[2020] IEHC 435

THE HIGH COURT

2019/71 JR

IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC, AS AMENDED BY DIRECTIVE 2007/66/EC

AND

IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES' CONTRACTS) REGULATIONS 2006 (S.I. NO 392 of 2006)

AND

IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS, 2010 (S.I. NO 130 of 2010)

AND

IN THE MATTER OF THE EUROPEAN UNION (AWARD OF PUBLIC AUTHORITY CONTRACTS) REGULATIONS 2016

AND

IN THE MATTER OF ORDER 84A OF THE RULES OF THE SUPERIOR COURTS 1986

BETWEEN

ROBERT OWENS

APPLICANT

AND

KILDARE COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Quinn delivered on the 4th day of September, 2020

1. The applicant seeks orders by way of judicial review quashing the decision of the respondent to eliminate him from any further participation in a tender for the establishment of a Multi-Party Framework Agreement for Planned Building Maintenance Works for County Kildare, (the "Framework Agreement").

2. The applicant seeks declarations that the decision made was:-

   (a) *ultra vires* the decision-making powers of the respondent;

   (b) arrived at on foot of a decision-making process which was flawed, unfair, unequal, discriminatory, arbitrary and otherwise not in accordance with natural and constitutional justice and the applicant's right to fair procedures; and

   (c) that the decision breaches the respondent's duty to give full and proper reasons as required by European Union (Award of Public Authority Contracts) Regulation, 2016 (S.I. No. 284/2016), (the "Procurement Regulations").

3. The applicant also seeks declarations that any steps taken after his elimination are void and that any contract concluded for the Framework Agreement is ineffective. He also seeks an injunction restraining the respondent from taking any further steps in the decision-making process for that Framework Agreement.

4. The respondent opposes the claims and asserts that it acted at all times in accordance with the Procurement Regulations and other applicable regulations and denies that the decision-making process was in any manner flawed, unfair, unequal, arbitrary or

otherwise than in accordance with natural and constitutional justice or the applicant's right to fair procedures.

The Tender

5. On 2 May, 2018, the respondent announced the commencement of a tender process for the establishment of the Framework Agreement. The purpose of the Framework Agreement was to allow the respondent to procure quick turnaround type works and mini tenders from prequalified contractors. The works comprised refurbishment and adoption of houses, both vacant and occupied, to bring them up to current regulations and standards. Two separate "Lots" were being tendered.

6. It was envisaged that Lot 1, which would relate principally to minor works, would involve the appointment of a panel of twelve contractors for use in mini-tendering competitions.

7. It was envisaged that Lot 2, referred to as the panel for "quick turnaround works", would result in the appointment of two preferred contractors, one for Kildare North and one for Kildare South and a panel of a further eight "reserved bidders" to back up the preferred contractors whenever they were unavailable.

8. The Framework Agreement was planned to last for a period of twelve months, with the option for the respondent to extend it for up to three additional twelve month periods. The total spend under the framework was set at a maximum of €10 million over the lifetime of the framework.

9. The process was undertaken by a two stage restricted tender. Initially, parties were requested to make submissions of interest within a four-week period. Such submissions were required to be supported by a suitability assessment questionnaire with supplements and appendices. On the basis of these materials, a selected number of parties were invited to participate in stage 2.

10. On 28 August, 2018, the respondent notified those parties which it had identified as eligible to move to stage 2 and invited them to submit tenders by Tuesday, 2 October, 2018. The deadline was later extended to 9 October, 2018.

11. The applicant was selected to progress to stage 2 and so notified.

12. The deadline for pre-tendering enquiries was Tuesday, 18 September, 2018.

13. In respect of each of the Lots, there was issued a separate Instructions to Tenderers, referred to in this judgment as an "ITT".

14. The ITT provided at s. 4.2 that each tender must include all of the documents listed in an appendix which were as follows:-

    (1) Completed form of tender and schedule;

    (2) Completed Pricing Document; and

(3) Quality Assessment Submission together with all necessary backup and supporting information and certification (referred to as a "Quality Submission").

15. The form of the Pricing Document was specified at volume C of the ITT, and there was issued separately by the respondent a "Works Requirement Document" prescribing the form in which the Quality Submission would be made.

16. The applicant and others submitted their tenders before the extended deadline of 9 October, 2018.

17. On 12 November, 2018, the respondent wrote to the applicant seeking clarification on two items as follows:-

(1) It stated that no Quality Submission had accompanied the tender;

(2) That the respondent's Tender Assessment Panel (the "TAP") had advised that the Lot 2 pricing document did not adhere to the tender requirements, and that the TAP had deemed the tendered amounts to be "both abnormally high and low" and requested that the applicant submit a revised Pricing Document.

18. In this letter, the respondent stated that it reserved the right to reject the tender if it was of the view that the rates do not reflect a fair allowance of the notional tender total.

19. The respondent also indicated that it required a reply by 12 noon on 20 November, 2018. It stated that any query would not be considered if it was received after 12 noon on Friday, 16 November, 2018.

20. The applicant replied on 20 November, 2018, making a number of submissions but did not enclose with his reply a Quality Submission or a revised Pricing Document.

21. On 26 November, 2018, the TAP met and finalised the list of tenderers with markings and rankings. It recommended that as the requested Quality Submission and revised Pricing Document had not been submitted by the applicant, his tender should be disqualified from the competition.

22. On 14 December, 2018, the respondent wrote to the applicant informing him that as no Quality Submission or revised Pricing Document had been received, and having considered the information provided by the applicant both in the initial Pricing Document and in his response email of 20 November, 2018, the applicant was thereby eliminated from further participation in the competition.

23. Further correspondence was exchanged, to which I shall refer below.

24. On 20 December, 2018, a Report of the TAP process was completed by Mr. Colm Flynn, Senior Executive Engineer of the respondent, for submission to the Acting Senior Architect of the respondent, Mr David Creighton.

25. On 9 January, 2019, the Acting Senior Architect and the Director of Services at the respondent signed off the Report of Mr. Flynn and the Chief Executive Officer made an order establishing the Framework Agreement.

Statement of Grounds

26. In his statement of grounds, the applicant claims the following:-

(1) That the respondent's decision to eliminate him from any further participation failed to have regard to or engage with submissions made by him on 20 November, 2018, 20 December, 2018 and 10 January, 2019 and that the respondent failed to take relevant considerations into account and acted unfairly (ground E.9). There are two elements to this aspect of the grounds, namely:-

(a) the applicant's email of 20 November, 2018, which the respondent says was his submission and was before the TAP when it made its decision to eliminate him on 26 November, 2018;

(b) the letters of 20 December, 2018, and 10 January, 2019, which were received by the respondent after it had notified the applicant of its decision to eliminate him. I shall be returning to the terms of this correspondence in greater detail.

(2) That the applicant was prejudiced or disadvantaged by competitors being afforded unfair advantage in the tender process by virtue of the respondent giving to them specific guidance as to pricing matters. He says that he was excluded from the benefit of this guidance and subjected to procedural and substantive unfairness in the decision-making process (grounds E.7 and E.8).

Under this ground, the applicant submits that rival tenderers were asked to adjust their rates on specific items and were given specific guidance in this regard. He says, therefore, that the decision to exclude him was tainted by unfairness and objective bias.

(3) That the decision to eliminate him unfairly failed to take account of documentation provided by him at stage 1 of the tender process and which was in fact relevant to Quality Assessment and amounted to a Quality Submission as required under the rules of the tender (ground E.13).

(4) That the respondent failed to give reasons for the decision as required by S.I. No. 284/2016, the Procurement Regulation (ground E.12).

(5) That the respondent failed to give reasons as to the relative advantages of preferred tenderers (ground E.10).

(6) That the respondent failed to provide a right to external review in accordance with s. 9.4 of the ITT for Lot 1, which provided for a review of the respondent's decision by the Society of Chartered Surveyors and that this failure constituted unsound administrative practice (ground E.14).

27. The statement of grounds made further general references to the decision-making process having been conducted in a manner inconsistent with the applicant's right to fair procedures, in excess of powers conferred on the respondent and otherwise than in accordance with procedural and substantive fairness.

28. It is necessary to consider in detail the documents governing the tender process, and then the correspondence between the parties, before and after the decisions sought to be quashed. The principal governing documents were the Instructions to Tenderers, Pricing Document and Works Requirement Document.

Instructions to Tenderers ("ITT")

29. The ITT for each of the two Lots were almost identical, with one important difference to which I shall return later. The controversy concerning the matter of pricing related only to Lot 2 and, accordingly, I shall refer to extracts from the ITT for Lot 2.

30. The ITT is in a form published by the Office of Government Procurement, Department of Public Expenditure and Reform and is described as "Instructions To Tenderers for the Restricted Procedure. Project: Multi-Party Framework Agreement for Building Planned Maintenance Works 2018 – Lot 2 – using the Framework Agreement for use with the Term Maintenance and Refurbishment Works Contract".

31. The provisions of the ITT for Lot 2 relevant to the issues in these proceedings are as follows:-

> …
>
> Section 1.1 This Procedure
>
> *"The employer has sent a contract notice for the Works to e-tenders. The candidates have submitted responses to the suitability questionnaires and those that have been prequalified and shortlisted are being invited to participate in a tender competition.*
>
> *These documents set out the award criteria and the evaluation and award process which will be followed by the Employer in making the assessment of which tender is either (1) the most economically advantageous or (2) lowest price only depending on the award criterion stated in appendix 3 to these instructions. The documents also set out the information which must be supplied by the candidates. Tenders must be submitted in accordance with these instructions. Any tenderers not complying with these instructions may be rejected by the Employer."*
>
> Section 2.1 Contact
>
> *"All communications with the Employer concerning this competition must be in writing (which includes email), and with the Employers contact person identified in the Particulars …"*
>
> Section 2.3 Queries

"Queries may be raised in writing by post (or email if an address is provided in the particulars) using the Employer's contact details for queries stated in the Particulars. Queries must be raised as soon as possible; and should be raised in any event no later than when stated in the Particulars although the Employer may at its discretion respond to queries raised after that date. The Employer has no obligation to respond to queries…"

4.2 Tender Documents

"Tenders must include all the documents listed in Appendix 1.

Appendix 1 listed the following documents:

1. *Completed Form of Tender and Schedule (volume B)*
2. *Completed Pricing Document (volume C)*
3. *Quality Assessment Submission together with all necessary backup and supporting information and certification."*

4.7 Pricing

"Candidates must not use abnormally high or low rates or prices. This prohibition includes using strategies that might allow the candidate to benefit disproportionately from clause 6.2 of the Conditions."

5 Noncompliant Tenders

"If a Candidate fails to comply in any way with these instructions, the Employer may (but is not obliged to) disqualify the Candidate concerned and reject any tender concerned as non-compliant and, without prejudice to this right, the Employer may (but is not obliged to) seek clarification or further information (that does not materially alter a Tender) from the candidate in respect of the relevant tender or take any other step permitted by law, including the principles of equal treatment, non-discrimination, transparency and proportionality."

