a judgment on that issue. Nonetheless, it seems to this Court that when resources in the Commercial Court are at such a premium, that cases are having to be adjourned due to unavailability of judges, there seems to be clear logic in pursuing any option which may result in a saving of court resources.

ANALYSIS

60. Accordingly, this Court has concluded that it should just consider the eligibility issue, which it will now do.

Is Word Perfect 'eligible' to challenge the tender process for Irish translation services?

61. It is common case that, in order to challenge the Request for Tender, Word Perfect must be an 'eligible person' for the purposes of the Remedies Regulations. Regulation 4 of those Regulations states:

"For the purposes of these Regulations, a person is an eligible person in relation to a reviewable public contract if the person –

- (a) has, or has had, an interest in obtaining the reviewable public contract, and
- (b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable public contract, of the law of the European Communities or the European Union in the field of public procurement, or of a law of the State transposing that law."

62. Word Perfect does not dispute the applicability of Regulation 4 to the circumstances of this case and quotes from Regulation 4 in its written submissions. However, it concludes in relation to this issue that:

"There can be no doubt that [Word Perfect] has an interest in obtaining the public contract at issue in these proceedings. [Word Perfect] was the leading supplier on the 2016 Framework [...] Faced with what it considered to be unlawful competition, [Word Perfect] chose to bring these proceedings, rather than participate in such a process. There is no requirement for [Word Perfect] to have submitted a tender in order for it to be an eligible person."

On this basis, Word Perfect claims that it complies with Regulation 4.

63. The State takes a different interpretation of what is meant, in Regulation 4, by '*an interest in obtaining*' the public procurement contract. It relies in particular on the judgement of Hogan J. in *Copymoore Ltd. and Oths v. Commissioner of Public Works in Ireland* [2013] IEHC 230 and his emphasis on the importance of the applicant, who is bringing the challenge, having submitted a tender. The State also relies on the judgment of the Court of Justice in Case C-230/02 *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v. Republik Österreich* [2004] E.C.R. I-1829.
64. Word Perfect disputes that the interpretation of Regulation 4 based on *Copymoore*, which itself relied extensively on *Grossmann*, applies to it.
65. In support of its approach, Word Perfect points out that the interpretation of Regulation 4 in *Copymoore* arose in the context of a challenge to an *award* of a contract arising from a tender process, unlike in Word Perfect's case which is a challenge to the legality of a Request for Tender. It is not disputed that no award has been made, since as previously noted the tender process has been stalled since these proceedings were instituted (on the 11th June, 2021), which was before the deadline for the submission of the tenders (on the 14th June, 2021).
66. Before considering Word Perfect's claim in this regard, it is relevant to note that in other respects the *Copymoore* case and this case are similar. In *Copymoore*, there was a challenge to the validity of a public service procurement process regarding print services required by the State. The applicant in that case, like Word Perfect, had not submitted a tender pursuant to the Request for Tender in that case.

Copymoore's and Grossmann's interpretation of Regulation 4/Article 1(3)

67. Hogan J. had to determine whether *Copymoore* was an eligible person within the meaning of Regulation 4 so as to entitle it to bring the proceedings. He relied in particular on the decision of the Court of Justice in *Grossmann*, which dealt with Article 1(3) of the Remedies Directive (which Regulation 4 transposes into Irish law). This Article states:

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

68. Rather than considering *Copymoore* and *Grossmann* separately, it is proposed to consider them together, particularly as *Copymoore* itself is taken up with a summary of the facts in *Grossmann* and the law. For this reason, it is necessary to set out in some detail Hogan J.'s judgment. At para. 20 *et seq* he states:

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

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

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

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

'However, where an undertaking has not submitted a tender because there were *allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested*, it would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated.'

On the one hand, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, *even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications*.

On the other hand, it is clear from the wording of Article 2(1)(b) of Directive 89/665 that the review procedures to be organised by the Member States in accordance with the Directive must, in particular, set aside decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications. It must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated.

Absence of proceedings against the invitation to tender

In this case, Grossmann complains that the contracting authority imposed requirements in respect of a contract for non-scheduled air transport services that only an air company offering scheduled flights would be in a position to fulfil, which had the effect of reducing the number of candidates capable of providing all the services required.

