Neutral Citation: [2013] IEHC 413

THE HIGH COURT

Record Number: 2012 No 287 JR

IN THE MATTER OF COUNCIL DIRECTIVE 2004/18/EC AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES' CONTRACTS) REGULATIONS 2006 (S.I. 329 OF 2006)

BETWEEN:

BAXTER HEALTHCARE LIMITED

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

AND

BEACON MEDICAL GROUP

NOTICE PARTY

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 16th DAY OF JULY 2013:

1. The applicant ("Baxter") is a leading provider of healthcare services not just in Ireland but worldwide. Among its many activities, it has since 2004 provided a renal dialysis service at its facility in the Beacon Clinic at Sandyford, Dublin 18. To date that facility has, according to the applicant, been run in partnership with Beacon Medical Group ("BMG") which Baxter describes as its "nursing partner". It appears that Baxter provides the facility, the equipment and the consumables, the dialysis equipment, and in addition provides support services including technical and administrative services. I should say that an affidavit on behalf of the Notice Party seeks to suggest that the applicant's first affidavit overstates the applicant's involvement in the provision of renal services as such, and suggests that its involvement is limited to providing the facility, equipment and consumables, but does not provide the dialysis services as such. The Notice Party makes the point also that the Beacon entity providing these services at Beacon Court is Beacon Dialysis Services Limited, and not BMG as stated by the applicant in its first affidavit. It seems a small point to refer to so early in my judgment, but one will see in due course that it assumes some significance in relation to a couple of issues which are raised herein, and which I shall come to.

2. On the 27th May 2011 the HSE published a public notice in the Official Journal to the European Union, and on the e-tenders website, by which it advertised a contract for the provision of renal haemodialysis satellite units to Dublin North East and Dublin Mid West.

3. The Contract was divided into 4 Lots. Lots 1 and 2 were in respect of units to be located in the area of Dublin North East, one being along the M1 Corridor, and the other being north of the River Liffey. Lots 3 and 4 were for the Dublin Mid-Leinster area. Lot 3 was to be located south of the River Liffey, but east of the River Dodder. Lot 4 was to be located south of the River Liffey but west of the River Dodder. It is Lots 3 and 4 only that are the subject of these proceedings.

4. The Contract notice went on to state that each unit would cater for approximately 80 patients, and, further, that HSE would not award all four Lots to any one contractor as its view is that the optimum service will require a minimum of two providers.

5. The Expression of Interest document (EOI) set out further information, including that the required services are "Annex IIB" services, and that, accordingly, only Articles 23 and 35(4) of the Consolidated Public Procurement Directive 2004/18/EC for the Award of public service contracts, as amended, would apply to the award of any contract. This EOI stated also that it was intended to conduct the procurement process in four phases in order to allow for direct dialogue with allow tenderers on all matters associated with the proposal. Those four phases were:

a. Expression of Interest;

b. Tender Proposals;

c. Dialogue on Proposals;

d. Award of Contract

6. A preliminary meeting (referred to as a plenary meeting) was held on the 7th June 2011 with all interested parties. The applicant was represented at that meeting. A deadline for the submission of an EOI was set for the 22nd June 2011, and the applicant complied with that deadline, as did four other entities including Beacon Dialysis Services Limited. While at this stage of the process, the applicant submitted EOIs in respect of all 4 Lots, it eventually tendered for Lots 3 and 4 only.

7. An evaluation of all five EOIs was completed by members of the Procurement Evaluation Group (PEG) on the 15th July 2011. That group comprised The Clinical Director, Dr. Liam Plant, 4 Consultant Nephrologists, 2 Regional Renal Leads, 2 Business Managers, 4 General Managers, and specialists in renal nursing, ICT and procurement.

8. All five proposals were considered to have passed the Mandatory Exclusion Criteria and the Qualitative Selection Criteria which had been set forth in the Request for Expressions of Interest document. A couple of issues arise for determination herein in relation to the basis on which the relevant Beacon entity was considered to have met the Mandatory Exclusion Criteria, and also whether the Beacon entity that was considered to have met those criteria (Beacon Dialysis Services Limited) can be considered to be the entity to which

the contracts for Lots 3 and 4 have been awarded. But I shall return to those matters in due course.

9. On the 29th July 2011 each successful entity was issued with the Invitation to Tender documentation. This documentation gave fuller information about the process being undertaken. It repeated that the required services are Annex IIB services, and that there were four phases to the process (which I have set forth above). It made it clear that all questions in the Tender response section of the document must be completed in the format provided as that section would form the basis for the evaluation and award. It also informed bidders that tenders would be evaluated in order to determine which presented the most economically advantageous tender on the basis of the criteria and associated weightings outlined in the document. The document also again stated that the HSE would reserve the right not to award all four contracts to a single operator, and reserved also the right to review the suitability of successful tenderers at the point of award of the contracts in order to ensure that there had been no material change to the standing of any such tenderer.

10. The criteria for evaluation were divided into two main categories – Quality for which 35% marks were available; and Cost Effectiveness for which the remaining 65% marks were available. It also contained the scoring methodology. The Quality category was sub-divided into 4 sub-categories – Patient Experience (including location and accessibility), Facility (including equipment and layout), Patient Management Systems and Audit, and finally a Value Add Option. The documentation stated that before a tender submission could be evaluated for a possible award of a contract, it must have achieved a mark equating to 70% of the available marks for each of the of the Quality sub-categories with the exception of the Value Add option i.e. Patient Experience, Facility and Patient Management Systems and Audit.

11. According to the HSE's first replying affidavit sworn by Michael Quinlivan on the 25th May 2012, HSE received a number of requests for clarifications from bidders, including one dated 19th August 2011 from Fresenius which referred to the four stage procedure already referred to, and asked whether HSE would invite all tenderers to submit a final tender proposal following the negotiation/dialogue phase, and if so, whether tenderers would be free to make changes to all elements of their proposals at the final tender proposal stage. The response to that clarification request, which was communicated to all tenderers, was that it was HSE's intention to commence dialogue with tenderers, and that "*all aspects of the tender, e.g. price or location, may be discussed at the dialogue phase and may be amended before presentation of final bids*" (emphasis added). Mr Quinlivan states at paragraph 53 of his first affidavit that "*all tenderers, including Baxter, knew or ought to have known, that the dialogue phase would enable all aspects of the tender proposals, including price and location, to be discussed and amended if required in the final bid*". I note from the second affidavit of Conor McCarthy that he considers this averment by Mr Quinlivan to be misleading and inaccurate, by reference to other statements in the Tender documentation – for example, at Section 2.3 of the Tender and Section 23 of the Tender Competition Rules. He submits that while these documents allowed for dialogue, discussion and clarification, it could not have been anticipated that that the dialogue process would be utilised to invite new and materially different tender proposals in the manner which, he says, occurred. He makes a similar point in relation to Section 23 of the Tender Competition Rules. Mr Quinlivan in turn responded to these matters in his second affidavit, where at paragraph 5 he rejects that the suggestion made by Mr McCarthy that paragraph 53 of his first affidavit was misleading and inaccurate, and in support of that rejection refers to Section 27 of the Tender Competition Rules which states, inter alia, as follows:

> *"If it is necessary for the HSE to amend the tender documentation in any way prior to receipt of tenders, all tenderers will be notified simultaneously. If deemed appropriate by the HSE, the deadline for receipt of tenders will be extended."*

Mr Quinlivan again referred to the clarification which issued in August 2011 and to which I have already referred earlier in this paragraph. He goes on to state that the applicant attended the various dialogue meetings on the 18th and 28th October 2011 and on the 4th November 2011, and was well aware that the HSE would be issuing revised specifications to assist bidders in the preparation of their final bids. I do not see any further averment by Mr McCarthy in relation to this question in any further affidavit sworn by him.

12. However, to continue the narrative - on the 9th September 2011, the applicant tendered for two Lots only, namely Lots 3 and 4. A Beacon entity tendered for all four Lots, as did other tenderers, with the exception of Fresenius Medical Care (Ireland) Limited which tendered for three Lots.

13. Following the submission of initial tenders on the 9th September 2011, the dialogue phase commenced. The PEG met also, and appointed various sub-groups to review aspects of the tender process such as location and ICT requirements. In addition, site visits were undertaken, so that during the dialogue phase some feedback could be provided to bidders. In respect of Lots 3 and 4, those site visits took place on the 13th October 2011, at which representatives of the bidders were in attendance with HSE staff.

14. On the 18th October 2011, the applicant met with HSE, along with other bidders and made a presentation to the PEG in relation to its tender. Mr McCarthy refers to that meeting in his first affidavit at paragraph 20 and states that that it was a meeting "*at which all aspects of the tender were discussed*". Two days after that meeting the HSE issued a clarification to the specification on the 20th October 2011, and Mr Quinlivan states in his second affidavit that the applicant responded fully to this clarification without raising any issue in relation to the manner in which the process was proceeding. He also refers to an exhibit to Mr McCarthy's first affidavit which is a contemporaneous note from the meeting which took place on the 4th November 2011 and which states:

> *"we could bid for Lots 3 and 4 in one building i.e. Beacon. While preference from the clinicians is for 2 discreet [sic] buildings if we offer a very competitive price for both lots at Beacon the clinicians may have to compromise on the separate building issue."*

Mr Quinlivan refers to the fact also that in its final Tender submitted on the 25th November 2011 the applicant in fact made a number of changes to its bid, from what had been contained in its Initial Tender, and he sets out those changes, and he goes on to submit therefore that it is clear that the applicant, contrary to what Mr McCarthy has averred in his second affidavit, was well aware that "*all aspects of the tender proposals, including price and location, [could] be discussed and amended if required in the final bid*" , as HSE had stated in its response to Fresenius's request for clarification dated 19th August 2011 to which I have referred in paragraph 11 ante, and which was circulated to all bidders. He makes the point also that at no point during this process was any objection made or issue taken by the applicant in relation to the question of amendment to the questions.