6 Corrections, unbalanced and abnormal tenders and rates

6.2 Unbalanced Tenders

"If in the Employer's opinion, the tendered rates or prices in the Pricing Document (after adjustment under section 6.1 above) do not reflect a balanced allocation of the Notional Tender Total, the Employer may (but is not obliged to) do either or both of the following:

- *Require the candidate to provide a breakdown of any tendered amounts to show that they reflect a fair allocation of the Notional Tender Total and*

- *Invite the candidate to adjust rates or prices tendered in the Pricing Document, but without adjusting the Notional Tender Total.*

If, having considered the information provided, the employer is of the view that the candidate's tendered rates or rates in the Pricing Document do not reflect a balanced allocation of the Notional Tender Total, the Employer may reject the tender."

6.3 Abnormally low tenders, abnormally high or low rates or prices

"If, in the Employer's opinion, any tendered amounts are abnormally low or abnormally high, the Employer may require the candidate to provide details of their constituent elements of the Notional Tender Total or the tendered amounts. This may include (without limitation) the information listed in Regulation 69(1) of the European Communities (Award of Public Authorities' Contracts) Regulations, 2006. Any failure to provide such information, when requested, may exclude the tenderer from further consideration. If, having considered the information provided, the Employer is of the view that any tendered amounts are abnormally low or abnormally high, the Employer may reject the tenderer."

32. The ITT for Lot 1 in this case differed in a number of small respects from the ITT for Lot 2. It appears that a more up to date version was used for Lot 1 being a version published by the Office of Government Procurement on 6 June, 2018.

33. The difference between the ITTs which is most relevant to the issues in this case is that the ITT for Lot 1 included a provision for "review" in s. 9.4 as follows: -

"A Tenderer who disputes a decision of the Employer about whether a Tender complies with these Instructions must in the first instance raise the matter with the Employer within seven days of the matter coming to its attention. Failing resolution of the matter, the Tenderer may, within seven days after receiving the Employer's response request the Employer in writing to refer the matter to the Society of Chartered Surveyors (the Sanctioning Authority) for review and recommendation.

Within seven days of receiving the Tenderer's request, the Employer should submit to the Sanctioning Authority a statement giving reasons for the initial decision together with a copy of the Tenderer written request. A copy of the Employer's statement should also be forwarded at the same time to the tenderer. The Tenderer may then make a further written submission to the Sanctioning Authority within seven days.

Any review or recommendation by the Sanctioning Authority will not be binding on the Employer or the Tenderer, and will not affect their rights or obligations."

Pricing Document

34. The Pricing Document was also in a standard form and contained a number of General Items and Notes, two of which are of particular relevance to this case as follows:-

Note 9

"The rates inserted in volume C will be checked to ensure that they are priced in a fair and balanced manner and to ensure that there is neither strategic pricing of the more commonly used items, under-pricing of other less commonly requested items, or frontloading of rates in any element of the document. If any tendered amounts are deemed to be abnormally low or high; the contractor may be required to provide a breakdown of their constituent elements and relevant rates for further assessment. Any failure to provide such information when requested may exclude the tender from further consideration. Should it be necessary to adjust any rates, it will be done prior to tender award and without amending the original tender amount."

Note 10

"If, having considered the information provided (both in the tender and in any response for detailed breakdown of rates), the Employer is of the view that the contractor's tendered rates in the PD do not reflect a fair allocation of the Notional Tender Total, the Employer reserves the right to reject the tenderer."

Works Requirement Document ("WRD")

35. The respondent also issued an information memorandum described as "*Volume A – Works Requirements for Multiparty Framework Agreement for Building Planned Maintenance Works, 2018*". This document described the scope of the proposed works which were stated to include but not be limited to:-

- Vacant house repairs,
- Renovation of new purchases,
- Disabled person grant extensions and alterations,
- Repairs and minor improvements to occupied houses.

36. The WRD described the establishment of the framework and the manner in which tenders would be assessed. In relation to the Quality Assessment, the WRD stipulated as follows: -

"For the purposes of fairness to the tenderer and clarity to our Tender Assessment Team, the following information is to be supplied in full and to the following format by the tenderer."

37. In respect of each Lot, information was required under each of the following headings:-

1. Proposed methodology:

(a) Construction programme,
(b) Works delivery plan.

2. Quality, Quantity and Balance of Team offered:

(a) Works Delivery Team,
(b) Competence of proposed Team Members Proposed [sic],
(c) Health and safety.

The WRD contained specific information as to the format in which certain elements of this information would be provided. For example, in relation to Construction Programme, there was required a Gantt chart in colour A3 format. In relation to "Works Delivery" there was required formatted reports as to how to manage delivery of the relevant works in terms of managing the tenderer's own direct labour, allocating works to subcontractors, dealing with the respondent's representatives etc. In relation to Works Delivery Team, information was required as to the profile of the proposed team, curriculum vitae and an outline and report as to how health and safety regulations would be complied with.

38. The WRD stipulated at 2B in relation to "competence of proposed team members proposed" the following:-

> *"Provide details of all proposed works delivery team members by way of CVs. Note that there is no need to supply details of team members where already supplied as part of stage 1 submission. Merely refer to this instead."*

39. The significance of note 2B is that no equivalent note, permitting reference back to Stage 1 submissions, is made in relation to any of the other information required. I shall be returning to this subject later.

Correspondence of November, 2018

40. The contents of the exchange of letters between the applicant and the respondent in November, 2018 are of central importance to the determination of this case and it is, therefore, necessary to quote the initial exchange of letters in full. On 12 November, 2018, the respondent wrote to the applicant in the following terms:-

> *"Re :Multi-Party Framework Agreement for Planned Building Maintenance Works 2018 – Clarification on Tender Submitted*
>
> *Dear Sir,*
>
> *I refer to your tender for the above competition. I hereby seek clarification with regard to your tender submission on the following items;*
>
> *(I) The tender assessment panel have advised that no Quality Assessment proposal was submitted in your tender. It is noted that on the tender return checklist you have indicated that the Quality Assessment proposal is completed and included as per Instruction to Tenderers. Can you confirm as to whether it was your intention to submit a Quality Assessment proposal as part of your tenderer submission? If it was your intention, said Quality Assessment proposal shall be submitted to the undersigned in the timeline provided below.*

(II) *The tender assessment panel have advised that the Lot 2 pricing document does not adhere to item 9 in section 2 of preliminaries – 'The rates inserted in volume C will be checked to ensure that they are priced in a fair and balanced manner and to ensure that there is neither strategic pricing of the more commonly requested items, under-pricing of other less commonly requested items, or front-loading of rates in any element of the document". The tender assessment panel have deemed tendered amounts to be both abnormally high and low in your submission. With specific reference to the aforementioned, you are requested to submit a revised pricing document. No adjustments made shall affect the Notional Tender Total. You are further advised that having considered any further information provided, Kildare County Council reserve the right to reject the tender if of the view that the contractors tendered rates in the pricing document do not reflect a fair allocation of the Notional Tender Total.*

A response to the aforementioned items shall be submitted in writing to the undersigned by Tuesday 20th November, 2018 at 12 noon. You are advised that any queries that you may have in respect to this letter will not be considered after 12 noon, Friday 16th November. Please note that this letter shall not be construed as either an acceptance or a rejection of your tender.

Kind regards,

Olive Howe

Staff Officer

Housing Maintenance

Kildare County council"

41. On 20 November, 2018, at 10:39 a.m., being 80 minutes before the deadline of 12 noon for responding, the applicant replied as follows:-

"query No. 1

It was our intention at the time to send in a Quality Assessment proposal… we have since decided to put our focus on the QT competition… We understand that we will lose points for that end of the assessment but hope that we would get placed somewhere on the panel for main framework tendering…

Query No. 2

with regards to our pricing document for the QT framework… we feel we have priced all items [sic] in a fair manner… we have based all our prices in conjunction with works relating to the QT works carried out over the past four years… we have as stated in the PD priced all individual items… some items are of a lower rate.

should we make it onto the QT panel we will stand over any works that are called for that have been priced by us of a lower rate… we accept that we must carry out all works regardless of the rate been profitable or not… it is a business decision that we have made in order to be more competitive in competing even though it might not always be the most profitable for us…it is however of great advantage to KCC should our low rated works be called for as it was in previous QT works … we have left most of our line items priced at the rate that has been accepted and awarded in recent QT works for KCC and bearing in mind these prices are set for the next four years.. At the rate that the construction economy is growing we feel that our rates at the moment are of a fair and balanced manner. [Section 7, item 4] relates to a condition of a low rated item.. it says.. should a contractor refuse to undertake a particular work item which he has priced at a low rate in the opinion of the client; he will be deemed in breach of contract and will be liable to a warning, suspension, or termination from the frame work, under the rules set out… we enter into this competition with the understanding that the client is to expect that some low rates were to be offered as it has already applied rules to protect themselves from such decisions. [Section 2, item 9].. if any tendered amounts are deemed to be abnormally low or high; the contractor may be required to provide a break down of their constituent elements and relevant rates for further assessment.. if you feel there is a rate that you the client would deem high please revert back to us for clarification or adjustment on it and an agreement can be met for such items if we are in the run for been a successful tenderer.. all low rates are of an advantage to the client… there has been no frontloading of any rates on most commonly used items as there are in line with past and present rates been awarded to us by KCC under the present framework.. we cannot be marked down or assessed on how other contractors choose to price items in the PD.. we have based all our prices and items priced on our on going works and experience of frameworks over the last number of years. if other builders tendering don't have the same knowledge and experience it shouldn't reflect on our business decisions in the tendering process… we feel should we be accepted on the framework if we are the lowest ranked bidder as per you tendering procedures we are offering a second to non reliable [sic] service to the client under reasonable rates … Rates that are already been applied for current works in situ under present QT frameworks for KCC. we do not see KCC using all of these items in conjunction with QT works and that has influenced us in our decision making for the QT Framework… The PD covers a vast amount of works that only relate to main frameworks our interests are to be on the QT panel and in the event that all of the works at a low rate are to be applied to QT houses we will stand over our low rates.. we hope that we can work together and that this answers and explains all queries that the panel has on this section…please do not hesitate to contact me if any further clarifications/queries or adjustments are deemed necessary by you the client.

Regards Robert"

December, 2018 Correspondence

42. On 14 December, 2018, the respondent wrote to the applicant in the following terms:-

"A Dhaoine Uaisle,

I write to inform you that we have assessed the tenders received from you for the above contract and have determined that your tender was deemed to be non-compliant for both Lots 1 and 2 for the following reason(s):

Lot 1

- *No quality submission. Tender deemed non-compliant in accordance with Clause 5.4 of ITT-W1v2.2, where the Contractors Works Proposals as defined in Appendix 1 were clearly a requirement to be submitted.*

Lot 2

- *No quality submission. Tender deemed non-compliant in accordance with Clause 4.2 and Appendix 1 of ITT-W6v1.2.*

- *In line with Sections 4.7, 6.2 and 6.3 of the Instructions to Tenderers and Section 1.2.10 of the Pricing Document Preliminaries for Lot 2, having considered the information provided by the tenderer both in the initial Pricing Document and your response to our letter dated 12th November, last, Kildare County Council is of the view that the tendered rates in the Pricing Document do not reflect a balanced allocation of the Notional Tender Total.*

In accordance with Section 7 of ITT-W1v2.2 and section 5 of ITT-W6v1.2 of the Instructions to Tenderers issued, you are herewith eliminated from any further participation in this competition.