It is apparent, however, from the file that Grossmann did not seek review of the contracting authority's decision determining the specifications of the invitation to tender directly, but waited until the decision to award the contract to Lauda Air was notified before asking the Bundesvergabeamt [Federal Procurement Authority] to set that decision aside.

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

'The national court therefore asks, essentially, whether Article 1(3) of Directive 89/665 must be interpreted as meaning that it precludes a person who not only has not participated in the award procedure for a public contract but has not sought any review of the decision of the contracting authority determining the specifications of the invitation to tender either, from being regarded as having lost his interest in obtaining the contract and, therefore, the right of access to the review procedures provided for by the Directive.'

[....]

It must be pointed out that the fact that a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his view discriminate against him, *in so far as they effectively disqualify him from participating in the award procedure for the contract at issue*, but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that those specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665.

[...]

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

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

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

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

[...]

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

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

treatment of tenderers was not observed), she did hold that the applicant had standing to make the case that the Minister was then obliged in these special circumstances to organise a fresh tender.

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

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

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

69. After this analysis, Hogan J. held that, as *Copymoore* had not submitted a tender, and clearly had not complied with any of the exceptions, it was not an eligible person under the Remedies Regulations and so the challenge was dismissed.
70. In *Grossmann*, while the question from the national court was whether Article 1(3) of the Directive is interpreted to mean that a supplier in *Grossman's* position *must be afforded* the opportunity to review the public contract (at para. AG 16), the Court of Justice (at paras. 34 and 40 of its judgment) reframed the question to say that the national court ‘*essentially*’ asked whether Article 1(3) is to be interpreted as *precluding* a supplier from being regarded as having no right to challenge the tender process, if he did not submit a tender because he could not supply the services due to allegedly unlawful terms in the tender.
71. The Court of Justice held that the Directive does not preclude a person from being an eligible person where he has not submitted a tender in these circumstances.
72. Accordingly, the Directive means that such an applicant may be regarded (as distinct from ‘must be regarded’) as an eligible person and so this is a permitted exception to the requirement that a person, to be eligible to challenge a tender, must submit a tender.

Summary of the analysis by Copymoore and Grossmann of Regulation 4

73. It can be summarised from the foregoing that for a supplier to be eligible to challenge the procedures for awarding a public procurement contract, it must have an ‘*interest in obtaining*’ the contract (and of course it must also allege that it is harmed or at risk of

being harmed by the alleged infringement, although the former issue is the focus of this case).

74. Regulation 4 has been interpreted by the Court of Justice and by Hogan J. in the High Court in the context of a challenge to an award of a public procurement contract, as distinct from a challenge to a Request for Tender, since the former was the situation in both *Copymoore* and in *Grossmann*.
75. From these judgments, it is clear that the way to show that a party has an interest in a contract, for the purposes of Regulation 4, is primarily, and almost exclusively, by tendering for that contract.
76. As noted by Hogan J. at para. 24 of *Copymoore*, the answer to the national court's question in *Grossman* is deliberately worded. As has been seen, the Court of Justice re-framed the question from mandatory in nature to permissive in nature. Accordingly, Hogan J. notes that 'the clear implication' of this approach is that the '*Directives positively preclude*' persons who do not submit a tender from being an eligible person.
77. Elsewhere, Hogan J. observes that a failure by a supplier such as Word Perfect to tender is '*impossible to overlook*' and '*well nigh dispositive*' of the question of whether such a supplier has an '*interest in obtaining the reviewable public contract*' and so is dispositive of whether it is an '*eligible person*' to challenge the tender process.
78. Indeed, this conclusion would also seem to comply with logic, since Regulation 4 is not talking about persons, who have a general interest in tenders that might be established by the State, being able to challenge those tenders. Rather it is quite clear from the wording that it is concerned with persons who have an interest in a *specific* contract. What better way is there, to establish that a person has an interest in a specific contract, than by tendering for that contract? Unless, of course, it is pointless in her doing so since she will not be awarded the contract because of the allegedly unlawful terms (which is not alleged in this case). Indeed, in support of this interpretation is the fact that the wording of Article 1(3) of the Remedies Directive states that the applicant has to have '*an interest in obtaining a particular contract*' (Emphasis added). Similarly as regards the wording of Regulation 4, it refers to an interest in '*obtaining*' the reviewable contract. Once again logic dictates that a person who claims that they have an interest in '*obtaining*' a contract prove that fact in one way only (subject to rare exceptions), namely by putting in a bid for that contract in order to obtain it. If you do not put in a bid, then you are guaranteed not to '*obtain*' it, in which case it is almost impossible to claim that you nonetheless have an interest in obtaining it (save in exceptional cases).
79. Another way to put the point being made by Hogan J. is to say that it is *tenderers* who are entitled to challenge the legality of a tender and not potential tenderers or others who might be said to have an interest, more generally, in the contract, whether that is because of their involvement in the previous tender process, or because they are a major supplier of the services in question in the market generally or because of some engagement with the contracting authority complaining about the terms of the Request