15. Further dialogues took place with bidders on the 28th October 2011 and 4th November 2011. Site visits in respect of Lots 3 and 4 took place on 13th October 2011 and 1st December 2011. Mr McCarthy says that these visits were cursory only, and lasting only 15 minutes or so, which he says he finds remarkable given that in his affidavit at paragraph 79 Mr Quinlivan has stated that "*on the date of each site visit, the relevant sub-committee recommended a score and comment for each question specified as Weighted Criteria which were subsequently agreed by the full PEG at their final meeting on 2 December 2011."* Mr McCarthy also refers to the fact that the discovered notes of those meetings would indicate that no scores appear to have been awarded on the first visit, but appear to have been given on the 1st December 2011. Mr Quinlivan in his second affidavit clarifies that the first visit on the 13th October 2011

was undertaken to provide tenderers with initial assessments of the suitability of proposed sites, and that no scores were given on that visit, and he says that in his first affidavit he never suggested the contrary.

16. According to Mr Quinlivan, further dialogue meetings with tenderers took place both on the 28th October 2011 and again on the 4th November 2011 in order to allow all tenderers to discuss the responses to various supplementary clarifications which issued on the 20th October 2011 and which had been responded to by the 26th October 2011, including by the applicant. At the meeting on the 4th November 2011, all were informed of their current cost ranking based on an initial assessment undertaken by HSE based on the responses to the supplementary clarifications. Mr Quinlivan states that on that occasion, the applicant was informed that it was ranked 4th of 4 in relation to Lot 3, and 5th of 5 in relation to Lot 4. They were also informed that further site visits would take place on the 29th November 2011 and on the 1st December 2011, the latter being in respect of Lots 3 and 4 locations.

17. The Final Invitation to Tender issued to all bidders on the 9th November 2011, which specified the 25th November 2011 as the date by which Final Tenders must be received. According to Mr Quinlivan, the Final Invitation to Tender took account of all the "refined" specifications which had been discussed at the dialogue meetings, and identified each question as being either "for information only" (not scored), a "mandatory requirement" (pass or fail), or a "weighted criteria" (scored). In addition, he says, each question which was specified as a mandatory requirement or a weighted criteria was linked to the relevant Award Criteria in the Final Invitation to Tender, which also identified an individual weighting for each question specified as a weighted criteria. This was all set out in table format.

18. While HSE received a number of requests for further clarifications from some bidders after the 9th November 2011, none was received from the applicant. Responses to any such requests were circulated to all bidders as and when they arose, but in addition a final composite HSE response to all requests was issued to all bidders on the 22nd November 2011.

19. The applicant submitted its Final Tender on the 25th November 2011. It appears that the applicant considered what it refers to in Mr McCarthy's first affidavit as "the optimum and best value for money solution for the HSE" was the award of the contract for both Lot 3 and Lot 4 in one location, namely the unit at the Beacon facility from which it currently operates, since it caters for and has capacity to cater for in excess of 160 patients, and is within 5km of St. Vincent's Hospital and within 10km of Tallaght Hospital, being some of the specifications in relation to location. However it also tendered for Lots 3 and 4 at separate locations. This was permissible under the competition rules. However, Mr Quinlivan makes the point that it was only upon receipt of the Final Tender bid from the applicant that HSE became aware of the fact that the applicant was putting in a bid based on both Lots being in a single location. Hence, he says, HSE did not have any opportunity to provide any feedback to the applicant as to the suitability of such a proposal under the Quality Criteria. Issues arise in relation to how this aspect of the applicant's tender was scored by the PEG, and I will return to those issues in more detail in due course.

20. Mr Quinlivan's first affidavit sets forth in considerable detail the way in which matters proceeded towards an award after the receipt of final tenders from the various bidders. He refers to the site visits made to Lot 3 and 4 locations on the 1st December 2011, and how scoring was arrived at. He refers to the verification of marking procedure which was undertaken by the PEG so that the Contract Approval Request (CAR) could be submitted to an internal HSE Steering Group on the 22nd December 2011, and to the National Director Commercial and Support Services (Mr Brian Gilroy). The CAR was apparently approved on the 16th February 2012, and bidders were notified of the outcome by letter dated 24th February 2012, followed by a letter dated 29th February 2012 which provided each bidder with the full scores awarded by the PEG.

21. This correspondence informed the applicant (and other bidders of course) that "Beacon Medical Group" had been successful in respect of Lots 3 and 4. Mr McCarthy states at paragraph 29 of his first affidavit that he took this to mean Beacon Medical Group Limited. I shall refer to that entity as BMG for convenience. The contents of this correspondence caused Mr McCarthy great surprise and concerns as he describes in his affidavit at paragraphs 30 – 31. That surprise and concern apparently related to the fact, firstly, that it appeared that BMG had gained top marks in all the weighted quality criteria (apart from the Value Add option), despite the fact that its proposals involved two new healthcare facilities and arrangements with a new equipment and consumables provider; and secondly to the fact that HSE had concluded that BMG had met the minimum qualification requirements at the Expression of Interest stage in connection with economic and financial standing. Mr McCarthy states that he assumed up to that point that BMG had tendered as part of a consortium (something permitted under Section 11 of the Competition Rules) in order to meet those minimum requirements. In the light of what appears below – perhaps culminating in an email dated 30th August 2011 from Mr Cullen of Beacon to Mr Markey of Baxter, it is hard to accept Mr McCarthy's averment that he assumed up to that point that BMG had tendered as part of a consortium.

22. He states also that arising from the notification he had concerns about how the applicant had had marks deducted in a number of questions, and I will come to those that are relevant to the issues which the applicant raises in these proceedings, when dealing with the various issues raised.

23. But another and different issue has more lately been raised by the applicant, and is contained in an Amended Statement of Grounds. Any amendment to the Statement of Grounds is resisted by the respondent*, inter alia*, on grounds of delay, and I will come to that. But the point, simply put, is that at the Expression of Interest phase of the process, the proposed Beacon tenderer was Beacon Dialysis Services Limited (sometimes referred to by its trading name Beacon Renal), and was the entity which was deemed to have met the qualification criteria in order to proceed to the next Dialogue phase, whereas the letter dated 24th February 2012 (and that of the 29th February 2012) notifying the result of the tender process informed all bidders that BMG was the winning tenderer. The applicant contends that BMG was never part of the Expression of Interest stage and therefore was never qualified by HSE to enter the next stage, let alone be awarded the contract. It is a point that superficially has an attractive quality (leaving aside the question of delay), but one must then consider the response to the point made by the respondent, through Mr Quinlivan firstly, and secondly by Fiona McNamara in her affidavit sworn on the 27th September 2012 where it is explained at paragraph 118 that there was simply a typographical error in the notification letter dated 29th February 2012, and that HSE intended to correct this in its publication of the Award Notice. Ms. McNamara makes it clear, as does Mr Quinlivan, that at no stage was HSE under any impression other than that the tenderer which was assessed at the Expression of Interest stage was Beacon Dialysis Services Limited, and that this was the entity which was assessed by the PEG, and whose tender was assessed to be the successful tenderer.

24. They believe that the applicant was never under any different impression, and was at all times aware that Beacon Dialysis Services Limited was the Beacon entity which was bidding for the contracts, and point to the fact that the applicant never raised any question or sought any clarification in that regard. Indeed, there seems no doubt from some of the evidence adduced on this application that prior to the EOI stage the applicant and Beacon Dialysis Services Ltd had been in touch, and had discussed whether they would each bid on a separate basis, or together as a consortium. In particular, Michael Cullen of Beacon and Alan Markey of Baxter met on the 4th August 2011, and according to Mr Cullen at least, the purpose of that meeting was to discuss the possibility of Baxter and Beacon Renal (i.e. Beacon Dialysis Services Limited) tendering for the contracts in partnership. Mr Cullen has stated in his

affidavit that at the conclusion of the meeting Mr Markey stated that Baxter wished to tender on its own, whereupon Mr Cullen informed Mr Markey that in those circumstances Beacon Renal would be tendering on its own. Lest any doubt remained, there is an email from Mr Cullen to Mr Markey dated 30th August 2011 stating:

> *"Hi Alan. Just so there is no confusion between us, we are tendering as Beacon Dialysis Services Ltd, trading as Beacon Renal. I assume you are tendering as Baxter but I just wanted to clarify. Regards, Michael".*

Alan Markey replied some 20 minutes later stating:

> *"Hi Michael. That's fine. Cheers, Alan"*

25. By email dated 1st March 2012, HSE offered Baxter a debrief meeting on the 7th March 2012 and that took place. Mr McCarthy in his first affidavit sets out in considerable detail the issues which were discussed. The affidavit makes no reference to any concern around the notification of BMG as the winning tenderer, even though it must have been known to Baxter personnel at that stage that it was Beacon Dialysis Services Limited had tendered, and, hence, which had been qualified at EOI stage. As I have said, it is hard to accept that Mr McCarthy had assumed all along hat BMG had tendered as part of a consortium, given that he was told specifically that Beacon Dialysis Services Limited was tendering on its own, and as Beacon Dialysis Services Limited.