There will be a minimum mandatory standstill period of 14 calendar days from the day following the day this letter was emailed to you which will end at midnight on Friday 3rd January, 2019, and the contract will not be concluded with the short-listed companies until after that time.

Tenderers who dispute this may wish to challenge the decision as per details set out in the Section 9.4 of the Instructions to Tenderers ITT-W1v1.2. Ultimate review body shall be the High Court.

I wish to thank you for your interest in this competition and wish you every success in the future."

43. On 20 December, 2018, the applicant wrote again to the respondent in the following terms: -

"Dear Sir/Madam,

Further to your letter dated 14th December, 2018 we write to give notice that we dispute the decision of the employer to eliminate us from the tender process.

We will demonstrate that we have been unfairly treated in the process to eliminate us for the following reasons:

The quality document you requested was submitted with our submission at Stage 1 – Prequalification Stage. An extensive amount of information and documents was submitted at that stage including all the relevant quality documents you reference is your letter.

With regards to the pricing document for stage 2, we outlined our position in our letter dated 20th November, 2018. We clearly stated that we are willing to carry out all the works as specified at the rates included in our tender. We took the commercial decision to keep some rates low on the basis that this was a competitive tender. All competitive tenders contain some element of strategic pricing, that is how all tenders are won. We feel it is unfair to exclude us from the process on this basis considering we have re-examined our tender and that we are willing to stand over our prices.

Also other tenders were asked to adjust their rates on specific items, they were asked to increase their rates on some items and reduce them on others. We were given no such specific guidance and feel that our competitors were given an unfair advantage in this case.

On the basis of the above we wish to dispute the decision to exclude our company from the process and request that you reconsider your position and reinstate us to the short-list of compliant companies.

Yours sincerely,

Robert Owens."

January 2019

44. On 10 January, 2019, the applicant wrote to the respondent in the following terms: -

"Dear Sir/Madam,

Further to our letter dated 20th December, 2018 we note that we are still awaiting a response. It has come to our attention that some contractors have been contacted with the intention of signing contacts. This is of great concern to us, as we have written to dispute the decision of the employer in accordance with section 9.4 of the instructions to tenderers but we have yet to receive a reply.

We will be grateful for your response as a matter of urgency.

Yours sincerely,

Robert Owens."

45. On 15 January, 2019, the respondent wrote again to the applicant. This was in effect a second "*standstill*" letter and repeated the contents of the letter of 14 December, 2018, with a small number of changes, which are highlighted in the version quoted below:

> *"A Dhaoine Uaisle,*
>
> *I write to inform you that we have assessed the tenders received by you for the above contract and have determined that your tender was deemed to be non-compliant for both Lots 1 and 2 for the following reason(s):*
>
> *Lot 1*
>
> - *No quality submission. Tender deemed non-compliant in accordance with Clause 5.4 of ITT-W1v2.2, where the Contractors Works Proposals as defined in Appendix 1 were clearly a requirement to be submitted. You did not submit a works proposal with your tender submission as described in Appendix 1 of the Instructions to Tenderers.* [emphasis added*]*
>
> *Lot 2*
>
> - *No quality submission. Tender deemed non-compliant in accordance with Clause 4.2 and Appendix 1 of ITT/W6v1.2. as no quality submission was received with your tender. [emphasis added]*
> - *In line with Sections 4.7, 6.2 and 6.3 of the Instructions to Tenderers and Section 1.2.10 of the Pricing Document Preliminaries for Lot 2, having considered the information provided by the tenderer both in the initial Pricing Document and your response to our letter dated 12th November, last, Kildare County Council is of the view that the tendered rates in the Pricing Document do not reflect a balanced allocation of the Notional Tender Total.*
>
> *In accordance with Section 7 of ITT-W1v2.2 and Section 5 of ITT-W6v1.2 of the Instructions to Tenderers, you are herewith eliminated from any further participation in this competition.*
>
> *There will be a minimum mandatory standstill period of 14 calendar days from the day following the day this letter was emailed to you which will end at midnight on Wednesday 30th January, 2019. A contract will not be concluded with the successful tenderer and framework agreements signed with the shortlisted companies to be invited to participate in the framework agreement for Lots 1 and 2 until after that time. The name of the successful tenderer will be published by means of a contract award notice.*
>
> *Should you wish to challenge the decision in this notice letter details of the review body are as follows: [*emphasis added*]*

The High Court of Ireland,

Central Office of the High Court,

Four Courts,

Ground Floor,

Inns Quay,

Dublin 7,

Ph: +353 1 8886000

Email: HighCourtCentralOffice@courts.ie

I wish to thank you for your interest in this competition and wish you every success in the future."

46. This concluded the direct inter-party correspondence. The next item of material correspondence was a letter of 29 January, 2019, from the applicant's solicitors, James A. Boyle & Company, notifying the respondent that unless the decision to eliminate their client was set aside proceedings would issue under O.84(A) of the Rules of the Superior Courts.

47. On 4 February, 2019, the originating notice of motion in these proceedings was issued returnable before the court on 4 March, 2019.

Construction of letter of 12 November, 2018

48. The first point of controversy as to the facts is that the applicant says that he believed that the respondent's letter of 12 November, 2018, (see para. 40 above) meant that its query in relation to the absence of a Quality Assessment proposal or Quality Submission (QS) related only to Lot No. 1 and that its query concerning his Pricing Document related only to Lot No. 2 and that this informed his reply of 20 November, 2018. He said that he believed this from the layout of the letter which is in two points, (I) and (II). Point (I) concerns only the absence of a Quality Submission. Point (II) concerns only the Pricing Document. The applicant says that he inferred from this layout that the point about absence of a Quality Submission related only to Lot 1 and that the observations about the Pricing Document related only to Lot 2.

49. The respondent says that the terms of the letter were clear, namely that para. (1) related to the absence of a Quality Submission, and was not limited to Lot 1 but related to both Lots and that nothing in the text of its letter suggested otherwise. It then says that para. (2) related to the matter of his Pricing Document, which it says was flawed only in relation to Lot 2. The respondent says that if there was a mistake on the part of the applicant that was his mistake and that the respondent cannot be visited with the consequences of this mistake, namely that no Quality Submission was ever submitted in response to the letter of 12 November, 2018.

50. This submission regarding the construction of the respondent's letter of 12 November, 2018, was made for the first time in these proceedings. The applicant gave evidence in his affidavits, and again under cross-examination at the hearing, of his interpretation and belief that the complaint concerning the absence of a Quality Submission related only to Lot 1 and therefore that the only complaint in relation to Lot 2 was in relation to his Pricing Document.

51. A close reading of the applicant's reply of 20 November, 2018, is informative on this subject. Under the heading "Query No. 1" the applicant addresses only the matter of the Quality Assessment proposal, and he states that he recognises that he "*will lose points for that end of the assessment*". He continues "*we hope that we would get placed somewhere on the panel for main framework or tendering*". This appears to have meant that he believed that his pricing submission was sufficiently strong that it would enable him to achieve enough points to be appointed to that panel, notwithstanding the absence of a Quality Submission.

52. The applicant's comments under "Query No. 2" relate only to his Pricing Document.

53. Having considered the applicant's evidence on affidavit and his evidence under cross-examination, I am willing to accept that the applicant may have persuaded himself that the respondent's para. No(1) in its letter of 12 November, 2018, related only to Lot No. 1 and that para. (2) of the respondent's letter related only to Lot 2. This error may have caused the applicant to believe that in relation to Lot 2, the only matter of controversy was his Pricing Document and that there was no outstanding complaint in relation to Quality Submission for that Lot. Nonetheless, this was entirely his own error and it does not mean that the terms or layout of the respondent's letter of 12 November, 2018, were misleading, or, when carefully and objectively read, justified his interpretation. Nor can it be said that anything in this correspondence amounted to a waiver, which would have been unique to the applicant, of the requirement for a Quality Submission for each Lot.

54. A close reading of the letter of 12 November, 2018, illustrates that para. (1), which identifies the absence of Quality Submissions to accompany the tender, is not limited to Lot No. 1.

55. Paragraph No. (2) related only to issues arising in the applicant's Pricing Document and was clearly confined to his tender for Lot No. 2. This does not mean that the respondent's point, made in para. (1), concerning the absence of a Quality Submission was limited to Lot 1. To the extent that the applicant misread the respondent's letter of 12 November, 2018, that was an error on his part, for which the respondent was not responsible.

The applicant's reply: 20 November, 2018

56. As regards the Quality Submission, under the heading "query no 1", the applicant states in his email that it was his original intention to submit a Quality Submission. He does not take this opportunity to submit one for either Lot and clearly acknowledges that the tender is flawed, where he states "*We understand we will lose points for that end of the assessment".*

57. The applicant's response in relation to the matter of his Pricing Document is under the heading "Query no 2". The syntax and content of his email is such that is requires close examination to discern its substance. I summarise it as follows: -

    1. The applicant feels he had priced all items in a fair and balanced manner,

    2. He has based all prices in conjunction with works relating to Quick Turnaround works carried out over the past four years,

    3. Some items are "*of the lower rate*",

    4. Should he make it onto the Quick Turnaround panel, he will stand over any works that are called for that have been priced at a lower rate,

    5. He had made a business decision to be more competitive even though "*it might not always be the most profitable for us*",

    6. It is a great advantage to the respondent "*should our low rated works be called for…",*

    7. If the respondents feels there is a rate which it deems high "*please revert for clarification or adjustment on it and an agreement can be met for such items of we are in the run for been [sic] a successful tenderer…",*

    8. There has been "*no front loading of any rates on most commonly used items …",*

    9. The applicant will stand over his low rates,

    10. *"please do not hesitate to contact me if any further clarification/queries or adjustments are deemed necessary by you the client."*

58. It is necessary to distil further the essence of this email to the following:

    1. The applicant elected not to submit a Quality Submission for either Lot or a revised Pricing Document as requested,

    2. The applicant stood over all of the low price rates provided,

    3. If the respondent deemed any of the rates high, it should revert for clarification on those rates and an agreement could then be made for such items, if the applicant was "…*in the run for been [sic] a successful tenderer*…",

    4. That if the respondent had any further clarifications or queries it should revert to the applicant.

59. The applicant's email of 20 November, 2018, contains a number of references to specific quoted rules in the ITT. It also referred to the substantive considerations which the applicant had embarked on in setting his pricing and referred to his view that "*We do not*

see KCC using all these items in conjunction with QT works and that has influenced us in our decision making for the QT framework".

60. It was pointed out by the applicant that he did not have the benefit of any legal advice when making this representation. I have come to the conclusion that even if the applicant did not have the benefit of legal advice when making this representation, it is, based on a full reading of its text, his considered response to the letter of 12 November, 2018, and not simply a "holding reply". It can only be interpreted as his definitive response to the requirements of the respondent identified in its letter of 12 November, 2018.