for Tender (and in this case, as noted below, Word Perfect wrote to the State complaining about the allegedly unlawful terms of the tender).

80. This view that it is only tenderers, subject to exceptional circumstances, who can challenge a public procurement process is also found in the Opinion of Advocate General Stix-Hackl in Case C-129/04 *Espace Trianon and Sofibail* [2005] E.C.R. I-7805, since she states at para. 48 et seq that:

“From the Community law perspective, the questions referred must be answered therefore in such a manner as to ensure that the Directive’s aim of enforcing the rights which can be derived from the directives concerning the substantive law of public procurement is taken into account.

If that principle is applied to the main proceedings it leads then to the conclusion that the Directive provides remedies only for tenderers”. (Emphasis in original)

Exceptions to the requirement to submit a tender do not apply in this case

81. However, it is important to bear in mind that it is also clear from *Copymoore* and *Grossmann* that there are some exceptional situations in which a person will be regarded as having an interest even where she has not tendered for the contract, e.g. where it would be pointless insisting on an applicant, who wishes to challenge a tender process, submitting a tender even though she knew it was bound to be unsuccessful. However, these exceptions, which are referenced to by the High Court and the Court of Justice in its interpretation of Regulation 4/Article 1(3), are not of relevance in Word Perfect’s case.
82. This is because Word Perfect is not claiming that any of these exceptions applied to it. On the contrary, it states that it decided not to tender. Indeed, the whole tenor of its submissions is that, as the leading supplier of Irish translation services, the rotation system, the floor price and the allegedly low turnover requirement, while they did not prevent Word Perfect from winning any State translation contracts, were likely to reduce its current market share of State translation contracts since it would prejudice efficient firms (and Word Perfect claims to be one such firm) from tendering at prices below the price-floor. Indeed, Word Perfect’s expert (Dr. Patrick McCloughan) accepted that the turnover requirement did not prevent Word Perfect from bidding and that it could bid at above the floor-price and that if it did, it would have a very good chance of getting onto the Framework.
83. As Word Perfect does not claim to be entitled to rely on the exceptions to which reference has been made, it seems clear that Word Perfect’s argument regarding the eligibility issue is focused on its view that the interpretation of Regulation 4 in *Copymoore* and *Grossmann* (which requires a challenger to a tender process to have tendered for the contract), does not apply to it, because it is challenging a Request for Tender, rather than an *award* of a contract.
84. In support of this view, it points out that the interpretation of Regulation 4/Article 1(3) in both those cases arose in the context of challenges to an award of a contract.

A different test depending on the form of the challenge to the tender process?

85. Accordingly, Word Perfect claims that the test for determining whether a person, challenging the Request for Tender, has an interest for the purposes of Regulation 4, is different from the eligibility test that applies when it is challenging an award of a contract under the tender process. Thus, it claims that there is a different eligibility test, depending on the form or timing of the challenge to the tender process.
86. Word Perfect claims that the eligibility or 'interest' test when challenging the Request for Tender is satisfied where the challenger has an interest, as that term is more generally understood, in the tender process, such as where, as in this case, Word Perfect was the leading incumbent supplier of translation services under the previous tender process. So it says interpreting the expression 'having an interest in', which is contained in Regulation 4, as this expression is normally understood, Word Perfect should be regarded as having an interest in the next tender process. It says that the fact that it has an interest in the tender process is illustrated by the State's solicitor's letter dated 10th June, 2021 to Word Perfect's solicitors, rejecting the claims that the Request for Tender is unlawful, but adding that it:

"is their sincere hope that [WordPerfect], as an important supplier in this market, will choose to tender and participate in the competition which aims to provide high calibre Irish translation services to framework clients into the future." (Emphasis added)

87. This Court would agree with Word Perfect that it has an interest in the tender process, as that term is generally understood. However, there is case law, to which reference has been made, as to how the expression 'interest' in Regulation 4 is to be interpreted. This makes it quite clear that the (almost) exclusive way to establish this interest is by submitting a tender and a failure to do so is practically dispositive of any question of the person having an interest.