26. According to Mr McCarthy, this meeting lasted some three hours. He states that since HSE did not have sufficient time to deal with all the questions arising, the applicant stated that it would follow up with a letter to outline its remaining questions. That letter was sent on the 8th March 2012, and set out 14 questions to which responses were sought. One of the questions was question 7 as follows:

> *"Given the turnover and other financial details contained in the published accounts for BMG, how did BMG meet the EOI financial criteria? In accordance with procurement rules and the procedures established in the tender documentation, was a letter of support provided prior to submission of BMG's EOI response by another consortium member or by the UMPC group?"*

27. While this question is raised in respect of BMG, being the entity notified as the winning tender, it appears likely in my view that at this stage the applicant was in fact referring to Beacon Dialysis Services Limited which it knew from the outset was the entity which was expressing interest at the EOI stage. I say that because in question 9 the applicant asked:

> *"Given that BMG currently provides a nursing service, and a third party will therefore be required to deliver the tender requirements, what is the contractual status between BMG and BMG's partner for this contract, Pinewood?"*

I say that also because of what was discussed at the meeting just referred to between Mr Markey and Mr Cullen which took place on the 4th August 2011, and which was followed by the email dated 30th August 2011 to which I have also just referred.

I would also refer to paragraph 39 of the second affidavit sworn by Mr McCarthy wherein he stated:

> *"It was and remains our understanding that the legal entity who submitted a tender was in fact Beacon Dialysis Services Limited, a wholly owned subsidiary of Beacon Medical Group Limited. This has been confirmed by Mr Cullen in his affidavit."*

28. The HSE responded to the applicant's questions by letter dated 14th March 2012. Its response to question 7 was:

> *"As confirmed to your company in the dialogue meeting on 18th October 2011 all five candidates, including BMG, passed the Expressions of Interest stage of the tender process. All candidates were deemed to have met the minimum financial requirements outlined in the Expression of Interest documentation."*

29. The applicant was not happy with the responses received, and instructed its solicitors, A & L Goodbody to write to HSE. Their letter dated 16th March 2011 stated, inter alia, that the responses given failed to respond to the specific request for reasons raised in the applicant's letter dated 8th March 2011, and called for a full response by return. The letter set forth in detail the deficiencies in the tender process which were considered to exist.

30. Arthur Cox, solicitors for HSE replied on the 22nd March 2012. That letter did not address the specific matters raised, but rather sought further particulars and clarification in relation to the issues being raised.

31. That response was not considered to be satisfactory by the applicant, and A&L Goodbody wrote again on the 23rd March 2011 pointing out that issues had not been addressed, and referred to ten specific issues, and stated that the applicant was left with no alternative but to institute proceedings. Mr McCarthy in his first affidavit states at paragraph 47 that he was advised at that stage that HSE had "*failed to furnish adequate reasons for its decision or to give all of the information that it is required by law to give*", and that the applicant on this application would rely upon that failure, having been forced to institute these proceedings without sight of that information.

32. Mr Quinlivan in his first affidavit at paragraph 87 rejects completely the accusation that HSE failed to provide the applicant with its reasons for the decision made, and that the reasons given were inadequate for the purpose of enabling the applicant to understand why it was unsuccessful and so that it could take an informed decision as to whether to challenge the procurement process. He notes also in that affidavit that in the applicant's Relies to Notice for Particulars on behalf of HSE it is stated by way of reply:

> *"It is not alleged that the applicant was unable to determine whether it had any valid grounds for challenging the procurement process".*

Again, I have to say that it is hard to understand how on the 29th March 2012, Mr McCarthy was able to swear on oath that he believed that HSE had failed to provide adequate reasons for its decision or sufficient information, and a few short weeks later state that it was not being alleged that the applicant was unable to determine whether it had any valid grounds for challenging the procurement process. It is certainly not explained in any replying affidavit.

33. The Amended Statement of Grounds seeks no less than 22 reliefs. Essentially, however, they boil down to asking this Court to set aside the award of the contract to the entity notified as the successful tenderer (BMG) and to direct that the contract be awarded

to the applicant instead, as well as seeking a number of declarations reflecting the issues being raised. Helpfully, at the commencement of her oral submissions, Eileen Barrington SC for the applicant distilled the issues requiring determination down to five in number:

> (a) The entity issue – i.e. Beacon Medical Group (BMG) being notified to bidders as the successful tenderer for Lots 3 and 4, even though it was not the entity which was qualified at the Expression of Interest stage.
>
> (b) The basis on which HSE concluded that Beacon Dialysis Services Limited met the qualification criteria in relation to turnover.
>
> (c) Failure to disclose award criteria, namely noise, activity and location.
>
> (d) Failure to take account of information provided in relation to the Model of Care criterion
>
> (e) Multiple Manifest Errors in the awarding/deduction of marks.

General principles:

34. General principles of equal treatment, transparency and non-discrimination emanating from the EU Treaty lie at the heart of the public procurement Directives, and Regulations made thereunder, in order to provide fair conditions of competition for economic operators. The Directives and Regulations provide for certain specific procedures and measures to be taken in respect of contracts to which the Directives apply, which reflect the general principles of transparency and equal treatment, and ensure that they are observed at all stages of such a tender process. This ensures for such contracts an appropriate level of fairness in terms of transparency, equal treatment and non-discrimination, and assists the task of verification in that regard.

35. However, none of the Articles of the Directives apply to Annex IIB contracts, with the exception of Articles 23 and 35(4) thereof (and therefore Regulations 23 and 41). Neither of those Articles have any relevance for the present proceedings, in the sense that it is not alleged by the applicant that there has been a breach of either. It is in those circumstances that the respondent argues that the applicant is not entitled to any reliefs under the Remedies Regulations and/or Order 84A of the Rules of the Superior Courts. The applicant submits that the general principles under EU law apply with equal force, whether the contract at issue comes within Annex IIA or Annex IIB of the Public Contracts Directive, whereas the respondent argues for a more restricted application of the principles for the latter.

36. Each party has gone to great lengths to helpfully refer the Court to a large number of the leading cases on this subject from both here and the European Court of Justice. I find it unnecessary to do more than refer briefly to some such cases, as it seems to me having considered all of them, and having heard the parties' submissions, that the position has been explained and is by now quite clear. In any event I do not believe that there is any meaningful distinction for the purpose of the present case in the views of the parties in so far as they may differ. I am certainly happy to accept that the general principles under EU law apply at all stages of the tender process. However, that does not mean, as has been made clear in the case-law to which I have been referred, that by implication or stealth the provisions of the Directives are applicable also to Annex IIB contracts. Such an implication would fly in the face of the specific statement that only Articles 23 and 35 (4) are applicable to the latter.

37. In *Commission v. Ireland*, Case C-226/09 [2010] ECR 1-11807 the contract under scrutiny was an Annex IIB contract. The Court noted that as such the contract was subject only to Article 23 and Article 35(4) of the Directive. The Court of Justice stated at para. 29 of its judgment:

> *"… even though the contracting authorities which conclude contracts listed in Annex IIB to the Directive are not subject to the rules laid down in the Directive relating to the requirements to put contracts out to competition by means of prior advertising, they nevertheless remain subject to the fundamental rules of the European Union, in particular to the principles laid down by the Treaty on the Functioning of the European Union (TFEU) on the right of establishment and the freedom to provide services."*

38. It is useful also to refer to the Opinion of Advocate General Mengozzi in *Commission v. Ireland* to which Jerry Healy SC for the respondent, and indeed John Gleeson SC for the Notice Party, have referred the Court, and where at paras. 44-45 he states:

> *"It is clear that in Directive 2004/18 the obligations to set out in advance the weighting to the award criteria for contracts coming within the ambit of the directive itself also reflects the need to guarantee respect for the principles of equal treatment and transparency. In my view, however, it is necessary to steer clear of the automatic assumption that the principles in question have the same scope in relation to both contracts subject to the directive and contracts not subject to the directive (or, as in this instance, subject to the directive only in part). If, in fact, the transparency required in relation to contracts excluded from the scope of the directive were regarded as necessarily the same as that required in relation to contracts coming within the ambit of the directive, this would open the way for the directive to be covertly applied to a whole range of circumstances to which the legislature explicitly considered that it should not apply. To some degree, in fact, the purpose of the whole directive is to put into effect the fundamental principles of the Treaty: if the procedure under the directive were the only way of achieving those principles in relation to public contracts, it would have to be applied in all cases with a cross-border interest."*

39. Mr Healy has referred the Court also to the Opinion of Advocate General Fennelly (as he then was) in *Telaustria Verlags GmbH and TelefonadressnGmbH v. Commission* [2000] ECR 1 – 10745 where he rejected the applicability of the provisions of the Directive to a contract outside the ambit of the Directive. In that regard he stated:

> *"I consider that substantive compliance with the principle of non-discrimination on grounds of nationality requires that the award of concessions respect a minimum degree of publicity and transparency. I agree with the Commission that what must at all costs be avoided is that their grant be shrouded in secrecy or opacity. I also accept the point made by the agent for Austria that publicity should not necessarily be equated with publication. Thus, if the awarding entity addresses itself directly to a number of tenderers, and assuming the latter are not all or nearly all undertakings having the same nationality as that entity, the requirement of transparency would, in my view, be respected. Transparency, in this context, is therefore concerned with ensuring the fundamental fairness and openness of the award procedures, particularly as regards potential tenderers who are not established in the Member State of the awarding authority. It does not, however, in my opinion require the awarding entity to apply by analogy the provisions of the most relevant of*

the Community procurement directives."

40. Mr Healy has referred the Court also to the judgment of the ECJ in *Strong Seguranca SA v. Municipio de Sintra*, Case C-95/10, unreported, 17 March 2011, and to the judgment of McMahon J. in *Release Speech Therapy Ltd v. Health Service Executive* [2011] IEHC 57.