Contact on 19 November, 2018

61. In its letter of 12 November, 2018, the respondent had stated that if the applicant wished to query the contents of that letter he should do so before 16 November, 2018. The evidence was that no contact was made before 16 November, 2018. On 19 November, 2018, being the afternoon before the stated deadline of 12 noon on 20 November, 2018, for replying to the letter of 12 November, 2018, the applicant made a telephone call to the respondent's office. He said that the purpose of the phone call was to speak with Mr. Colm Flynn, arising from the letter of 12 November, 2018. The applicant's evidence was that he made this call because he was confused about what to do next.

62. Mr. Flynn was at the time the Senior Executive Engineer at the Housing Department of the respondent. Some controversy arose in the case about the respective roles of Mr. Flynn and others within the respondent in relation to the tender, to which I shall return later. The telephone call was answered not by Mr. Flynn but by Mr. John Tennyson. Mr. Tennyson was a member of the two-person TAP. In the brief telephone call Mr. Tennyson said to the applicant that this tender was "Mr. Flynn's baby" and he would leave a message for him.

63. The applicant said that he left a message asking that Mr. Flynn would return his call but the call was never returned.

64. Mr. Flynn in his evidence said that he did not recall receiving such a message, but did not deny definitively whether such a message had been left.

65. The applicant exhibited a text message which he sent on the evening of 19 November, at 18:48 in the following terms: -

"Hi Colm – can you give me a buzz for a minute if you're free thanks".

66. Mr. Flynn did not deny having received such a text, and the telephone call was not returned.

67. In his evidence, Mr. Flynn referred to Section 2.1 of the ITT which provided for communications or clarifications to be in writing. He said that there was no provision for phonecalls or text communications. He said that in the light of these rules he was under no obligation to respond to such a communication. It was also submitted that it would

have been inappropriate for the respondent to engage in informal communications with the applicant or any other tenderer at this stage of the competition.

68. Importantly, the letter of 12 November, 2018, notified the applicant that the respondent reserved the right to reject his tender, and notified him that the deadline for any request for clarification of that letter was 12 noon on 16 November, 2018. That deadline passed without any communication. No explanation was proffered as to why the applicant did not, if he needed clarification, request such clarification by the deadline for doing so of 16 November, 2018. On the afternoon of 19 November, 2018, rather than sending a written communication seeking clarification, as the rules required, albeit that such a requirement would have been out of time, the applicant made a phone call to the respondent and sent the text referred to above. No further representation was made by him other than the contents of his email of 20 November, 2018.

Quality Submission

69. In his letter of 20 December, 2018, the applicant states that a Quality Submission had been submitted by him at the Stage 1 prequalification stage. He says that an extensive amount of those documents were provided at that stage.

70. In his grounding affidavit in these proceedings sworn on 1 February, 2019, the applicant exhibits extensive material, which again he says was delivered by him to the respondent as part of Stage 1, in or about May, 2018. These comprised documents which outlined certified works previously performed by the applicant, details and professional qualifications of his team and health and safety credentials. Critically, he says that *"I thought my record and work history would speak for itself and I submitted documents based on factual and real success".*

71. The respondent says the following: -

    1. That nowhere in the ITT does it say that the requirement for Quality Submission can be met by reference to materials submitted at Stage 1.

    2. There is one important exception to this, in that the Works Requirement Document stated that there was no requirement to resubmit CV's of team members and the tenderer may simply refer back to their previous submission. The expression of this exception underlies the fact that it was limited to the CV's.

    3. Nowhere in the applicant's tender document did he refer back to material submitted at Stage 1 even in relation to CV's.

    4. In his email of 20 November, 2018, the applicant expressly acknowledged that he had not submitted a Quality Submission. Only when he was later informed of his elimination from the competition did he claim, in his letter of 20 December, 2018, that he had already met this requirement through documents previously submitted at Stage 1.

5. That this aspect of the applicant's submissions revealed that he was largely relying on his own track record of performance on the respondent's projects, and that this informed his view that the absence of a Quality Submissions would not be fatal to his tender.

72. I agree with these submissions, and I find that nothing in the applicant's correspondence before the commencement of these proceedings or in his submissions justifies the failure to submit a Quality Submission.

73. The respondent, without prejudice to the submissions above, also addresses the contents of the material which had been submitted at Stage 1 and which are exhibited in these proceeding by the applicant as evidence that he had done so. It submits that those materials are not in the form prescribed by the Works Requirement Document.

74. It is not a matter for this Court to assess those documents to determine whether they comply with the Works Requirement Document. That is a function for the TAP, if it were to have decided to waive, for the benefit of the applicant only, the requirement that a Quality Submissions accompany the Tender at Stage 2. Not having waived that requirement, it was not incumbent on the TAP to examine the material submitted at Stage 1 against the stipulated requirements of the WRD for Stage 2. The question is whether the respondent fell into manifest error in determining that the absence of a Quality Submission accompanying the tender at Stage 2 rendered the tender non-compliant.

75. The respondent's letter of 12 November, 2018, drew to the applicant's attention, under peril of the rejection of his tender, that the request for a Quality Submission had not been met. He was informed that if it was his intention to submit a Quality Submission he should do so by 12 noon on 20 November, 2018. This was an extension in his case of the general deadline of 9 October, 2018 for compliance with this requirement, an extension of which he failed to avail.

Pricing Document

76. I now turn to the contents of the applicant's email of 20 November, 2018, as regards the matter of the Pricing Document.

77. As regards rates deemed low, the email exhibited no engagement on the part of the applicant. It was a statement, repeated at length, that he stood over the rates and that as a business matter and to render his tender competitive, he had decided on this strategy. A key assertion made in that email is that he will "*Stand over any works that are called for that have been priced by us of a lower rate".*

78. At the hearing, the applicant submitted that this email exhibited a willingness to engage with the respondent in relation to rates which the respondent deemed high. The purport was that he would be willing to enter an agreement to reduce those rates if he was included in the panel. This can only have been a suggestion that if he were informed that he was to be included in the panel, he would then enter into a "bilateral" discussion

leading to specific agreement on pricing. The respondent submitted that such a bilateral engagement at this stage of the competition would be outside the general pricing policy and rules which governed the tendering process.

79. A central feature of the email of 20 November, 2018, was that the applicant in standing over any abnormally low prices, yet offering to engage bilaterally in relation to prices deemed abnormally high, did not recognise the seriousness of the rule requiring balance or, perhaps more importantly, did not recognise that the respondent was concerned about the items which were priced abnormally low, at least, if not more so, then those deemed abnormally high.

80. The applicant submitted that in previous tenders to the respondent in which he had been successful, he had submitted prices which were similarly low, if not abnormally low.

81. The respondent submits that the provisions of the ITT prohibiting abnormally low tenders and requiring a balanced tender were new to this tender and had been specifically introduced to avoid the practice of submitting abnormally low pricing which of itself had created difficulties in the operation of such panels.

82. It is informative to summarise what the applicant now says about his pricing submission as follows: -

    (1) That he did not price items in an artificial manner but that he did so strategically,

    (2) That every tender process is by its nature strategic as to the pricing submitted,

    (3) That he was not asked to explain why any particular items were priced either high or low,

    (4) That the respondent had never had any difficulty with low pricing in previous tenders, even where certain items had been priced as low as zero,

    (5) That in previous tenders he revised his prices when requested to do so, including the number of items which had been priced at zero,

    (6) That he would honour the low priced items as and when they were called for.

83. The respondent says that of the 619 items priced in Lot 2, 438, being more than 70% of the items, were priced abnormally. Of these, 28 were priced abnormally high, and 410 were priced abnormally low.

84. An illustration of what is meant by abnormally low is the pricing of certain items at 0.25 cent regardless of their true cost, the pricing of labour rates at €10 per hour which is said to be significantly below current rates of pay in the construction industry, and the pricing of internal painting and redecoration of residential units at a rate of €10 per unit.

85. It was said by the respondent that the average percentage pricing of the under-priced items was lower than 1% of the average of other tenderers, and that in the case of

overpriced items, the applicant's prices were between 170% and 916% of the average price submitted by other tenderers.

86. The respondent submits that Rule 6 concerning unbalanced tenders and the restriction on abnormally low tenders and rates which are abnormally low or high is new to the 2018 ITT. It says that the principles contained in the tender regarding abnormally low pricing are of importance for the following reasons, given in an affidavit sworn by Mr. Tadhg McDonnell on 15 March, 2019: -

> *"There is a particular concern that a tenderer might take the view that certain of the items listed in a Pricing Document are not items which would regularly arise in the type of work which it would perform under a contract whereas others are more common. It may thus be possible for the tenderer to assign a very low price to the former items and a very high price to the latter items. Depending on the quantities of the items provided for in the Pricing Document, it may be thought to be possible for a tender to end up with a very competitive Notional Tender Total for the purposes of the tender competition yet would still be in a position to charge a relatively high price for the type of work which it will actually perform under the contract. It is this type of conduct which is envisaged by the reference to 'strategic pricing of the more commonly used items, under-pricing of less commonly requested items'. Front loading of rates is where a contractor identifies the work items which are to be carried out early in a project and increases the rates for those items in order to increase the amount that they will be paid early in the project. Rates for items to be carried out later in the project are reduced so that there is less value in the work to be carried out later in the project. The risk here for a contracting authority is that if a contractor becomes insolvent during the period the contracting authority will have paid out a disproportionate amount of money to the contractor in comparison to the amount of work done."*

87. The respondent says that when it identified the extent of the abnormal pricing in the applicant's tender it afforded the applicant the opportunity to submit a revised Pricing Document, which he declined to do. It says that, instead, the applicant repeated twice, in his email of 12 November, 2018, and his letter of 20 December, 2018, that he stood over his original pricing submission.

The decision to eliminate

88. The respondent's letter of 12 November, 2018, identified two requirements if the applicant was not to be eliminated from the competition: -

    1. The provision of a Quality Submission.

    2. The provision of a revised Pricing Document for Lot 2.

    The applicant did not provide either of these.

89. The respondent says that faced with the applicant's failure to address the two requirements in its letter of 12 November, 2018, namely the delivery of the Quality

Submission and of a revised Pricing Document, it was left in a position where it had to make a decision and its decision to eliminate the applicant from further participation in the tender process was within its authority and that it made no "manifest error" in making such a decision.

90. The correspondence of 12 and 20 November, 2018, was before the TAP when it met to make a decision on 26 November, 2018. It was faced with the applicant's clear statement that he had intended to submit, but was not now submitting, a Quality Submission, and that he stood over his Pricing Document and had declined to submit a revised Pricing Document. These were the respondent's two outstanding requirements, clearly stated in its letter of 12 November, 2018. Presented with these stated omissions, the decision of the respondent that the applicant had failed to comply with the requirements of the tender was wholly within the scope of the respondents' discretion and I find it did not fall in to error in making that decision.

91. Counsel for the respondent submitted that in circumstances where the applicant's tender had not been supported by a Quality Submission, where he was given an opportunity to remedy that omission and an extension of time to do so by a letter which warned him that the respondent reserved the right to reject the tender and where he had failed to avail of that extension, the decision then taken to eliminate the applicant from the competition was clearly with the scope of the respondent's authority and was not made in manifest error, and therefore that the claim should be dismissed on that ground alone. It was submitted that the further grounds advanced do not effect the validity of that decision, having regard to the rules stipulated in the ITT, the WRD and the prescribed form for the Pricing Document.