Eligibility test for Award challenge is the same as for challenge to Request for Tender?

88. This therefore narrows the question down for this Court to whether there is any merit in Word Perfect's claim that the interpretation of the meaning of 'interest' in Regulation 4/Article 1(3) in the case law, in the context of challenges to an award of a contract, does not apply to a challenge to the terms of a Request for Tender.
89. It seems to this Court that the answer to this question is yes for the following reasons.

(i) Wording of Regulation 4 does not apply different tests for eligibility to challenges

90. First, there does not seem, to this Court, to be any basis in the actual wording of Regulation 4 for saying that the test, which must be applied before a tender process can be challenged, is different depending on the stage of the process when the challenge is initiated, whether that is at the 'award of the contract' stage or the 'request for tender' stage.

91. In particular, no distinction is made in that wording between what is meant by the term an 'eligible person' in Regulation 4, as regards a challenge to the terms of the Request for Tender, on the one hand, and a challenge to an award, on the other hand. It seems to this Court that a challenge is a challenge. Accordingly, whether that challenge to a procurement process is a challenge to the Request for Tender or a challenge to the award, it is still a challenge to the procurement process. The wording of Regulation 4 does not therefore provide any support for Word Perfect's claim.

(ii) The consequences of a challenge supports a strict interpretation of Regulation 4

92. Secondly and critically, the very significant consequences of the initiation of a challenge to a public procurement process, regardless of the merits of a challenge, are the same, whether it is a challenge to the Request for Tender or a challenge to the award, i.e. the State cannot complete the tender process.

93. It is important to bear in mind that this significant and automatic consequence is the case whether one is dealing with critical healthcare equipment for hospitals or important language translation services for the Oireachtas. In light of these significant consequences, it is not a surprise to this Court that the High Court and the Court of Justice have adopted a very strict interpretation of the test for eligibility, before a third party (other than the tenderers) can bring the whole process to a halt by the mere act of instituting proceedings challenging the tender process (and irrespective of whether the grounds of challenge might be strong or frivolous).

94. Indeed, the importance of a strict approach is highlighted, when one considers that in other respects it is much easier to judicially review the State's actions regarding public procurement, than it is to judicially review the State's actions in the non-public procurement sphere. This is because in the latter instance, it is necessary to seek leave from the High Court pursuant to Order 84 of the Superior Court Rules to bring proceedings to challenge State actions, while there is no such requirement in the case of a judicial review brought under Order 84A for a challenge to a State tender process, provided of course that the supplier is an 'eligible' person. Accordingly, this supports a strict interpretation of what is meant by the term 'eligible person'.

95. Indeed a further example of this strict approach by the courts to eligibility to challenge the public tender process is provided by the Court of Justice decision in Case C-129/04 *Espace Trianon and Sofibail* [2005] E.C.R. I-7805 to which Hogan J. refers in *Copymoore*. In that case, it was held that a rule which required all the members of a tendering consortium to challenge the validity of a contract award, for it to be legally admissible, was perfectly acceptable. As noted by Advocate-General Stix Hackl at para. 37:

"a member of a consortium is merely interested in the consortium being awarded the contract, not however in obtaining the contract itself."

96. The point is made explicit at para. 41:

"According to the Court's case-law, *the requirement of participation in the contract award procedure should be departed from therefore only in those cases in which participation was impossible or at the very least pointless*. The decisive element is therefore that the cause of the impossibility of successful participation in a contract award procedure lies in the conduct of the contracting authority. *Cases of impossibility must be distinguished, however, from those in which an undertaking does not even desire to participate in a contract award procedure*. This also applies to the individual members of a consortium which do not desire to participate individually in a contract award procedure." (Emphasis Added)

97. As noted by Hogan J. in relation to this case (at para. 25 of his judgment, set out above), the Court of Justice:

"again (at least) strongly implied that only persons who participated in the tender process have an interest in challenging the tender award."