41. As I did recently in my judgment in *Fresenius Medical Care (Ireland) Limited v. Health Service Executive*, High Court, July 2013, I will conclude this topic by setting forth a passage to which the Court was referred by Counsel for the Notice Party in its written submissions. It is from *Arrowsmith, The Law of Public and Utilities Procurement*, 2nd ed, 2005, page 194 where the learned author states:

> *"A cautious approach was advocated in Telaustria by Advocate General Fennelly. In that case he stated that transparency is concerned with ensuring the 'fundamental fairness and openness of the award procedures' and that the awards are not 'shrouded in secrecy or opacity', and does not require entities 'to apply by analogy the provisions of the most relevant of the Community directives'. In other words, he considered that the principle of transparency under the Treaty is more limited than found in the directives, although the purpose of the principle is the same. Thus, for example, the fact that the directives require reasons for certain procurement decisions does should not [sic], it is submitted, lead the ECJ to conclude that the Treaty provisions require such reasons, even for major contracts (such as concessions) that are excluded from the directives."*

42. It seems to me that where a tender is for an Annex IIA contract, the authority is bound to undertake the tender process in strict compliance with the applicable Directives which, in the view of the legislature at least, ensure in respect of such contracts that the EU law principles of transparency, equal treatment, non-discrimination and general fairness are complied with in the interests of fair conditions of competition between entities across member States, and as part of a properly functioning market within the European Union.

43. With Annex IIB contracts, the position is different. While the Annex IIA procedures are not required to be undertaken as a means of ensuring that the general principles are complied with, that does not mean that the general principles under EU primary law can be ignored, or that they do not provide a canopy under which the process must be conducted and by which it must be guided. However, it is left to the authority to decide upon a tender process which observes those principles, and under which compliance with those principles may be later reviewed and verified. That, it seems to me, is a distinction to be drawn between the Annex IIA procedures under the Directives, and procedures which may be undertaken in respect of an Annex IIB contract.

44. I do not believe there is any real distinction between the parties' positions on this question of the applicability of the general principles. The point emphasised by the respondent seems to be that while the principles are clearly applicable in a general sense, that should not be taken as meaning that the Annex IIA articles in the Directive are by implication brought into play in respect of an Annex IIB contract, and I certainly accept that.

45. It will be recalled that as part of its claims in these proceedings, the applicant has contended that the HSE has breached the principle of transparency by, it says, introducing undisclosed criteria such as noise, activity and location. It claims also that there have been breaches of the principles of equal treatment and transparency in the manner in which HSE purported to qualify Beacon Dialysis Services Limited at the EOI stage, where reliance was placed by it on the capacities and resources of other entities, and in circumstances where an entity which did not qualify at all at EOI stage (and did not even participate at that stage other than by way of providing support to Beacon Dialysis Services Limited), namely Beacon Medical Group (BMG) has been notified to all tenderers as having been the successful bidder. I will examine those issues in the light of what I have stated above in relation to the applicability of the general principles.

Applicable Standard of Review – Manifest Error:

46. In my recent judgment in *Fresenius Medical Care (Ireland) Limited v. Health Service Executive*, also delivered today, I considered the standard of review in matters of this kind, and the question of manifest error. I have stated the following therein, and it seems appropriate to repeat it here for convenience. In that regard I said:

> *"39. The next part of the legal landscape against which the applicant's complaints must be considered is the standard of the Court's review. It is frequently and correctly said that when performing its task of judicial review, the Court is not conducting a merits-based review, or conducting an appeal against the impugned decision. This Court is not concerned whether if it was making the decision it would come to a different result. Neither is the Court concerned with whether it considers that the scores given by the awarding authority are unduly high or unduly low in any particular section, or under any particular heading. The Court will permit an expert body, such as in this case the Procurement Evaluation Group (PEG) already referred to, a margin of appreciation or discretion in respect of scoring and assessing tender bids, and will defer to that body in this respect. That margin must be permitted to it since its members have been tasked by HSE as an expert body to assess the bids received. It has significant experience in such matters and must be allowed to do its job without undue and unnecessary interference by the Courts. The Courts must not lightly interfere in the tender process, including the result. What the Court must do when the decision is under judicial review is adjudicate upon the process by which the relevant decisions were reached, including by ensuring that competition rules in the tender documentation are clear, that those rules are applied equally and objectively to all tenderers, and that only tenders which are completed and submitted in compliance with these rules are accepted and considered.*
>
> *40. In so far as clarifications are sought and/or provided during the tender process, all tenderers must be kept fully informed of any such clarifications, so that any one tenderer does not receive additional advice or information to the prejudice of any other tenderer thereby gaining some advantage. In that regard, the rules must be clear and transparent so that any review of compliance can also be effective. These matters ensure that appropriate levels of transparency and equality of treatment are built into the tender process. Naturally, as stated by Fennelly J. in his judgment in the Supreme Court in SIAC, the obligation to render effective the public procurement principles means that where there has been an established failure to respect the principles of equality, transparency or objectivity, there can be no question of permitting the discretion or margin of appreciation to overlook it. In such clearly established circumstances the Court must act and quash the decision.*
>
> *41. That margin of appreciation, and the desirability that a Court should not lightly interfere with the decision of an expert body charged with the evaluation of bids in a particular sector explains and is consistent with the principle by now well-established in the case-law that the Court will not do so except where a manifest error has occurred in the process – in other words a very clear error, an error obvious to the eye, and one which prompts the Court to ask itself could*

this possibly be correct, and upon close examination answer that question in the negative. Different judges have put the same relatively simple concept in different ways in an attempt to bring more clarity to what is meant by manifest error. Fennelly J. in SIAC felt that the case-law showed that Courts are prepared to annul a decision "at least in certain contexts, when they think that an error has been clearly made". He went on to state that he did not think however "that the test of manifest error is to be equated with the test adopted by the learned trial judge, namely that, in order to qualify for quashing a decision must 'plainly and unambiguously fly in the face of fundamental reason and common sense", and he referred to the fact that in the SIAC case the Advocate General had felt that the test "should be rather less extreme", so as to avoid the possibility that the remedy available here by way of judicial review in such matters may not be sufficiently effective to ensure protection of the interests of disappointed tenderers for the purposes of the Remedies Directive.

42. In Clare Civil Engineering Ltd v. Mayo County Council [2004] IEHC 135, O'Neill J. in the High Court referred to what Fennelly J. had stated in SIAC and added that "the applicant carries the onus of and must satisfy this court that the decision of which he complains has been made in clear error" (my emphasis)". He went on to explain further:

> *"Clearly established error must mean in my view more than being simply wrong: i.e. error resulting from a mere difference of opinion. It must be shown that the decision or step taken which gives rise to complaint was plainly, unambiguously or unarguably wrong"."*

47 Ms. Barrington for the applicant has urged that in considering whether a manifest error has occurred, the Court, while allowing some margin of appreciation, should do so to a limited extent only. She has referred to the comment of Fennelly J. in SIAC that "*the word 'manifest' should not be equated with any exaggerated description of obviousness*". I am certainly prepared to accept that limitation to the requirement that an error must be a clear and obvious error before it can be said to be a manifest error.

48. She also submits that in making its assessment of whether or not a manifest error has occurred, the Court should not have regard to any rationale or explanation for what may otherwise on its face appear to be an obvious/manifest error. In support of that submission, she has referred to the judgment of McCloskey J. *Easycoach Limited v. Department for Regional Development* [2012] NIQB 10, and to a passage appearing at paragraph 88 thereof as follows:

> *" … I record my view that the doctrine of manifest error in EU public procurement, properly analysed by reference to the overarching principles, is not concerned with whether the relevant act or omission on the part of a contracting authority has some benign or innocent explanation. Thus the existence of a manifest error is not dependent on the authority's state of knowledge or any blameworthiness in its behaviour. Rather, I consider liability to be of the no fault variety. Accordingly, where an authority asserts – or demonstrates – that the relevant error has occurred without any fault on its part, I consider this legally irrelevant. The exercise conducted by the court is of a clinical, detached and objective nature. The only question for the court is whether a manifest error has been established. A manifest error can occur with or without fault on the part of the contracting authority. To hold otherwise would be inimical to the overarching principle of fair, equal and open access to the market concerned and the related principles of non-discrimination and equality of treatment. If a contract award decision clearly influenced, and contaminated, by false or misleading information contained in a bidder's tender were to escape censure by the court on the ground that the authority acted blamelessly, the aims and objectives of the Directive would plainly be thwarted."*

49. I can accept that "*the existence of a manifest error is not dependent on the authority's state of knowledge or any blameworthiness in its behaviour*". To that extent a manifest error is just that, an error, and the fact that it has some innocent explanation or that the contracting authority is not blameworthy does not alter the fact that an error has occurred. But I cannot accept, and I doubt if McCloskey J. would have intended this, that a mere 'typo' in the notification letter cannot be explained to be just that, and thereby escape capture under the manifest error rule. It would be absurd in my view if, where the entire process had been impeccable up to that point, where entity A submitted an EOI, where entity A participated in the dialogue phase, where entity A submitted a Final Tender, and where that is the tender that was evaluated, the entire tender process would have to be set aside simply because in the eventual letter of notification entity A was inadvertently described as entity B. I will obviously be returning to that issue after considering the submissions that have been made for the purpose of this particular case.

Issue 1: Non-Compliance of Beacon Dialysis Services Limited at EOI stage with Minimum Financial Requirements for qualification:

50. In broad terms, the applicant submits that the HSE failed to adhere to its own rules in its evaluation of the EOI submitted by Beacon Dialysis Services Limited, and the supporting financial information and documentation provided, and in concluding that it met the minimum requirements for qualification. It is submitted that HSE is guilty of manifest error in some respects, and that overall its approach to this part of the process failed to comply with the general principles of equal treatment, transparency and objectivity.