92. I accept this submission. Nonetheless, I have concluded that it is appropriate to consider the further submissions made. These are based on grounds relating to such matters as an allegation of failure to engage with the applicant's further letters of 20 December, 2018, and 10 January, 2019, claims of unfair and discriminatory treatment having regard to the respondent's communications with other tenderers, failure to give reasons and failure to provide an external review.

93. In order to understand a number of the further submissions made by the applicant it is necessary to describe the tender process in more detail and the chronology showing the manner in which it was performed within the respondent. This is best understood with a preliminary description of the *dramatis personae*.

Tadhg McDonnell

94. Mr. McDonnell was the Director of Services for Housing and Corporate Affairs of the respondent. He was the official with ultimate responsibility for the tender competition. Those engaged in the process reported directly to him and he says that he was kept informed at all times of the progression of the tender competition. In this capacity he was one of the two persons (together with Mr. David Creighton, Acting Senior Architect) who signed off on the Tender Assessment Report recommendation before it was transmitted to

the Chief Executive Officer of the respondent who made the final Order on 9 January, 2019, to establish the Framework Agreement.

95. Mr. McDonnell swore six affidavits in this matter. The first two were in response to the substantive allegations of the applicant. Others related to the respondent's application for entry of the proceedings in the Commercial List, and to contentious applications relating to discovery and to cross-examinations of deponents.

Tender Assessment Panel

96. The TAP comprised of two persons, Mr. John Tennyson and Mr. Alan Dunney.

97. Mr. Tennyson held the position of Executive Engineer in the employment of the respondent. He was requested by Mr. Colm Flynn to serve as a member of the TAP.

98. Alan Dunney was a civil engineer, in the employment of the respondent, and was requested to serve as a member of the TAP.

Colm Flynn

99. Mr. Flynn was a Senior Executive Engineer in the Housing Department of the respondent. He was the person with overall responsibility for housing maintenance for the period from April, 2015 to January, 2019 (at which time he was relocated to the Environment Department of the respondent).

100. Mr. Flynn managed and organised the logistics of the tender competition.

101. Mr. Flynn's precise role and the extent of his authority was the subject of controversy at the hearing. It appears from the evidence given by Mr. Flynn that his responsibilities included the following:

(a) The compilation of tender and contract documents,

(b) The publication of notices,

(c) Communicating with tenderers,

(d) Selecting members of the tender assessment panel,

(e) Preparing and issuing the final report at the conclusion of the competition for presentation to Mr. McDonnell and Mr. Creighton before its onward transmission to the Chief Executive Officer of the respondent for the making of the necessary Order,

(f) Reporting to Mr. McDonnell.

102. Mr. Flynn also engaged with other tenderers after, it is said by the respondent, the confirmation by the TAP of the decision to eliminate the applicant.

TAP: 9 November, 2018 and 26 November, 2018

103. On 9 November, 2018, the TAP met to consider the tenders submitted.

104. The outcome of their deliberations is recorded in a "Tender Assessment Report – Tender Reference FWA12", which was exhibited to an affidavit sworn by Mr. Tennyson. The first page of the Tender Assessment Report notes in relation to the applicant for Lot 2 that the Pricing Document contained "numerous abnormally low costings".

105. The form has a section entitled "Comments from Tender Assessment Team on whether this tender warrants proceeding to detailed assessment as per the Tender Assessment Matrices in the Published Contract Documents". The comments inserted by the TAP under this heading are as follows "*Clarifications required on comments outlined above. When brought forward for quality assessment, no submissions received in tender for specified criteria (except qualifications/cvs of team submitted at prequal stage). In that regard, not possible to assess tender."*

106. Pages 4 and 5 contain separate reports for Lots 1 and 2 respectively.

107. In relation to Lot 1, page 4 notes that in relation to Pricing the report scores the applicant, and the score is redacted. In relation to Quality Assessment, page 4 notes in relation to "Construction Programme, Works Delivery Plan, Works Delivery Team and Health and Safety" "*no programme provided – assessment not possible*". In respect of "Competence of Proposed Team Members a score of 240 out of 300 is given – "*assessed based on prequal submission. Very good."*

108. In relation Lot 2, page 5 scores the applicant in respect of Pricing, and in relation to Quality Assessment notes are made to the effect that "*not provided – assessment not possible"* with the exception of "*competence of proposed team members*" which are scored by reference to material "*submitted in prequal*".

109. The results of the Tender Assessment Report in respect of each candidate were then recorded on an "Overall Tender Assessment Report". This report recorded the list of tenderers with their scores under each Lot for "price", "quality" and "total" and each tenderer is then given a "ranking".

110. The applicant appears on this "overall" list but without any scores inserted or any ranking given.

111. The second page of the Overall Tender Assessment Report contains recommendations to invite identified tenderers to the framework under each of the two Lots, with the following recommendation "*Based on the rules of the proposed framework as outlined in the Works Requirement and the original Request for Tenders; following a detailed assessment of all tenders received we recommend that the following contractors be invited to the Framework under the two Lots*."

112. For Lot 1, the first ranked tenderer is the "*Preferred Contractor for Pilot Projects"* as per tendered prices and waste plans. The remaining eleven are "*Invited to join Lot 1 – Minor Works Framework for Planned Maintenance."*

113. For Lot 2, the first ranked tenderer is "Invited to take the role of Preferred Contractor for choice of North/South". The second ranked tenderer is "Invited to take the role of Preferred Contractors for remaining Area". The third to tenth ranked tenderers are "Invited to take the role of Reserved Contractor #1" to "#8" respectively.

114. Mr. Tennyson gave evidence as to the process which was followed by the TAP. He said that the report of the panel completed on 9 November, 2018, was in the terms outlined above. The report was signed by himself and Mr. Dunney on 9 November, 2018, with the following note: -

> *"This Tender Assessment Report has been compiled by the following persons in a fair and transparent way in strict accordance with the Kildare County Council procurement guidelines v. 32017.*
>
> *Signed,*
>
> *John Tennyson*
>
> *Alan Dunney".*

115. Although this Report was first dated 9 November, 2018, the final version exhibited contains a note dated 26 November, 2018. According to the evidence of Mr. Tennyson, this note is an assessment particular to the applicant and is said to be the conclusion of the TAP after the applicant had been given the opportunity, by the respondent's letter of 12 November, 2018, to address the two key shortcomings in his tender, namely the absence of a Quality Submission and a noncompliant Pricing Document. The note was signed by Mr. Dunney and Mr. Tennyson on 26 November, 2018, after they had met that day and after the contents of the applicant's email of 20 November, 2018, had been reported to them. The note reads as follows: -

> *"Lot 2 Assessment*
>
> *Tender Assessment Board reconvened on 26 November, 2018 on foot of response to request for information dated 20 November, 2018.*
>
> *1. Quality Submission*
>
> *No submission made.*
>
> *Tender deemed noncompliant based on Clause 4.2 and Appendix 1 of the ITT.*
>
> *2. Pricing Document*
>
> *Contractor was asked to submit a balanced tender on foot of the original tender that included abnormally low and high rates, in the opinion of the Assessment Board.*
>
> *No such submission was made.*

Tender deemed noncompliant based on: -

- *Section 1.2.10 of the Pricing Document.*
- *Section "4.7 Pricing" of ITT.*
- *Section "6.2 Unbalanced Tenders" of ITT.*
- *Section "6.3 abnormally low, high or low rates or prices" of ITT*

It is recommended that this tenderer be disqualified from both [sic] lot 2 of this competition.

Lot 1 assessment 26 November, 2018

1. *Quality Submission*

Contractor failed to submit a Quality Submission and further the [sic] Clause 5.4 Format of the ITT was deemed to be non-compliant with the tender documents.

It is recommended that this tenderer be disqualified from Lot 1 of this competition".

116. The evidence of Mr. Tennyson was that when the TAP met on 26 November, 2018, and signed off on these recommendations, that was the final meeting of that panel.

Events after 26 November, 2018: Correspondence with other tenderers

117. The applicant claims that in the tendering competition he was treated unequally with other tenderers in that the respondent engaged with others by giving specific guidance as to pricing adjustments to be made. Following a contentious discovery process, documents had been made available on discovery which revealed that on 27 November, 2018, Mr. Flynn wrote to a number of the other tenderers identifying specific items or rates which they were then asked to consider.

118. The letters so discovered were referred to at the hearing and they included specific references to what the respondent described as clarifications regarding contents of the tender. A paragraph which appears to have been common to these letters was in the following terms:-

"The Tender Assessment Panel have raised concerns regarding some abnormally high or low rates for commonly called up work items within your tender and this matter needs to be addressed prior to a decision being made with regards to your future inclusion in this competition. We refer to s. 6.2 and 6.3 of the ITT and s. 2.9 of the Pricing Document Preliminaries in particular.

Particular reference is made by the Tender Assessment Team to rates tendered for the following common work items:"

119. In each of the letters a number of specific items are then referred to, varying in number between two and nine in the case of the highest number mentioned in any such letter.

120. The common form of such letter continues as follows: -

> *"With specific reference to the aforementioned, you are requested to consider whether some of these abnormally low or high rates can be rebalanced against the remaining tender, bearing in mind that any adjustments made shall not affect the notional tender total. If you are in a position to rebalance your rates with this in mind, you are asked to present an amended full Pricing Document in the original excel tender format.*
>
> *You are further advised that under section 6.3 of the ITT and section 2.10 of the Pricing Document preliminaries; having considered any further information provided by you by return, Kildare County Council reserve the right to reject the tender if of the view that the contractor's tendered rates in the Pricing Document do not reflect a fair allocation".*

121. These tenderers were then invited to give their response by 12 noon on Tuesday 4 December, 2018.

122. Apart from identifying potentially abnormally high or low rates a number of these letters then refer to specific questions concerning such matters as "*clarify the spread of costs within each section*" (*Thomas Carroll*)". In another case "*Project 1 does not appear to include for [redacted] you are asked to clarify and resubmit if required without amending the overall project total (CTS projects)"; "in your project 3 Pricing Document we note you have added in two line items for [redacted] to your subtotal, which is not deemed to be in accordance with s. 1.13 of the Pricing Document instructions. You are asked to revise this and add instead to Appendix A as per the instructions*", and "*it was noted by the tender assessment team that you have quoted a rate of [redacted] to cover your [redacted]. You are asked to consider if you have assessed this correctly bearing in mind you will not be allowed claim extras through the FWA to cover normal costs associated with [redacted]".* (McNeely).

123. The letters of 27 November, 2018, led to a number of further exchanges and among the discovery documents were subsequent exchanges of emails and certain handwritten notes and internal emails of the respondent, said to record the fact of ongoing engagement with a number of these tenderers after 27 November, 2018, on the items referred to in the letters referred to above.

124. It also appeared from the documents discovered and was acknowledged in the evidence that the first draft of these letters was prepared by Mr. Flynn on 15 November, 2018.

125. The respondent says that these letters were written to tenderers in respect of whom it had concluded that only a very limited number of pricing or other queries arose. In the case of the letters exhibited less than ten items were identified as having been abnormally priced. The respondent says that by contrast the applicant's Pricing Document for Lot no. 2 contained out of the total of 619 priced items, 438 which were abnormally priced, 28 abnormally high and 410 abnormally low.