98. *Payzone Ireland Ltd. v. National Transport Authority* [2021] IEHC 212 is another relevant case. This is an example of another Irish case illustrating what might be called this zero-tolerance approach to applicants challenging State tenders, where they have not tendered, yet claim to be 'eligible' to stall public tender processes, by the simple expedient of instituting proceedings (regardless of the merit of their grounds of challenge).

99. In that case, the applicant had not tendered since it had agreed to participate in the tender of another supplier, but then, when that supplier was awarded the contract, it informed *Payzone* that it was not, after all, part of the successful tender. It is clear therefore that, like *Word Perfect* in this case, *Payzone* had, in accordance with the general meaning of the word, an 'interest' in the tender process. However, O' Moore J. points out that *Payzone* did not have an interest sufficient to be an 'eligible person' since it was not a tenderer (see para. 30), and he notes therein that the evidence which was provided to the court regarding the '*distinction between Payzone and the actual tenderers for the contract*' (Emphasis added).

(iii) The interests of other parties, who have tendered, have to be taken into account

100. Thirdly, it is also important to note that, when deciding who is an '*eligible person*' to challenge a public procurement process, such a decision involves not just the interests of the State and the applicant (in this case, *Word Perfect*). It also affects the interests of the persons who have gone to the expense of tendering for the contracts. In this case, this is in the region of ten suppliers, predominantly, if not exclusively, SMEs, who are hoping to get work from the State under the 2021 Framework Agreement and who may be financially prejudiced by a stalling of the tender process.

101. With so many interests affected and in view of the importance, in some cases at least, of the public contracts at stake, it is understandable that the Court of Justice and the High Court would take the view that very strict eligibility requirements need to be satisfied before the whole process is stalled.

102. Accordingly, this Court cannot see a basis for the suggestion that a different and less onerous test applies for determining eligibility requirements, when there is a challenge to a Request for Tender, than when determining the eligibility requirements for a challenge to a tender award, particularly, since in both instances the effect is the same, i.e. a halting of the procurement process and its potential prejudicial effect on other parties, who did submit tenders for the contracts.
103. In particular, this Court does not believe that the fact, *inter alia*, that the State's solicitors wrote to Word Perfect saying that the Office of Government Procurement 'hopes that Word Perfect, as an important supplier in the market, will choose to tender', comes anywhere close to constituting an 'interest' for the purposes of Regulation 4, as suggested by Word Perfect.
- (iv) Cases do distinguish between 'request for tender' stage and 'award' stage**
104. Fourthly, while *Grossmann* and *Copymoore* were both concerned with challenges to tender awards, there is nothing in those judgments which would lead one to conclude that the principles set out therein, regarding interpreting Regulation 4/Article 1(3), are not equally applicable to a challenge to a Request for Tender.
105. Thus, to take an example, if a tenderer was unable to comply with an alleged discriminatory term of a Request for Tender, such that it was unable to tender (e.g. if the tender documents for no good reason stated that the tenderer had to have only male employees), then whether one is dealing with a challenge to an award, which was made arising from that discriminatory tender, or a challenge to the terms of the Request for Tender, it seems clear that the principle that tenderers should be able to challenge the process, without having to put in a tender for a contract it could never be awarded, is equally applicable to both scenarios.
106. More specifically, it seems to this Court that the court in *Grossmann*, when outlining the general principle (that an applicant should have submitted a tender, see para. 27), and then the exceptions to it (i.e. that the alleged discriminatory terms prevented it from providing the services – see para. 28), the court was clearly considering not just the challenge to an award of a contract (*albeit* that this was the circumstance before it) but rather the award process generally.
107. This is because, for example, at para. 28, the Court of Justice in *Grossmann* expressly refers to the fact that the '*invitation to tender*' might contain discriminatory terms which prevent the applicant providing the relevant services and which would then entitle the applicant to challenge the tender process without having to submit a tender and so '*even before the procedure for awarding the contract concerned is terminated.*'
108. It seems to this Court that it is the corollary of the situation contemplated by the Court of Justice in that paragraph that arises in this case, namely that Word Perfect does not claim that the alleged discriminatory terms prevent it from supplying the services and so it must submit a tender before it can challenge the tender process before the contract is awarded.