51. In her written submissions, Ms. Barrington has conveniently set out six headings under which these complaints are made:

(i) Failure to apply the minimum requirements published in its own EOI documentation;

(ii) Failure to properly verify whether there had been any material change in compliance with the minimum requirements;

(iii) Failure to devise a lawful methodology for verifying compliance with minimum turnover;

(iv) Failure to properly verify compliance with the minimum turnover;

(v) Manifest Error/Failure to take a relevant consideration into account;

(vi) Failure to properly verify whether there had been any material change in compliance.

52. The first issue arising for consideration is whether the applicant has impermissibly delayed in raising this issue, given that it was notified of the qualification of Beacon Dialysis Services Limited on the 15th July 2011, and whether it is out of time now for doing so, given the strictness of the applicable time limits in cases of this nature. The question of an extension of time also arises potentially.

53. It is appropriate in the first instance to summarise what the respondent says in this regard, but to note at the outset that the applicant's submission is that it only discovered that what is described in the submissions as "a Beacon entity" had tendered on its own when it received the notifications dated 24th and 29th February 2012, and that time commenced to run only from then at the earliest. I have already set forth what Mr McCarthy has stated at paragraph 30 of his first affidavit about his surprise at that moment

that HSE had concluded that BMG had met the minimum requirements of the EOI. I have already made certain comments in relation to his evidence in this regard. But the applicant has gone on to submit, nevertheless, that it was only as the proceedings progressed, and discovery provided, that it has been in a position to fully make its case in relation to this issue, as more information became available to it, in order to demonstrate a breach of general principles, and the existence of manifest errors in the process.

54. Mr Healy for the respondent has emphasised the policy of urgency and rapidity which have been found to underpin the need for a strict adherence to the time limits provided for the commencement of proceedings challenging decisions, including interim decisions, in a procurement process, in the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations, 2010 ("the Remedies Regulations") and in Order 84A of the Rules of the Superior Courts, 1986 ("the Rules").

55. He has referred to the judgments of the Supreme Court in *Dekra Éireann Teo. v. Minister for Environment* [2003] 2 IR 270 – a case in which the applicable time limit at that time was three months from such date when grounds for the challenge first arose - and in particular to that of Denham J. (as she then was) in which she stated at p. 283:

> *"In this case the relevant law and practice is that of public procurement contracts. An essential feature of both European law and the consequent Superior Court Rules is a policy of urgency and rapidity which is required in such judicial reviews. Thus, art. 1 of Council Directive 89/665/E.E.C. of the 21st December, 1989 requires that 'decisions taken by the Contracting authorities be reviewed effectively, and in particular, as rapidly as possible'. In national law, an application under O. 84A, r. 4 to review a decision to award, or the award of a public contract (a) shall be made at the earliest opportunity, (b) and in any event within three months from the date when grounds for the application first arise, (c) unless the court considers that there is good reason for extending such period.*
>
> *This rule applies to a decision to award, or the award of a public contract and is a specialist area of judicial review. The rules reflect a policy that such reviews be taken effectively and as rapidly as possible."*

56. At page 287 of her judgment, she went on to state:

> *"In this specialist area of judicial review there is a clear policy underlying the law. The policy includes the requirement that an application for review of a decision to award a public contract shall be made at the earliest opportunity. There is a degree of urgency required in such applications. The applicant should move rapidly. The requirement of a speedy application is partially based on the prejudice to the parties and the State in delayed proceedings. Also, there is the concept that the common good is best served by rapid proceedings. The necessary balance to protect fair procedures is met in the saver that the court may extend time for such application for good reason."*

57. Mr Healy has drawn attention also to the statement by the ECJ in its judgment in *Commission v. Ireland* [2010] ECR I-859 that "*since Directive 89/665 pursues an objective of rapid action, it is legitimate for a Member State, in implementing that directive, to require interested parties to be diligent in bringing actions for review*."

58. The Remedies Regulations at Regulation 7(2) provide:

> *"(2) An application referred to in sub-paragraph (a) or (b) of Regulation 8(1) shall be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application.*

Regulation 8 (1) provides:

> *" An eligible person may apply to the court –*
>
> *(a) for interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the eligible person's interests, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract concerned or the implementation of any decision taken by the contracting authority, or*
>
> *(b) for review of the contracting authority's decision to award the contract to a particular tenderer or candidate."*

Accordingly, Mr Healy submits that it is clear that the 30 day time limit is applicable not only to the final decision in respect of the award itself, but also to any interim decision made during the course of the tendering process, and to any infringement of public procurement law which is alleged to have occurred during the course of that process. Indeed, that is reflected in the fact that under the terms of Order 84A RSC, the reliefs to which the time limit applies include at r. 2(c) "*the review of a decision (including an interim decision) of a contracting authority taken under or in the course of a contract award procedure falling within the scope of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 or the European Communities (Award of Contracts by Utilities Undertakings) Regulations 2007*".

59. This, as submitted by Mr Healy, is confirmed by the ECJ in its judgment in *Commission v. Ireland* [supra] when it stated at paras. 51-58 of its judgment:

> *"The Court has already held that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a period laid down to that effect, and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that when the period has passed it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the period in question is reasonable (Case C-241/06 Lammerzahl [2007] ECR I-8415, paragraph 50 and case-law cited).*
>
> *That case-law is based on the consideration that the full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thereby obliging the contracting authority to restart the entire procedure in order to correct such infringements (Lammerzahl, paragraph 51).*
>
> *Accordingly, it is not compatible with the requirements of Article 1(1) of that directive if the scope of the period laid down in Order 84A of the RSC is extended to cover the review of interim decisions taken by contracting authorities in public procurement procedures without that being clearly expressed in the wording thereof."*

60. Mr Healy has referred also to the judgment of Kelly J. in *SIAC Construction Limited v. National Roads Authority* [2004] IEHC 128,

who held that the time limit prescribed by O.84A RSC applied not only to the decision to award the contract itself, but also to decisions taken by contracting authorities regarding contract award procedures, and that accordingly complaints concerning those procedures must be brought within the specified time period. In so deciding, Kelly J. stated:

> *"I am of the view that O.84A must be viewed as being reflective of the provisions of the Remedies Directive. That Directive, and the jurisprudence developed on foot of it, clearly envisages challenges to decisions taken by contracting authorities regarding contract award procedures. Similar wording appears in article 3 of S.I. 309/94.*
>
> *It is clear that national authorities are obliged to ensure that the Remedies Directive in full is implemented. Such implementation cannot be confined to decisions to award the contract, or the award of the contract, but must extend to other decisions taken in respect of contract award procedures. It follows, therefore, that O. 84A in order to be in accord with applicable community law, must be interpreted as applying not only to a decision to award a contract, or award of a contract, but also to decisions taken by contracting authorities regarding contract award procedures.*
>
> *Such being so, it follows that complaints of the type which are sought to be advanced here concerning the procedures followed must be brought at the earliest opportunity and, in any event, within three months from the date when grounds for the complaint first arose. Proceedings cannot, and ought not to be, postponed until the decision to award, or the award of, the public contract has been made. If that were so the complaint concerning, for example, the negotiated procedure where grounds first arise in August 2001 would not be the subject of proceedings until 2004. Such a result in the light of the authorities would be absurd."*

61. If indeed further authority is required for this submission, Mr Healy has referred to the judgment of Clarke J. in *Veolia Water UK plc v. Fingal County Council (No.1)* [2007] 1 IR 690, where at paragraph 45 of his judgment he stated:

> *"There may be decisions which have a greater or lesser degree of formality and which may be binding and irreversible to a greater or lesser extent. The decision to award is of course a formal and relatively final decision. The determination as to the tender criteria might, normally, be similarly categorised. In certain tendering processes there may be other formal stages. For example it is not unusual for a tender process to contain a formal pre-qualification during which tenderers have to establish a capacity to perform the contractual obligations which would fall upon them if they were to be successful in order that they might be permitted to move to the next stage and make a formal tender. Thus parties who fail to establish sufficient technical or financial (or other appropriate) capacity may not be permitted to make a formal tender at all. A decision to refuse such pre-qualification to a party is clearly also a formal decision."*

62. Before moving to the submissions made by Ms. Barrington to those of Mr Healy, I should refer to a passage from the judgment of the UK Court of Appeal in *Jobsin Co.UK plc v. The Department of Health* [2002] 1 CMLR 44 to which Kelly J. referred in his judgment in SIAC [supra], and which states as follows:

> *"It is a fairly startling proposition that, even where a tenderer knows that he has grounds for starting proceedings, he has a good excuse for not doing so because such proceedings may imperil his relationship with the contracting authority and may jeopardise his prospects of securing the contract. It seems to me that a tenderer who finds himself in such a position faces a stark choice. He must either make his challenge or accept the validity of the process and take his chance on being successful, knowing that the other tenderers are in the same boat. In my view, it is unreasonable that he should sit on his rights and wait to see the results of the bidding process on the basis that, if he is successful he will remain quiet, but otherwise he will start proceedings. I do not believe that a tenderer who deliberately delays proceedings in an attempt to have his cake and eat it has good reason for an extension of time if the outcome of the process is not to his liking."*

63. It is against the backdrop of the above jurisprudence that Mr Healy submits that the applicant is time-barred for any challenge to the qualification of Beacon Dialysis Services Limited, or, as it has also been referred to by the applicant, BMG, given the date or dates by which, without contradiction, the applicant was aware that that entity has been qualified by HSE. He submits that the earliest date on which the applicant was so informed was on the 29th July 2011 when it was notified, along with all other entities who had expressed interest, but at latest on the 18th October 2011 at the first dialogue meeting, at which Mr Quinlivan has stated all were so informed.