126. The respondent says that this difference alone means that the position of the other tenderers was not comparable to that of the applicant. Whatever about asking a tenderer to adjust small numbers of items, being less than 10, the proposition that the respondent should identify in this stage of the process to the applicant all 438 items which were identified as abnormally priced was a totally different one.

127. The respondent submitted that the principle that tenderers should be treated equally and not discriminated against does not require that they be treated identically, particularly in circumstances where there was a sufficient difference or distinction as between their original tenders. (See *Somague Engenharia S.A. v Transport Infrastructure Ireland* [2016] IEHC 435 (Baker J.) and *BAM PPP PGGM Infrastructure Cooperative U.a. v National Treasury Management Agency* [2016] IEHC 546 (Haughton J.)).

128. The applicant submits that the Court is entitled to infer through a comparison of the letter sent to him on 12 November, 2018, and the letter sent to the other tenderers on 27 November, 2018, that the respondent was guilty of providing different and unequal treatment to other candidates in the tender process and that this occurred without any justification, reasonable or fair basis. It is submitted that this breaches the applicant's right to fair procedures and natural and constitutional justice.

129. The respondent says that the correspondence with other tenderers must be taken in the context of the following sequence of events.

130. On 9 November, 2018, the TAP met to consider all the tenders. It identified that the tender of the applicant suffered from two deficiencies which rendered his tender incapable of assessment and potentially that it should be eliminated from the competition. Those two deficiencies were the absence of a Quality Submission and, in the case of Lot 2 only, a Pricing Document which, having 438 items priced abnormally, required the provision of a revised Pricing Document. On 12 November, 2018, the respondent wrote to the applicant to this effect and granted him an extension of time to remedy these matters up to 20 November, 2018. When he failed to remedy these deficiencies, the TAP decided at its meeting of 26 November, 2018, to eliminate him from the competition. Thereafter, the respondent engaged in further correspondence with other tenderers which it says were of such a different scale, having price normalities of less than ten in each case. It says that this difference was so radical as to mean that the respondent, although not treated identically, was treated fairly. The respondent says that, if anything, it had favoured him by writing the letter of 12 November, 2018, and affording him the opportunity to remedy the defects which would otherwise cause his elimination from the tender.

131. The respondent submitted that the form of the letters it issued to tenders on 27 November, 2018, and in the correspondence which followed did not constitute any form of guidance in relation to pricing. This was an unhelpful feature of the positon adopted by the respondent. I am not persuaded that the contents of those letters did not contain within their terms an element of guidance insofar as they refer to particular aspects of the Pricing Document and raised other queries. Whilst the words "guidance" or "advice" are not used in any of these letters, it is clear that the respondent invited individual tenderers

to take the opportunity to remedy certain aspects of their Pricing Document which offended the rule against abnormally high or low pricing.

132. The critical question is whether the number and scale of the abnormally high and low pricing by the applicant by contrast with the other tenderers placed his tender in a position so radically different from that of the others as to justify the more specific degree of engagement contained in the letters of 27 November, 2018.

133. In *Fabricom SA v Belgium (C-21/03)* [2005] 2 CMLR 25, the CJEU, at para. 27, held that the principle of equal treatment or non-discrimination does not require that all participants in a tender process are treated identically: -

> *"… it is settled case law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."*

This principle was cited with approval by Baker J. in Somague and by Haughton J. in *BAM PPP.*

134. In this case, the respondent says

1. Its letter to the applicant of 12 November, 2018, was written to afford him the opportunity to remedy defects in his tender which had the potential to cause him elimination,

2. He declined to remedy the defects,

3. The TAP determined that the applicant be eliminated,

4. The TAP then finalised its list of tenderers who would be invited to join the Framework Agreement,

5. As part of the further engagement with those who the TAP had decided to invite into the Framework Agreement, Mr. Flynn then engaged in the more detailed queries and clarification, necessary to ensure that a "works callout document" would be readily available as and when those tenderers were called on for specific projects within the Framework Agreement.

6. By this stage the applicant had in effect eliminated himself by declining to meet the requirements for a valid tender.

135. At one level, a question arises as to whether a distinction based only on the number of price abnormalities, would of itself justify the different treatment of the applicant, being arguably a matter of scale only. However, I have come to the conclusion that the distinction applied by the respondent was valid and not unfairly discriminatory, for the following reasons:

1. The very scale of the pricing deemed abnormal placed the applicant in a radically different position from the other tenderers. Over 70% of his priced items were deemed abnormal. His under-priced items were less than 1% of the average priced submitted by others. His overpriced items were between 170% and 916% of the average submitted by others.

2. The applicant had not submitted a Quality Submission.

3. Both of these matters were considered by the respondent to be of such importance that it regarded them as grounds for elimination of the applicant from the competition.

4. After the deadline for submission of valid tenders, the respondent wrote to the applicant drawing these matters to his attention and affording him the opportunity to remedy them, by the submissions of a Quality Submissions and, for Lot 2, a revised Pricing Document, giving him a new deadline.

5. The applicant elected not to avail of this opportunity.

136. The applicant says that the other tenders had their specific queries about the tender answered. This is a reference to evidence of exchanges between Mr. Flynn and tenderers, not limited to the letters of 27 November, 2018. The applicant did not refer the court to any specific query he had raised which was not answered. In his lengthy email of 20 November, 2018, he had said that on any prices which were too high he would engage and that if the respondent had any queries it could revert to him. Otherwise he stood over his tender. What the applicant effectively seeks to do is to then suggest that there was an onus on the respondent to revert to the applicant on a 'line-by-line basis' in relation to his tender and grant yet another extension of time, the extension to 20 November, 2018, in respect of the first deadline for the tender having been granted uniquely to him, and a second opportunity having been given to him to submit the Quality Submission and revised Pricing Document.

137. The respondent says that all of this occurred in circumstances where the applicant had been invited to raise any further queries which he wished to raise by 16 November, 2018, and had chosen not to do so.

The TAP process and role of Mr. Colm Flynn

138. At the hearing there was much focus by the applicant on the fact that although the respondent says that the final decision regarding the applicant's elimination was made by the TAP on 26 November, 2018, and communicated to him on 14 December, 2018, it appeared that as early as 15 November, 2018, Mr. Flynn had commenced the preparation of drafts of the letters to be written to the other tenderers, being the letters which were issued on 27 November, 2018. The respondent stated that it was only after the elimination decision had been made by the TAP that the further letters were issued to the respondents. It also submits that there was nothing improper about Mr Flynn undertaking such preparatory work in the period between 9 and 26 November, 2018.

139. This led to submissions and contradictory evidence about the respective role of Mr. Flynn on the one hand and the members of the TAP on the other hand and questions as to who within the respondent contributed to the drafting of correspondence to tenderers and questions as to what information was before the TAP when it met on 26 November, 2018.

140. On the third day of the hearing, an application was made by the applicant for an amendment to the statement of grounds to permit the addition of a Ground E18(a) in the following terms: "*The Affidavits of Colm Flynn and John Tennnyson dated 4 October 2019 demonstrate that the Applicant's tender was unfairly eliminated on illegitimate grounds and was prejudged. The Applicant was deliberately excluded from an appraisal of the tenders process carried out while the tender process was purportedly ongoing. The process was therefore biased and tainted by manifest unfairness."*

141. I disallowed this amendment but permitted cross-examination of a number of the respondent's deponents subject to certain limitations.

142. The respondents counsel complained that this aspect of the case became something of a "roving enquiry" into every aspect of the respondent's conduct of the tender competition, to a degree which went beyond the case as pleaded and was not justified by the Public Procurement Regulations or the Remedies Regulation.

143. The applicant submitted that the principle of transparency called for the court to examine the conduct of the competition in all its aspects and that this was necessary to give efficacy to the Regulations. It referred the court to the right to fair procedures and natural and constitutional justice, objective fairness (*B.F.O. v Governor of Dóchas Centre* [2005] 2 IR 1), the right to be heard and to have his submissions considered by the decision maker (*Dellway Investment Ltd & Ors v NAMA & Ors* [2011] IESC 4) and the right to equality (*O.R v An tArd Chláraitheoir* [2014] IESC 60).

144. Whilst a wide ranging or "roving" enquiry in relation to each and every aspect of the manner in which the respondent conducts itself would not be appropriate having regard to the case as pleaded, there are certain further aspects of the chronology of events which inform the court's examination of the allegation of a lack of transparency and further allegations that the decision maker did not afford a due and proper hearing to the applicant, and I now turn to those matters.

145. The evidence of Mr. Flynn and Mr. Tennyson was that on 9 November, 2018, Mr. Flynn met with the members of the TAP. The absence of the Quality Submission and the abnormalities in the applicant's Pricing Document for Lot 2 were identified. The TAP members decided to afford the applicant the opportunity to deliver the Quality Submissions and a revised Pricing Document for Lot 2.

146. Mr. Flynn says that he did this in his letter of 12 November, 2018, (albeit that it is signed by a different person Ms. Olive Howe).

147. In his first affidavit sworn 12 November, 2019, and a second affidavit sworn on the 1 October, 2019, Mr. Flynn stated that his letter to the applicant on 12 November, 2018, and his letter to the other tenderers issued on 27 November, 2018, had been drafted by him with the assistance of Mr. Tennyson. In a further affidavit sworn on 4 October, 2019, the Friday before the hearing of these proceedings, Mr. Flynn effectively changed his evidence on this point. He said that although Mr. Tennyson had assisted him with the letter of 12 November, 2018, Mr. Tennyson had not assisted him with the wording of the letters to the other tenderers issued on 27 November, 2018, noting that the TAP had concluded its assessment and its work on the matter on 26 November, 2018.

148. Much is made of this change of evidence at the hearing and clearly the fact of this change of evidence triggered suspicion on the part of the applicant. The explanation given in evidence was that since January 2019, Mr. Flynn was no longer assigned to the Housing Department of the respondent, having been transferred to another department within the respondent, that this was a complex tender, and that in recent conversations Mr. Tennyson had corrected his recollection of this matter.

149. This aspect of the respondent's case was somewhat unsatisfactory and the applicant sought to take advantage of this to introduce a measure of uncertainty regarding such matters as:

    1. When exactly the decision to eliminate the applicant was made,

    2. Who made that decision,

    3. Whether the elimination of the applicant occurred at a time when the respondent was engaged in correspondence regarding pricing abnormalities with other tenderers in a fashion which was discriminatory and unfair and tainted the entire process.

150. On these questions, the respondent's evidence was as follows: -

    1. The decision to eliminate the applicant was made by the TAP on 26 November, 2018, after it was reported to it that the applicant had declined to remedy the matters identified by the TAP on 9 November, 2018, and communicated to the applicant on 12 November, 2018.

    2. The decision was made by the TAP.

    3. The applicant had been eliminated before Mr. Flynn embarked on more detailed correspondence with other tenderers in the context of the preparation by him of a works callout document, which would be an essential tool in the operation of the Framework Agreement.

151. I am not persuaded that the change of Mr. Flynn's evidence as to who within the respondent made any contribution to the drafting of the letter, either to the applicant or to other tenderers, is such as to undermine the evidence given by Mr. Flynn, Mr.