(v) Court of Justice has applied Grossmann test to a Request for Tender in Azienda

109. Fifthly, further support for the view that the eligibility requirements, for a challenge to a Request for Tender, are the same as for a challenge to an award, is provided by the judgment of the Court of Justice in Case C-328/17 *Amt Azienda Trasporti e Mobilità SpA* ECLI:EU:C:2018:958.
110. As previously noted, the *Grossmann* case and the *Copymoore* case interpreted Regulation 4/Article 1(3) in the context of a challenge to an award of contract.
111. However, the *Azienda* case (which was not in the booklet of authorities or referred to in the legal submissions, but was brought to the Court's attention during the hearing) is, in fact, a case which concerned a challenge to the '*notice for selection of economic operators*' which was published in that case by a contracting authority, and thus was concerned with the '*request for tender*' stage and not the '*contract award*' stage.
112. The tender was for regional bus services in Italy, but they were to be awarded in one lot covering the whole territory of the Region of Liguria, which meant that operators at a local level, such as the applicant, were unlikely to be successful.
113. While it did involve a Request for Tender, rather than an award of a contract, it was not concerned with the direct question of whether an applicant was an 'eligible person' for the purposes of a challenge to a Request for Tender, unlike the situation in *Copymoore*.
114. However, it dealt with a related point, namely the legality of an Italian law which provided that there was no right to bring proceedings to challenge a Request for Tender, if the applicant had not submitted a tender, even where the applicant could demonstrate that the terms of the Request for Tender made it very unlikely that it would be awarded a contract.
115. Thus, this was not a situation where the terms of the Request for Tender made the award of contract impossible, but rather they made it possible, but highly unlikely. The question for the Court of Justice was, does Article 1(3) of the Remedies Directive permit such an applicant being prevented from challenging the tender process if he did not submit a tender?
116. The Court of Justice held that Article 1(3) of the Directive did not preclude a law that an applicant was ineligible to challenge the tender process if he did not submit a tender, even where it was highly unlikely to be awarded the tender due to the allegedly unlawful terms in the tender.
117. It is relevant to note therefore that once again the Court of Justice interpreted Article 1(3) ('*an interest in obtaining a reviewable contract*') in a very strict manner, since it permitted a national law determining that a person does not have such an 'interest' if she did not submit a tender even if her failure to do so was because it was highly unlikely that she would be successful (because of the alleged unlawful conditions). The importance which the Court of Justice attaches to submitting a tender is once again emphasised, but

here in the context of a challenge to a Request for Tender, and not in the context of a challenge to a contract award.

118. More specifically, since Word Perfect argues that the Grossman interpretation of Article 1(3) does not apply to a Request for Tender, it is important to note that at paras. 44, 45, 46, 47, 48, 49, and 52, the Court of Justice expressly relies on the principles set out in Grossmann, in the context of a challenge to the award of a contract, and applies them to the challenge before the court, a challenge to the terms of a Request for Tender. In particular, at para. 46 and para. 49, the Court of Justice states:

“46. Participation in *a contract award procedure may*, in principle, with regard to Article 1(3) of Directive 89/665, *validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract* at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. *If he has not submitted a tender it will be difficult for such a person to show that he has an interest* in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision (judgment of 12 February 2004, Grossmann Air Service, C-230/02, EU:C:2004:93, paragraph 27).

[.....]

49. The findings derived from the judgment of 12 February 2004, *Grossmann Air Services (C-230/02, EU:C:2004:93)*, *are applicable mutatis mutandis in the present case.*” (Emphasis Added)

119. Similarly, in this case, this Court does not see any issue with it concluding that the interpretation of Article 1(3)/Regulation 4 in *Copymoore* and *Grossmann* should be applied in Word Perfect’s case to a challenge to a Request for Tender in the same way as it applies to a challenge to an award of a contract.
120. Finally, Word Perfect relies on Regulation 7(2) of the Remedies Regulation, Order 84A Rule 6 of the Superior Court Rules and the failure of the State to challenge its eligibility in the other proceedings (the challenge to the tender for foreign language interpretation services) to support its interpretation of Regulation 4.