64. I note also that at the debriefing meeting which took place with Baxter, which Mr Markey and Mr McCarthy attended, they queried how the winning tenderer was able to achieve the mandatory qualification financial criteria. The response to that query, according to HSE's minutes of the meeting was that "*HSE advised that all companies had met the mandatory financial criteria and that the tender documents and the EU Procurement Directives stated that any tenderer could rely on the capacities of another entity in order to achieve the minimum requirements*", and it is noted also that the applicant had been informed on the 18th October 2011 that the five bidders had qualified for the tender stage.

65. Mr Healy submits that there can be no doubt whatsoever, given the evidence to which I have already referred, that on the 4th August 2011 Mr Markey, General Manager of Baxter met with Mr Cullen, and was told by him that Beacon Dialysis Services Limited would be tendering on its own, which was again confirmed to him by the email dated 30th August 2011 from Mr Cullen to him to which I have already referred.

66. In her submissions on the delay point taken by the respondent (and supported by the Notice Party), Ms. Barrington emphasises that the applicant must commence his challenge to any particular decision within 30 calendar days "*after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application*" (emphasis added). She submits that while Mr Markey of Baxter may have been told by Mr Cullen on the 4th August 2011, and confirmed by email from him on 30th August 2011 that Beacon Dialysis Services Limited would tendering on its own, this was insufficient to fix the applicant with the requisite knowledge of an infringement on the 29th July 2011 when it was notified that each of the five bidders who had submitted an EOI had successfully qualified at that stage. She points to the fact that the letter is silent as to who the five bidders were, even though it is accepted that Baxter knew that one of them was Beacon Dialysis Services Limited.

67. Ms. Barrington submits that it was not until the 24th or 29th February 2012 that the applicant discovered that "a Beacon entity" had tendered on its own and not as part of a consortium. She refers to what Mr McCarthy has averred at paragraph 30 of his first affidavit in this regard, and to which I have already referred. There is an overlap in relation to this submission between the delay point taken in relation to the qualification of Beacon Dialysis Services Limited at EOI stage, and the so-called entity point where the applicant complains that BMG (Beacon Medical Group) who had not submitted any EOI nevertheless was stated on the 29th February 2012 to have been the successful tenderer. But I am dealing at the moment with the delay point taken in relation to the minimum

requirements issue at EOI stage. She points to the fact that even at the dialogue meeting on the 18th October 2011 all that was said by HSE in this regard was that all five bidders had qualified at EOI stage. In such circumstances it is submitted that the applicant was entitled to assume that Beacon Dialysis Services Limited must have expressed interest as part of a consortium.

68. The applicant has submitted that its complaint in relation to the minimum requirements has "evolved" following the commencement of these proceedings, and that it could not have known prior to discovery that Beacon Dialysis Services Limited had not bid as part of a consortium.

69. It seems clear that it was not until the debrief meeting on the 7th March 2012 that the applicant raised any issue as to how the Beacon entity was able to achieve the mandatory financial criteria. The Minutes of that meeting indicate that HSE responded to this query by saying that all companies had met the mandatory criteria, and in addition pointed out that the tender documents (as well as the Procurement Directives) state that any tenderer could rely on the capacities of another entity to achieve the minimum requirements under the Selection criteria. The Minutes go on to state that at the dialogue meeting on the 18th October 2011 the applicant had been informed that all bidders had qualified for the tender stage.

70. Ms. Barrington submits that the time limits under O.84A RSC and Regulation 7(2) of the Regulations must be interpreted in the light of EU law. That is correct and uncontroversial. She has referred the Court in that respect to the judgment of the ECJ in Case C406/08 *Uniplex v. NHS Business Services Authority*, 28 February 2010. It was a case decided upon a reference for a preliminary ruling from the Queen's Bench division of the HIGH Court of England and Wales, and, as noted by Advocate General Kokott in her Opinion, provided the Court of Justice with an opportunity "*to develop its case-law on the remedies available to unsuccessful tenderers in public procurement procedures* ", noting also that while Member States may provide appropriate limitation periods for remedies of this kind "*clarification is required … in particular on the question of the time from which those limitation periods may start to run: the time at which the alleged breach of procurement law occurred or the time at which the unsuccessful tenderer knew or ought to have known of the breach*".

71. The reference in *Uniplex* was in the context of a national procedure rule, Regulation 47(7)(b) of the 2006 Public Procurement Rules, similar in all respects to the former Order 84A RSC here, requiring an applicant to commence proceedings promptly and in any event with three months from the date when grounds of challenge first arose, and including a discretion for the court to extend time for good reason. The point at issue was the same as that addressed by the Court of Justice in case *C-456/08 Commission v. Ireland* and which led to a change to the present O.84A RSC, as the rule in question was the same in each jurisdiction. Indeed, Advocate General Kokott gave her Opinion in both cases on 29th October 2009, with the Court of Justice in due course gave its judgment in both cases on the 28th January 2010. The then existing rule was considered to give rise to uncertainty. That uncertainty has largely been removed under the present rule, or at least that is its intention, by providing, by reference to Regulation 7(2) of the Regulations, that proceedings must be commenced within 30 days of the notification of the decision, or 30 days from the date on which the applicant knew or ought to have known of the infringement alleged in the application. How much an applicant needs to know or ought to have known before the 30 day period commences is another matter, and will vary from case to case.

72. In its judgment, the Court of Justice emphasised that the objective of the Remedies Directive (89/665/EEC) is to guarantee the existence of effective remedies for infringements in this area, and national procedural rules therefore must not be such as to compromise that effectiveness. The former rule was considered to compromise the effectiveness of the Directive by reason of its uncertainty. The case was, as Mr Healy was at pains to point out, one where the decision under attack in the domestic proceedings was that of the final award of the contract, and not an interim decision, or one made at an earlier stage of the process as in the present case. That is clearly a distinction, but nevertheless Ms. Barrington calls the judgment in aid of her submission that the applicant herein ought not to be taken to have possessed the required level of knowledge of relevant facts to raise the minimum requirements issue until at earliest the 29th February 2011, because it could not have assumed that Beacon Dialysis Services Limited would not have tendered as part of a consortium, as permitted under the competition rules. The entity point requires separate consideration from the point of view of delay, and I shall come to that.

73. Ms. Barrington relies on the following paragraphs in *Uniplex*:

> *"30. … the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.*
>
> *31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it can come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.*
>
> *32. It follows that the objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions.*
>
> *33. This conclusion is supported by the fact that Article 41(1) and (2) of Directive 2004/18 which was in force at the time of the facts in the main proceedings, requires contracting authorities to notify unsuccessful candidates and tenderers of the reasons for the decision concerning them. Such provisions are consistent with a system of limitation periods under which those periods start to run from the date on which the claimant knew, or ought to have known, of the alleged infringement of the provisions applicable in the field of public procurement."*

74. In relation to the last paragraph above, it is worth repeating that the context of that judgment was a final decision in relation to the award of a contract, and not an intermediate decision such as one by which all tenderers were found to have met the pre-qualification criteria. That is relevant so far as deciding what reasons are sufficient for such an intermediate decision. Clearly if all tenderers are being informed that each has passed, no tenderer would wish to challenge such a decision in respect of itself. That is obvious, and accordingly the only relevant reason to be given, if indeed any is strictly necessary despite Article 41(1) and (2) of Directive 2004/18 in that regard, is that each tenderer was deemed to have met the criteria. That is the reason for the decision.

75. While Article 41 of Directive 2004/18 does not apply to an Annex IIB contract, it is nevertheless worthy of note that the requirement to give reasons under the Directive is a requirement to give them to an unsuccessful tenderer, or a tenderer whose application has been rejected. The relevant provision in Article 41(2) provides:

> *"On request from the party concerned, the contracting authority shall as quickly as possible inform:*

— any unsuccessful candidate of the reasons for the rejection of his application,

— any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 23, paragraphs 4 and 5, the reasons for its decision of non-equivalence, or its decision that the works, supplies or services do not meet the performance or functional requirements,

— any tenderer who 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."

76. I am not for one moment suggesting that, because Article 41 is inapplicable to an Annex IIB contract, there is no obligation to give reasons for a decision. Clearly there is a general obligation under the principle of transparency, and under general judicial review principles, that reasons be given in respect of a decision affecting a party adversely, so that he can be in a position to challenge the decision, and so that any review court can carry out its function of review. Nevertheless it provides some assistance in advancing the view, as I do, that a distinction can be drawn between the nature and extent of reasons to be given to an unsuccessful tenderer, and those in respect of a decision such as the one presently under consideration where it is a decision that all persons who have expressed interest in phase one of the tender process have been considered to have met the minimum requirements so that each may proceed to the next stage.

77. *Uniplex* does not of course provide any assistance as to what level of knowledge is required by an applicant before the clock starts to run against it for the purpose of the applicable time limit. That will be a matter for the national court to decide on the facts of any particular case. But it provides guidance in the sense that it emphasises the objective of an effective remedy, and therefore this Court must decide at what point did the present applicant possess sufficient knowledge of facts to enable it to consider that it had reasonable grounds to challenge the decision that Beacon Dialysis Services Limited had qualified in the competition. As soon as it had sufficient facts at its disposal to commence its challenge, an effective remedy was available to it, and therefore the clock started to run against it. From that point on, it could not sit on its hands and hold the point over until it saw the final decision on the award of the contract. It was obliged at act immediately.