Tennyson and Mr. McDonnell regarding the respective roles of Mr. Flynn on the one hand and the TAP (comprising Mr. Tennyson and Mr. Dunney) on the other hand. I accept their evidence to the following effect. Mr. Flynn had an administrative role in relation to the tender (see paras 99 to 102 above). He collated tenders and presented them to the TAP for assessment. When the TAP identified its concerns regarding the applicant's tender, Mr. Flynn was charged with communicating these concerns to the applicant, and then relaying the applicant's response to the TAP.

152. The TAP made its assessment of all tenders on 9 November, 2018. It prepared its preliminary recommendations but did not finalise them before affording the applicant the opportunity to address the issues which would cause the elimination of his tender. When it noted that these matters were not addressed by him, it finalised its report in which the applicant was eliminated and it identified the required number of other tenderers who would be invited to join the Framework Agreement.

153. The effect of these events is that at the time letters were issued to other tenderers on 27 November, 2018, the applicant was no longer in the competition and the respondent had moved on to engage with others in the manner described by Mr. Flynn in the context of the works callout document.

154. It is not for this Court to embark on an adjudication as to the respective merits and distinctions between the substance of the applicant's tender and those of the other tenderers. The question is whether the respondent acted within the principles of fair and equal treatment and transparency in making the determination to eliminate the applicant by reason of the issues which the TAP had identified and which had been notified to him on 12 November, 2018.

155. In *SIAC v. Mayo County Council* [2002] 3 I.R. 148, Fennelly J. recognised that the court must, in applying a test of manifest error, concede to the deciding authority a "*wide margin of discretion to awarding authorities*". He continued, at p.176: -

> *"…while recognising that awarding authorities have a wide margin of discretion, must recognise that this cannot be unlimited. The courts must exercise their function of judicial review so as to make the principles of the public procurement directives effective. In the case of clearly established error, they must exercise their powers."*

156. I have concluded that the decision to eliminate the applicant, in light of the issues identified by the TAP and the subsequent correspondence with the applicant, was within the remit and discretion of the respondent, whose function it was to perform the assessment of tenders and adjudicate on their validity having regard to the rules of the tender. I cannot find that the decision, based on the applicant's stated election not to address the matters identified by the TAP but instead to "*stand over*" his original tender, was a manifest error such that the court should intervene.

157. For the reasons described above, I do not find that the subsequent engagement with other tenderers deemed admissible under the rules of the tender vitiates the decision to eliminate the applicant.

Correspondence after 14 December, 2018

158. The letter to the applicant of 14 December, 2018, (see para. 42 above) clearly states the reasons for the decision made to eliminate the applicant.

159. In his letter of 20 December, 2018, the applicant for the first time makes the case that that a Quality Submission had been furnished with his submission at Stage 1, the pre-qualification stage of the tender. It also states clearly his intention to dispute the decision of the respondent.

160. No reply was written to the letter of 20 December, 2018.

161. The applicant claims that the respondent deprived him of his constitutional right to be heard by the deciding body, by not considering and replying to his letter of 20 December, 2018.

162. The respondent says that the applicant had been afforded the opportunity to make representations before the decision was made to eliminate him, and that his email of 20 November, 2018, was such a representation. Therefore, before the letter of 12 December, 2018, the decisions had been made and communicated to him by that letter. It says therefore there was no necessity for it to reply further.

163. The applicant then refers to the further letter he wrote on 10 January, 2019. In this letter he repeated his objection to the decision and repeated his desire to dispute the decision, this time citing s. 9.4 of the Instructions to Tenderers.

164. On 15 January, 2019, the respondent wrote a second "standstill" letter as quoted at para. 45 above. The applicant says that the effect of this letter is that it was not until the notice was given to him by the letter of 15 January, 2019, that the decision had become final and therefore the failure to take into account the representations made in his letters of 20 December, 2018, and 10 January, 2019, constituted a failure by the decision maker to have regard to the representations made by him in these further letters.

165. The respondent said that the second letter of standstill, written 15 January, 2019, had been written because a more expansive and accurate description was required of the standstill procedure and of the procedure for review by the Society of Chartered Surveyors. In particular, it was concerned that the original letter of 14 December, 2018, had made only a reference to s. 9.4 of the ITT, (the review procedure), and a general reference to *"ultimate review body shall be the High Court".*

166. Mr. McDonnell explained this further in his evidence: -

> *"There was a lack of clarity in the detail of the letter and it was felt that we should reissue the letter and identify that if somebody wished to challenge the decision*

with respect to the intentions to award the tender, that it was the High Court was the appropriate appeal mechanism".

167. Mr. McDonnell explained his concern that the original letter of 14 December, 2018, implied that the appropriate forum for dispute was a referral to the Society under s. 9.4, with an alternate review thereafter to the High Court. In fact, the correct position, he said, was that if a party wished to make a challenge that should be to the High Court, hence the necessity for a more expansive and accurate description of the judicial review procedure in the letter of 15 January, 2019.

168. Mr. Tennyson's evidence was that the TAP concluded its process when it met on 26 November, 2016. The result of its workings led to Mr. Flynn making a report on 20 December, 2018, which was the report before the Chief Executive Officer of the respondent when he made the final order for the establishment of the Framework Agreement on 9 January, 2019.

169. The effect of the applicant's submission is that the new points made by him on 20 December, 2018, (to the effect that the Quality Submission had been submitted at Stage 1 and his complaint concerning communications with other tenderers on specific items) ought to have caused the respondent to reopen the competition to investigate these allegations after the TAP had concluded its process and made the report on which the Chief Executive Officer acted when ordering the establishment of the Framework Agreement.

170. Mr. McDonnell was pressed in his evidence that the effect of the letter of 15 January, 2019, was to supersede the letter of 14 December, 2018, and that this had the effect of resetting the timetable and therefore that it was not too late for the respondent to give due consideration to the complaints raised by the applicant in his letter of 20 December, 2018. Mr. McDonnell's evidence was that the purpose of the letter of 15 January, 2019, was to ensure that a clear and correct statement of the judicial review process was given and that the letter reset the standstill period for that purpose only. He said that the applicant's letter of 20 December, 2018, was received after the TAP had concluded its process, albeit that it was written on the same day that Mr. Flynn's report to the CEO had been made. The respondent claims that if every tenderer could raise such issues at such a late stage, particularly when a prior opportunity had been given to remedy flaws previously identified, the effect would be to reopen the competition and Mr. McDonnell said that this would mean that "*no contracting authority would ever award any contract*".

171. No evidence was given of an assessment of the complaints made in the letter of 20 December, 2018. It was acknowledged that in effect while no conscious decision was made that the letter did not require a reply, the respondent had simply taken the view that the process for the selection of the panel had by that time been concluded, and including the decision to eliminate the respondent.

172. There is therefore no evidence of any reasoned examination of the allegation in the letter of 20 December, 2018, that other competitors were given an unfair advantage by being given specific guidance.

173. The position adopted by the respondent is simply that this complaint came at a stage when the process was concluded and that it was not incumbent on the respondent, even in the context of principles of fairness and transparency, to reopen a general or even a new enquiry as to these allegations.

174. The ground on which the applicant was eliminated was his failure to submit a Quality Submissions and, for Lot 2, a balanced Pricing Document. Those matters were drawn to his attention on 12 November, 2018, and he made his response, declining to submit a Quality Submission and a revised Pricing Document. His submission now is that after the TAP had concluded its deliberations and determined based on his response that he should be eliminated, he should have been afforded a further opportunity to advance new grounds of objection. This is to disregard the fact that he had already been granted an opportunity to mend his hand and granted a time extension unique to him, and elected not to avail thereof. In those circumstances, I have concluded that the principles of fair procedures and transparency do not dictate that the respondent should at this stage of the process have opened a further and wide-ranging enquiry as to the manner in which other tenderers were dealt with following his elimination.

Reasons

175. There are two aspects to the applicant's claim under this heading. Firstly, he says that the respondent failed to give reasons for its decision as required by S.I. 284/16, the Procurement Regulation (Ground E.12). The second is that the respondent failed to give reasons as to the relative advantages of preferred tenderers (Ground E.10).

176. In relation to the general reasons the letter of 14 December, 2018, could not have been clearer in its terms. Firstly, it refers to the absence of a Quality Submission. Secondly, it states the respondent's view that the tendered rates in the Pricing Document for Lot 2 did not reflect a balanced allocation of the Notional Tender Total, and did not comply with ss. 4.7, 6.2 and 6.3 of the ITT and s. 1.2.10 of the Pricing Document Preliminaries.

177. As regards relative advantages, the applicant complained that Regulation 55(2) of S.I. 284/2016 required that he be given details of the relative advantages of the tenderers selected.

178. Regulation 55(2)(c) provides that a contacting authority shall inform "*any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement".*

179. This provision applies only to tenderers who have submitted an admissible tender. In circumstances where the respondent had made its determination that the applicant's tender was non-compliant and had eliminated him, it was under no obligation to provide

details of the relative advantages of other tenderers which were admitted to the framework.

Right of external review

180. The applicant claims that the respondent failed to provide him with a right of external review of the decision to eliminate him, as required by Clause 9.4 of the ITT for Lot 1. He claims that this failure is unfair and amounts to *"unsound administrative practice"*. He claims that the denial of his entitlement to an external review is contrary to the basic tenets of fair procedures, and taints the respondent's decision.

181. This issue arises only for Lot 1. In Lot No. 1, the elimination of the applicant was grounded only on the absence of a Quality Submission. Therefore, the only matter which could have been the subject of the review by the Society of Chartered Surveyors would have been the contention by the applicant that the documents submitted by him at the Stage 1 prequalification stage amounted a Quality Submission meeting the requirements of the Works Requirement Document, notwithstanding that they were not submitted with the tender.

182. The ITT for Lot 1 contains a provision for review at s.9.4 as follows: -

> *"A Tenderer who disputes a decision of the Employer about whether a Tender complies with these Instructions must in the first instance raise the matter with the Employer within seven days of the matter coming to its attention. Failing resolution of the matter, the Tenderer may, within seven days after receiving the Employer's response, request the Employer in writing to refer the matter to the Society of Chartered Surveyors (the Sanctioning Authority) for review and recommendation.*
>
> *Within seven days of receiving the Tenderers' request, the Employer should submit to the Sanctioning Authority a statement giving reasons for the initial decision together with a copy of the Tenderer's written request. A copy of the Employer's statement should also be forwarded at the same time to the Tenderer. The Tenderer may then make a further written submission to the Sanctioning Authority within seven days.*
>
> *Any review or recommendation by the Sanctioning Authority will not be binding on the Employer or the Tenderer, and will not affect their rights or obligations".*

183. The letter of 14 December, 2018, to the applicant, in which the respondent notified him that it had determined that his tender was deemed noncompliant included a statement in the following terms: -

> *"Tenderers who dispute this may wish to challenge the decision as per details set out in the s. 9.4 of the instructions to tenderers ITT – W1V1.2. Ultimate review body shall be the High Court."*

184. In his reply dated 20 December, 2018, the applicant gives three reasons for his objection to the decision. He states at the outset of the letter: -

"Further to your letter dated 14th December, 2018, we write to give notice that we dispute the decision of the employer to eliminate us from the tender process."