Regulation 7(2) impacts on interpretation of Regulation 4?

121. Regulation 7(2) of the Remedies Regulation states:

“An application referred to in subparagraph (a) or (b) of Regulation 8(1) *shall be made within 30 calendar days* after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application.”
(Emphasis added)

122. Thus, there is a 30 day deadline, from when a person becomes aware of an alleged infringement, within which she must challenge the tender process.

123. The Request for Tender was issued on the 15th May, 2021 and it provided a deadline for submitting tenders under the Request for Tender of the 14th June, 2021.
124. Word Perfect claims that under the Request for Tender, it is arguable that a period of 30 days, for the purposes of Regulation 7(2), expired on 13th June, 2021 if one counted the first day (i.e. the date of issue of the Request for Tender on the 15th May, 2021) in that 30 day period.
125. As it happens, the 13th June, 2021 was a Sunday, so Word Perfect decided to issue proceedings, in this case, not on the 14th June (for fear that the first day might be counted as part of the 30 days), nor on the 13th June, because it was a Sunday, but on the Friday, the 11th June, 2021.
126. On this basis, Word Perfect argues that the fact that in the particular circumstances of this case, as so outlined, if the State's interpretation of Regulation 4 is correct, Word Perfect, if it had decided to submit its tender on the last date for tenders, the 14th June, 2021, and so after it had issued the proceedings, it would become an eligible person *after* it had issued proceedings.
127. It says that such an outcome could have happened in the circumstances of this case, if the term '*interest*' is interpreted to mean having to submit a tender. However, it says this is absurd, since you have to be able to say whether Word Perfect is an eligible person when it issues its proceedings. Accordingly, it says that this supports its interpretation of Regulation 4, as not requiring it to have submitted a tender to be an '*eligible person*'.
128. However, whether Word Perfect is an eligible person is completely within its own control, since it can simply submit a tender at any time, and so any absurdity is brought about by its own decision not to submit a tender, combined with its decision as to when it issued the proceedings.
129. Accordingly, this Court does not accept that this argument supports Word Perfect's interpretation of Regulation 4 (as not requiring the submission of a tender in order to be an eligible person).
130. What Word Perfect decides to do regarding the timing of its challenge is a separate matter, it is still required to be an eligible person, and whether it institutes proceedings on the day the Request for Tender is issued or on the expiry of the tender deadline is a matter for it.
131. Furthermore, Regulation 7 (which must be satisfied if someone wishes to challenge a tender process) makes no reference to what is meant by an '*eligible person*'. In this Court's view therefore, Regulation 4 (which has strict eligibility requirements for an applicant to be an '*eligible person*') is not implicitly amended by Regulation 7 (regarding the timing of a challenge) in the manner suggested by Word Perfect.

Order 84A Rule 6 impacts on interpretation of Regulation 4?

132. In addition, Word Perfect relies on order 84A, Rule 6 (2) of the Superior Court rules to support its interpretation of Regulation 4. This provides:

“(2) Where a contracting authority, contracting entity or notice party opposes the application *on the ground that the applicant is not an eligible person* (within the meaning of Regulation 4 of the Public Procurement Remedies Regulations or, as the case may be, Regulation 4 of the Utilities Remedies Regulations), that contracting authority, contracting entity or notice party *may apply to the Court* for an order dismissing the application by motion on notice, grounded on an affidavit, in the proceedings commenced by Originating Notice of Motion, which motion may be made returnable for the return date of the Originating Notice of Motion.” (Emphasis added)

133. Word Perfect claims that this section envisages that an application, challenging the eligibility of an applicant to bring a challenge, will be made straightaway when the proceedings are brought by the applicant. On this basis it says that there is no credibility to the eligibility argument since if there was, the State would have brought such an application at the start of these proceedings, as was done in the *Payzone* case.

134. However, it is clear from the wording of this rule, and in particular the use of the word ‘may’, that it is permissive. Accordingly, there is no obligation upon the State to deal with the eligibility issue by way of preliminary motion, since it is equally entitled to deal with this issue at the plenary hearing. Indeed, the *Copymoore* case is an example of a case where the eligibility issue was determined at the trial and not by way of preliminary application. Hence, this Court rejects Word Perfect’s claim that the State is not entitled to raise the eligibility issue at this stage in the proceedings, and that this somehow supports its interpretation of Regulation 4.