78. Ms. Barrington submits, in accordance with *Uniplex*, that it is not sufficient simply that the decision is communicated, and that one must know the reasons for the decision before time starts to run for a challenge. By that, I take her to mean in the present case, that if an effective remedy is to be available to the applicant, the communication of the decision that all tenderers had qualified ought to have included a narrative as to precisely how that conclusion had been reached, and in respect of each candidate, if time is to be considered to have commenced from the 29th July 2011 when that decision was communicated, and therefore that until such time as the applicant became aware of the precise basis on which the Beacon Dialysis Services Limited was considered to have met the minimum requirements it cannot be considered either to have known that there was an infringement, or that it ought to have known.

79. In relation to the significance of the countervailing objective of rapidity in relation to time limits so that a decision can be subjected to review as quickly as possible, Ms. Barrington has submitted that rapidity must not be at the expense of effectiveness, and in that regard has referred to paragraphs 39 – 40 of *Uniplex* where it is stated:

"39. The objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations … .

40. Furthermore, the objective of rapidity pursued by Directive 89/665 does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of effective review proceedings laid down in Article 1(1) of that Directive."

80. It is submitted in the light of all that is stated in *Uniplex* that the threshold is set high in relation to what knowledge an applicant must have before it can be lawfully concluded that time has started to run, and that it must be a sufficient level of knowledge of relevant facts so as to give an effective remedy to an applicant.

81. There has inevitably been some eliding of the minimum requirement issue with the entity issue when these submissions were made. As I have said, I am at the moment dealing with the time issue only in relation to the former.

82. In reaching a conclusion as to whether the applicant is time-barred in relation to the minimum requirements issue, it is essential to keep in mind the fact that the time limit applies equally to interim decisions as it does to the final decision to award the contract at the end of the process. The objective of effectiveness of the remedy applies to every decision whenever it is made, but so does the objective of rapidity as a counterweight. In the balance also is the fact that a short time limit has been prescribed in the interests of rapidity, and that it has been decided that time limits in such proceedings are to be strictly applied, subject of course to the consideration of when the applicant knew or ought to have known sufficient to consider that an infringement has occurred.

83. The objective of rapidity is not achieved for the tender process or the parties where one party may delay a challenge to an interim decision until the end of the process, where it knew or ought to have known of the infringement alleged in relation to that interim decision. It is necessary for such a party to pursue its challenge at that point in time. It is not necessary for the party to know all the facts, and be possessed of all the information which may only emerge during the course of the proceedings from affidavits filed in response, through discovery of documents or through replies to interrogatories. But a party must know or ought to know sufficient to have reasonable grounds for making a challenge to the decision, before the clock begins to run against it. That is clear from the authorities to which I have referred.

84. In the present case, the nature of the interim decision is important, namely one that all tenderers were informed that all had qualified at stage one. The date when that decision was notified was the 29th July 2011. It was not necessary, given the nature of the decision at that stage, that the HSE in its notification should have provided a detailed discursus as to the manner in which each tenderer had met the minimum requirements. It explained that all had qualified because each had met the minimum requirements. If on the other hand the applicant had been deemed not to have met those requirements, then of course it would have been entitled to know what were the reasons that it had not qualified so that it could consider a challenge to the decision and so that the decision could be reviewed if necessary.

85. Given the nature of the decision, and given that within days of that decision the applicant was told and therefore knew that Beacon Dialysis Services Limited had tendered on its own, and therefore must have been qualified on that basis, I believe that it knew as much then as it knew on the 8th March 2012 when it wrote to HSE for the first time raising questions as to how the Beacon entity

had qualified. I appreciate that on that date it was raising the question in relation to BMG, but that does not alter the fact that as of 4th August 2011 its concerns about how Beacon Dialysis Services Limited could have qualified first crystallised. One must bear in mind also that in the weeks leading up to the submission of the EOI there had been discussions between Baxter and Beacon Dialysis Services Limited as to their approach to tendering – as a consortium or separately.

86. The applicant did not raise the issue at that time or even after the dialogue meeting on the 18th October 2011. It did not write to HSE after that meeting, as it did after the debrief meeting on the 7th March 2012. Only then was the issue raised. No further information had come its way between August 2011 and March 2012. At these times, the applicant knew that only Beacon Dialysis Services Limited on its own had put itself forward at EOI stage for qualification purposes. It therefore knew, or ought to have known, that only that entity had been qualified, albeit that it may have relied on the capacities of other entities in order to qualify. One must bear in mind that the tender documentation made it clear to all, including the applicant, that any tenderer could rely upon the resources and capacities of other entities in order to meet the minimum requirements, regardless of the legal relationship between them, provided of course that it could satisfy HSE that those resources would be available to it. The applicant has in these proceedings elided this with the concept of applying as a consortium, which is a different concept, whereby two or more entities may tender in partnership.

87. The fact that BMG was stated in the notifications of the 24th and 29th February 2012 to have been the successful bidder is really a distraction from the main consideration on this issue – namely what was in the mind of Baxter up to that point, as is the fact that the handwritten note of the meeting on the 18th October 2011 makes reference to 'BMG'. I am satisfied that at that stage the applicant still believed that it was Beacon Dialysis Services Limited that had qualified, even if that note mentions 'BMG'. In my view, what was then in the applicant's mind from August 2011, or ought to have been, was puzzlement how Beacon Dialysis Services Limited had managed to qualify by meeting the minimum requirements given their knowledge of that entity. One must remember also that up to these parties had been in partnership in relation to the provision of dialysis services at the Beacon site under a partnership agreement. To that extent the applicant was aware of the capacity of Beacon Dialysis Services Limited to meet those requirements on its own, or the lack of it. The parties were not strangers to each other.

88. But even if one was to be indulgent to the applicant and consider that time should be held to have commenced against it from the 18th March 2011, it is still out of time.

89. If one looks at the letter which was written to HSE on the 8th March 2012, reflecting the question raised at the meeting the previous day, one sees that nothing that was asked at that stage could not have been asked in respect of Beacon Dialysis Services Limited upon receipt of the notification of the decision on the 29th July 2011, or in the aftermath of the meeting on the 4th August 2011, or even after the dialogue meeting on the 18th October 2011. At any point during that period, the applicant could have elicited the same information which it elicited in March 2012 and which was considered to justify the inclusion of this issue in the proceedings which were then launched, and thereafter the further facts and information that emerged following the commencement of these proceedings. It can be presumed that the same information would have been provided in answer to any earlier request.

90. Given the nature of the decision in question, and the reason given for it, namely that all tenderers had qualified, the onus was on the applicant to seek out further information at that stage if it wished to claim that there had been an infringement by the qualification of Beacon Dialysis Services Limited. It was in just as good a position to raise it at that stage, as it did in March 2012. In all these circumstances I am satisfied that by the date of commencement of these proceedings, the applicant was out of time for raising it. The applicant had an effective remedy available to it after the 29th July 2011. There was no good reason to delay for many months later before engaging with the issue after the 29th February 2012.

91. In this regard I note the comment of Clarke J. in *Veolia & others v. Fingal County Council* [2007] 1 IR 690 at p. 705 that "*the obligation of transparency on the awarding authority does not absolve a potential applicant from an obligation to make reasonable inquiries if he is not to be fixed with any delay. The obligation of transparency may, however, effect the calibration of any blame and may also affect the extent of the obligation to inquire*". This comment was made in the context of an application to extend time.

92. The question arises whether the applicant should be granted an extension of time in relation to the issue. In so far as the applicant may be required to seek an extension of time, Ms. Barrington places some reliance on the judgment of Clarke J. in *Veolia* [supra] where he stated at p. 707:

> *"… amongst the matters that must properly be taken into account by the court in considering whether to extend time is to ensure that time will be extended in any case where a refusal to extend time could be said to establish a breach of the principle of effectiveness."*

I read that as perhaps meaning that too strict an approach to when the applicant knew or ought to have known enough about the alleged infringement to consider it appropriate to raise it, would constitute a breach of the principle of effectiveness. That of course does not mean that in every case where an extension of time is refused the applicant is deprived of an effective remedy.

93. In *Veolia*, one of the matters which persuaded Clarke J. that an extension should be granted was the failure on the part of the respondent to give clear answers to the applicant to questions which were raised in correspondence, and he concluded in that regard:

> *"All in all, I must regard the respondent as being culpable in having twice failed to give a straight answer to a straight question."*

The culpability of the respondent for the delay is a theme taken up by McCloskey J. in *Easycoach Limited v. Department For Regional Development* [2012] NIQB 10, a case to which Ms. Barrington has referred. It is a matter more relevant perhaps to any delay argument in the entity issue, given that the applicant never raised the minimum requirements issue in correspondence until the 8th March 2012.

94. Before the Court should grant an extension of time, there must under O. 84A RSC be "good reason" for doing so. I can find no good reason on this issue. If Mr McCarthy of Baxter believed at all times, as he says he did, that Beacon Dialysis Services Limited had tendered on its own, and this was what he was told at the relevant time, he ought to have raised the issue at the earliest opportunity unless there is some reason which he can point to which justifies him in not having done so until the date of commencement of these proceedings. I have pointed to the fact that there was silence on the issue from October 2011 (and prior to that date) until it was first raised on the 7th and 8th March 2012. I have been given no good reason for that. I therefore refuse to extend time on this ground.

95. I will not therefore set out all the arguments put forward on this issue by the parties, or reaching any detailed and final conclusions thereon. I should mention, however, that Ms. Barrington called in aid the judgment of McCloskey J. in *Easycoach* to the extent that at para. 71 of his judgment, he stated that in considering an application to extend time the Court can take into account "*the apparent strengths and merits of the ground of challenge … in tandem with some other factor*". However, even if I was to weigh the merit/strengths of the issue in the balance, I would not consider it sufficient to swing it in the applicant's favour.