185. He concludes the letter by stating: -

"On the basis of the above we wish to dispute the decision to exclude our company from the process and request that you reconsider your positions and reinstate us to the shortlist of compliant companies".

186. In his follow up letter of 10 January, 2019, the applicant states that he is awaiting a response to his letter of 20 December, 2018, and continues: -

"We have written to dispute the decision of the employer in accordance with s. 9.4 of the instructions to tenderers but we have yet to receive a reply."

187. The respondent's letter of 15 January, 2019, the "second standstill letter", makes no further reference to Clause 9.4 and refers to the facility for challenge to the decision by way of judicial review to the High Court, giving the High Court Central Office contact details.

188. The applicant claims that it is clear from the contents of his letter of 20 December, 2018, that he wished to dispute the contested decision. He also points to the fact that although s. 9.4 was not referenced in his letter of 20 December, 2018, his intention to dispute the decision is clearly stated twice. Section 9.4 is clearly referenced in his follow up letter of 10 January, 2019.

189. The respondent says that the applicant's letter of 20 December, 2018, makes no reference to the review procedure. It states that this letter is simply a statement that he wished to dispute the decision and that if the s. 9.4 procedure was to be validly invoked it necessitated that the applicant refer to s.9.4 and formally request that the respondent "*refer the matter to the Society of Chartered Surveyors (the Sanctioning Authority) for review and recommendation*".

190. Insofar as the decision was restated in the respondent's letter of 15 January, 2019, the respondent says that there was no letter following it invoking the s. 9.4 review procedure.

191. Finally, the respondent says that the applicant has suffered no prejudice because s. 9.4 clearly states that the outcome of any review or recommendation would not be binding on the parties and the respondent says that the applicant has now instead availed of the review procedures provided by the Remedies Regulation, namely this judicial review.

192. The applicant's letter of 20 December, 2018, in which he uses such clear language as "*we write to give notice that we dispute the decision of the employer*" and "*we wish to dispute the decision*", was written in response to the respondent's letter of 14 December, 2018, which made a specific reference to the review procedure in s. 9.4. In circumstances where the applicant was replying to a letter from the respondent which itself referred to s. 9.4 and thereby gave clear notice of intention to dispute the decision, it seems to me that the

respondent cannot fairly rely on the omission of the applicant to make an express reference to s. 9.4 or on his failure to use a particular form of words to request the respondent to refer the matter to the Society.

193. As regards the January 2019 correspondence, although no further letter was written by the applicant within seven days of the letter of 15 January, 2019, which itself did not refer to the review procedure, the applicant had clearly stated in his letter of 10 January, 2019 that he "*had written to dispute the decision of the employer in accordance with s. 9.4*". This was a reference to his letter of 20 December, 2018. That letter did not cite Section 9.4, but, as I have already concluded, this omission cannot be fatal when the letter was a reply to the respondent's letter citing s.9.4. The combined effect of the applicant's letters of 20 December, 2018, and 10 January, 2019, is to clearly notify an intention to invoke the review procedure.

194. The next question is what are the legal consequences of the failure of the respondent to provide the external review requested.

195. For this purpose, it is instructive to examine the terms of the ITT which contain the provision for review, quoted at paras 29 to 33 above.

196. Firstly, Section 9.4 itself provides as follows: -

> *"Any review or recommendation by the Sanctioning Authority will not be binding on the Employer or the Tenderer, and not affect their rights or obligations."*

At first pass, the effect of this provision would mean that the applicant has suffered no legal prejudice by reason of the failure of the respondent to refer the matter to the Society. It is arguable that he may have suffered commercial prejudice, if it could be said that the Society would have made a recommendation that the applicant be "*re-admitted*" to the competition, had such a thing been possible, and that the respondent would have accepted and acted on that recommendation. But this court can make no assumptions as to what the outcome of such a review may have been or whether the respondent would have accepted any recommendation. Therefore, the specific exclusion of binding legal effect means that the applicant cannot demonstrate that he has suffered prejudice by being deprived of a remedy which would have had such effect..

197. Secondly, there are no provisions in the ITT which stipulate any other consequences of a failure by the respondent to implement Section 9.4. On the contrary, the following provisions are consistent only with the proposition that the respondent has, per the rules of the tender, sufficiently reserved its legal position: -

(a) The third paragraph of the Preface states "*The Employer does not bind itself to accept any outcome of the process described in these documents and is not obliged to enter into a contract for the Works with anyone.*" [emphasis added]

(b) Section 1.1 provides: -

"Tenders must be submitted in accordance with these Instructions. Any tender not complying with these instructions may be rejected by the Contracting Authority, whose decision in the matter shall be final." [emphasis added]

(c) Section 7 provides: -

"If a Tenderer fails to comply in any way with these Instructions the Employer may (but is not obliged to) disqualify the Tenderer concerned as non-compliant…"

(d) Whilst a very short timetable is stipulated for submissions to the Sanctioning Authority, the ITT contained no provision for a "*contractual standstill*" pending the making of a review pursuant to Section 9.4. Accordingly, the respondent was not precluded from implementing its decisions, pending such a review, subject to the statutory standstill required by Regulation 5 of the Remedies Regulation (S.I. 130/2010). The issue is whether the applicant was deprived of a remedy. His core remedy was an application to this court. The respondent was at pains to ensure in the correspondence, and in particular by its letter of 15 January 2019, that he would be in a position to avail of that remedy and that time would not run against him before he had been made clearly aware of that remedy. Therefore his right to an effective legal remedy was fully respected.

198. These, and other provisions of the ITT quoted earlier in this judgment, clearly establish a regime by which the final decision as to the validity or otherwise of a tender, like decisions concerning the ranking of tenders, is vested in the respondent, subject to the Public Procurement Regulations and the Remedies Regulations, and the availability of an effective remedy by way of judicial review, which the applicant has invoked.

199. As a general rule, it is undesirable that a tendering authority would not avail of such a review procedure, not least because of the possibility that participation in such a process may avert litigation. Nonetheless, taking into account the clear exclusion in S. 9.4 itself of binding effect on the rights of the respondent or the applicant, and the remaining relevant provisions of the ITT, I cannot find that the applicant has demonstrated that he suffered prejudice as a consequence of the failure to refer under this Section.

Conclusion

A. The decision to eliminate the applicant

200. The Instructions to Tenderers required the submission in respect of each Lot of a Quality Submission, in accordance with the Works Requirement Document, and a Pricing Document which reflected a balanced allocation of the Notional Tender Total. The rules provided that if the respondent formed the opinion that tendered rates or prices did not reflect balanced allocation, it could (a) require the candidate to provide a breakdown; and (b) invite the candidate to adjust its rates without adjusting the Notional Tender Total.

201. If the respondent, having considered the information provided formed the view that a candidate's rates or prices did not reflect a balanced allocation, it could reject the tender.

202. If the respondent formed the opinion that any tendered amounts were abnormally low or abnormally high, it could require a candidate to provide details of the constituent elements. Any failure to provide such detail could exclude the tender from further consideration. If further information were provided, the respondent could, having considered it, reject a tender.

203. On 9 November, 2018, the TAP of the respondent met to consider tenders submitted for the Framework Agreement. The panel made a provisional result and ranking of the tenderers. The panel identified that the applicant had submitted a tender which was not compliant, by reason of the absence of a Quality Submission for either Lot 1 or 2, and in the case of Lot 2, by reason that the Pricing Document contained an excessive number of abnormally low and abnormally high pricing items. It decided that it was not possible to assess or rank the tender. Instead of disqualifying the applicant at that stage, the respondent decided to give the applicant the opportunity to address these matters.

204. By letter dated 12 November, 2018, the respondent requested the applicant to submit Quality Submissions for Lots 1 and 2, and in respect of Lot 2, requested that a revised Pricing Document be submitted. In this letter the respondent stated that it reserved the right to reject the tender.

205. The respondent stated that if the applicant had any queries in relation to the contents of this letter, these should be submitted by 16 November, 2018, at 12 noon. The deadline for replying to the letter substantively was 20 November, 2018, at 12 noon.

206. No queries were submitted by the applicant in response to this letter.

207. On 20 November, 2018, the applicant responded by email to the following effect. The applicant did not submit a Quality Submission or a revised Pricing Document. He then stated the following: -

    1. He had intended to submit a Quality Submission and understood that he would "lose points for that part of the assessment".

    2. He considered that he had priced all items fairly.

    3. In relation to abnormally low priced items, he confirmed that he would stand over them.

    4. In relation to abnormally high priced items, he stated that if any were deemed high, the respondent should revert back to him and an agreement could then be made for such if he was "*in the running for being a successful tenderer*".

    5. If the respondent had any queries it should revert to him.

208. On 26 November, 2018, the TAP met again to finalise its assessment. It noted that the applicant had declined to provide the materials requested, namely a Quality Submission and in respect of Lot 2 a revised Pricing Document. The TAP decided that the applicant should be eliminated from the competition and the panel finalised the list of tenderers to be invited to participate in the Framework Agreement.

209. The decision to eliminate the applicant from further participation in the competition was within the discretion to exclude him conferred on the respondent by the ITT. The test to be applied to this decision is whether the respondent fell into manifest error (per Fennelly J. in SIAC). By the contents of the applicant's email of 20 November, 2018, the respondent was presented with a refusal by the applicant to address the identified deficiencies by submitting a Quality Submission and for Lot 2 a revised Pricing Document. Faced with this refusal, the decision cannot be characterised as a manifest error.

B. Communication with other tenderers – unequal treatment

210. Between 15 and 27 November, 2018 Mr. Flynn had started work on the preparation of a "works callout document" which involved engagement by him with individual tenderers and included identifying certain pricing abnormalities and other aspects of the tenders. In all cases concerning prices there were less than ten prices deemed to be abnormally high or low. This process was undertaken only with those whose tenders had not been deemed inadmissible.

211. The engagement by the respondent with those not eliminated was not discriminatory or unfair to the applicant. The principles of fairness and equality in this process do not require that tenders be treated identically. The absence of a Quality Submission coupled with 439 items deemed to have been priced abnormally high or low distinguished the applicant so radically that the engagement with the other tenderers by Mr. Flynn from 27 November, 2018 onwards did not constitute unequal treatment or unfair discrimination against the applicant.

C. Other grounds

212. On 14 December, 2018, the applicant was notified of the elimination and given reasons for the decision in compliance with the Procurement Regulations.

213. When the applicant wrote on 20 December 2018 to state that he was disputing his elimination he did not expressly invoke the facility for a reference to review by the Society of Chartered Surveyors in accordance with Section 9.4 of the ITT for Lot 1. Nonetheless I have found that the combined effect of his letters of 20 December 2018 and of 10 January 2019 was to clearly notify an intention to seek such a review. No such review was provided.

214. Section 9.4 of the ITT in respect of Lot 1 expressly stated that any review or recommendation by the Society "will not be binding on the Employer or the Tenderer and will not affect their rights or obligations". Having regard to this and all the other provisions of the ITT and to the circumstances considered above I have concluded that the applicant has not demonstrated that he suffered prejudice by reason of the failure to

provide such review and it would be unjust to make an order of certiorari in respect of the decisions of the respondent by reason only of this failure.

215. The court will therefore refuse the reliefs sought.