Failure of the State to challenge the eligibility of Word Perfect in the other proceedings

135. Word Perfect claims that the different approach of the State, in Word Perfect’s challenge to the foreign language interpretation tender, where the State did not challenge its eligibility to challenge that tender, supports Word Perfect’s interpretation of Regulation 4. Brief reference has already been made to details of the challenge to the foreign language interpretation tender.

136. However, that was a case in which the State decided, on receipt of the challenge from Word Perfect to that tender, to place the entire tender process on hold. Thus, it seems clear that it would not have been appropriate for the State to claim that Word Perfect did not tender, since the whole tender process was put on hold.

137. In this case, the position is different as the tender deadline remained in effect and tenders were submitted and now are awaiting decision, but no tender was submitted by Word Perfect.

138. Accordingly, this Court does not believe that the distinction, between the approach of the State in the challenge to the foreign language interpretation tender and its approach to

the challenge to the Irish language translation tender, has any bearing on meaning of 'eligible person' in Regulation 4.

139. Indeed, even if the circumstances of the challenge to the foreign language interpretation tender was the same as the challenge to the Irish translation tender, the fact that a litigant decides not to raise the interpretation of a term in legislation in its defence in one case, does not in any way affect a court's interpretation of that term, if it chooses to raise that issue in a separate case.

SUMMARY

140. For the reasons set out above, this Court is of the view that when challenging public tenders, the eligibility requirement for challenging a Request for Tender is the same as that for challenging an award of a contract, namely that save in the most exceptional circumstances the applicant has to have submitted a tender.
141. It is clear from the case law that the requirements are very strictly applied so that the failure to tender is '*nigh dispositive*' (per Hogan J.) of an applicant's claim that it is entitled to challenge a tender process (if it did not submit a tender).
142. There are, of course, exceptional cases in which a failure to tender is not dispositive. In this regard, although not analysed in detail by this Court for the reasons aforesaid, the essence of the substantive claim being made by Word Perfect appears to be that if the three disputed terms (i.e. (i) the rotation system, (ii) the price-floor and (iii) the low turnover requirement) were not in the Request for Tender, then a highly efficient firm like Word Perfect could be expected to win more contracts and more valuable contracts. This is because, *inter alia*, Word Perfect claims it would be able to bid below the price-floor. It might also be the case, of course, that there would be less competition for those contracts for Word Perfect from firms with low turnovers since these firms would not be permitted to tender.
143. The essence of Word Perfect's substantive case appears to be that it has a right to compete to win, *inter alia*, on price, all the State contracts for Irish translation (and in recent years it has indeed won most of the mini-competitions under the previous Framework). This right, it says, is being affected by the attempts of the State to signal by the use, *inter alia*, of the rotation system, the price-floor and the allegedly low turnover, that the State was not focused solely on price but also on quality and on increasing the number of SMEs participating in tenders for Irish language translation services.
144. However, crucially there is nothing in these three allegedly unlawful terms in the Request for Tender which prevented Word Perfect from tendering, or which prevented it from being awarded a contract. Accordingly, Word Perfect does not, and cannot, rely on any of the exceptions to say that it is 'eligible' to challenge the tender process (without having to submit a tender).
145. Yet, Word Perfect chose not to submit a tender and this fact is '*impossible to overlook*' (per Hogan J.) when determining whether it was eligible to challenge the tender process

in this case. Without having tendered in the process, Word Perfect has challenged the legality of the entire process and so has stalled its operation by virtue of the automatic suspension which applies to public procurement contracts when a challenge is instituted.

146. However, in this Court's view, for the reasons aforesaid, Word Perfect never had standing to bring that challenge, as it had not submitted a tender, and so these proceedings should be dismissed and this automatic suspension will come to an end.
147. Since this Court has concluded that Word Perfect does not have standing to challenge the terms of the Request for Tender in the first place, it is not necessary for this Court to make a determination regarding the claims made by Word Perfect that the Request for Tender is itself unlawful (to which brief reference has been made).
148. This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms of any draft agreed court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).