96. Having said that, however, I am not to be taken as agreeing that the potential merit of the issue in question is a relevant consideration. I do not. It seems to me that for the purpose of effectiveness, the person who has a potentially good point, labours under precisely the same burden of moving expeditiously as the person who seeks to raise an issue which may seem less meritorious at that stage. I see nothing in the Directives, or the Regulations, or the case-law from the ECJ which suggests that the merits are a consideration in relation to whether an application has moved in time.

Issue 2: The entity issue:
97. This issue requires separate consideration in the context of delay. The issue arises because while Beacon Dialysis Services Limited expressed interest at the EOI stage, and was assessed at that stage as having met the minimum requirements, it was not named as the successful tenderer in the notification letters which issued to all tenderers on the 24th and 29th February 2012.

98. The successful tenderer, as already shown, was named as 'Beacon Medical Group' in that letter. Ms. McNamara has made it clear in her affidavits that this is a typographical error, which was intended to be corrected, and that at all times it was the tender of Beacon Dialysis Services Limited which had expressed interest at EOI stage, and which submitted a tender, and which was evaluated and found to be the winning tender.

99. The applicant did not raise this entity point in its letter dated 8th March 2012. At that point it seems clear that even though Beacon Medical Group was named in the notification letter of 29th February 2012, the applicant was referring to Beacon Dialysis Services Limited when it asked question 7 in its letter which was:

> *"Given the turnover and other financial details contained in the published accounts for BMG, how did BMG meet the EOI financial criteria? In accordance with procurement rules and the procedures established in the tender documentation, was a letter of support provided prior to submission of BMG's EOI response by another consortium member or by the UPMC group?"*

The answer given by HSE in its response dated 14th March 2012 was:

> *"As confirmed to your company in the dialogue meeting on 18th October 2011 all five candidates, including BMG, passed the Expressions of Interest stage of the tender process. All candidates were deemed to have met the minimum financial requirements outlined in the Expression of Interest documentation."*

100. While this answer refers to BMG having qualified, there is no doubt that the applicant knew, or ought to have known, that it was Beacon Dialysis Services Limited on its own which had expressed interest, and it is clear that even the applicant was eliding the two names in its own mind, as well as HSE.

101. Question 9 in the letter of 8th March 2012 provides a further basis for concluding that at this stage the applicant, when it referred to BMG, was in fact referring to Beacon Dialysis Services Limited, being its then current partner in the provision of dialysis services at Beacon, because question 9 asks:

> *"Given that BMG currently provides a nursing service, and a third party will therefore be required to deliver the tender requirements, what is the contractual status between BMG and BMG's partner for this contract, Pinewood."*

That question is answered under question 10 in the HSE response dated 14th March 2012 as follows:

> *"The response from BMG demonstrated to the Procurement Evaluation Group compliance with the mandatory criteria. The HSE is not obliged to disclose the contractual arrangements between BMG and its partner. A Service Level Agreement will be put in place to ensure adherence to all tender requirements and maintenance of the service in accordance with the specification set out in all the tender documents."*

102. In its letter dated 16th March 2012 the applicant's solicitor again raised the issue about minimum requirements at paragraph 6 where they set out one of the alleged deficiencies in the process as:

> *"The evaluation of and purported award to a tenderer that does not meet the minimum pre-qualification criteria as outlined in the Expression of Interest."*

Arthur Cox, solicitors for HSE, responded to that complaint in its letter dated 22nd March 2012 by asking:

> *"6. Please specify which tenderer is referred to and how that tender fails to meet the minimum prequalification criteria as outlined in the Expression of Interest?"*

The applicant's solicitor replied by stating:

> *"From the information available to our client and which is in the public domain, our client understands that Beacon Medical Group is not in a position to meet the minimum pre-qualification criteria in respect of turnover thresholds in the tender document".*

103. These proceedings then issued on the 29th March 2012, and there was no ground included therein which related to the fact that BMG was awarded the contract, in circumstances where it was Beacon Dialysis Services Limited which had submitted the EOI. The question naturally arises as to why not.

104. In my view it is clear that the applicant was not truly under any real misapprehension in this regard at that point in time. Mr McCarthy has averred in his third affidavit that discovery documents were received from HSE following a letter seeking voluntary discovery. He refers to a large number of matters emerging on discovery which he addresses in relation to the minimum requirements issue. But in so far as the applicant submits that it was not until this discovery was made that the entity issue could have been raised, I cannot agree. In fact I can find nothing in that documentation to which he refers in his affidavit which added in any

meaningful way to what he already believed the situation to be as of at latest the 29th February 2012. He always believed, and knew, that the entity that had expressed interest at the EOI stage was Beacon Dialysis Services Limited. I am satisfied that when the notification letter was sent to him on 29th February 2012 telling him that Beacon Medical Group was the successful tenderer, he believed (and correctly as it has turned out) that to refer to Beacon Dialysis Services Limited. If he did not believe that to be the case, that was the time to raise it with HSE. He did not raise that precise matter at the debrief meeting on the 7th March 2012, nor in his follow-up letter on the 8th March 2012.

105. The only useful information for the purpose of his arguments on this issue which emerges from discovery is that he was able to point to a number of instances where in internal documents HSE has variously referred to the Beacon tendering entity as 'BMG', 'Beacon Medical Group', 'Beacon Medical Limited', or simply as 'Beacon'. HSE also had referred to it as 'Beacon Renal' but that is the name under which Beacon Dialysis Services Limited trades at the Beacon facility.

106. The applicant has tried to build the entity issue around these confusions, but in truth it knew the true position all along in my view. If it wanted to raise the entity issue it could just as easily have done so after the 29th February 2012. That was the date on which any possible infringement came to light from the way the successful tenderer was named. There was no need to await discovery in order to raise it. If it had been raised in their letter dated 8th March 2012, no doubt matters would have proceeded to discovery, and the applicant could have decided then whether the discovered documents supported his point or not.

107. But there was certainly no need to await discovery, and it is certainly not the case that some part of the discovery suddenly brought this alleged infringement to his attention for time purposes. As it happens, the position has been made completely clear on discovery. It is crystal clear that the entity that submitted the EOI was Beacon Dialysis Services Limited, which is precisely what Mr Markey was told on the 4th August 2011 by Mr Cullen, and again in the email of the 30th August 2011. It is also crystal clear that the tender submitted was one from Beacon Dialysis Services Limited, and also that while that entity was relyingon support and the resources of other parties, as it was entitled to do under the rules, it was still the bid of Beacon Dialysis Services Limited that was assessed as part of the tender process.

108. I agree that there are references in the internal documents within HSE which refer to the Beacon entity variously as set forth above, but that does not alter what the applicant knew or believed, or the fact that it was the bid submitted by Beacon Dialysis Services Limited that was assessed and evaluated. The reference to Beacon Medical Group in the notification letter is certainly an unfortunate mistake, but that is all it was. Beacon Medical Group never expressed interest, never submitted a tender, and was never assessed. As I have said, I do not believe that the applicant ever thought differently. If it had, then the moment to raise it was immediately after it received the notification letter. It did not do so. I believe that the applicant has only thought to try and build some sort of issue around that error having received the discovery documents. In my view it is out of time for raising it, since it could have raised this issue when it commenced its proceedings, and could have raised it prior to that in the letter dated 8th March 2012 following the debrief meeting. That is the time when the applicant knew or ought to have known of any alleged infringement in that respect. I see no basis for granting an extension of time on this issue.

109. I therefore dismiss that ground of complaint.

Issue 3: Alleged Failure to Disclose Award Criteria in relation to Beacon Facility 2 Lots Same Location bid:

(a) Noise and Activity:
110. In its tender for Lots 3 and 4 in one location, the applicant scored 4 marks out of a possible 10 in respect of Section 11.9 of the Revised Specification. Section 11.9, a weighted question, stated:

> *"An [sic] proposed outline of the proposed building layout including access and parking facilities* ***must*** *be provided by the tenderer in the tender response. The HSE will review this as part of the tender evaluation. However, tenderers are asked to note the provision of 11.10 below." [emphasis in original]*

Section 11.10 (a pass/fail question i.e. not weighted) provided:

> *"Tenderers are required to confirm your agreement to working with the HSE prior to contract award in relation to an agreed building layout. The layout of the building must be to the satisfaction of the HSE before patients will be referred." [emphasis in original]*

The applicant was deemed to have passed under this section.

111. On the score sheet which accompanied the notification letter of 29th February 2012 the comment beside that mark is: "*more noise and activity anticipated in a 40 station unit*". The applicant complains that nowhere in the Tender documentation did it appear that noise and activity were criteria which would be considered in marking this section, and in particular that these criteria were not referred to in Section 11.9, or even as sub-criteria, and that if they had been, the applicant could and would have emphasised a number of factors which would have demonstrated that there would be less noise and activity in a 40 station unit than in a 20 station unit. Mr McCarthy in his first affidavit has listed seven matters which would have demonstrated this. It is submitted that by applying these two undisclosed criteria to the marking of Section 11.9 HSE has breached the applicable general principles of equal treatment and transparency.

112. This matter was raised by the applicant at the debrief meeting on the 7th March 2012, and the Minutes state the HSE advised that the PEG "*had used their professional judgment when identifying why 4/10 was the mark awarded as there would be an increase in noise and activity for patients when the number of patients and staff in a single location doubled*".

113. In his first affidavit, Mr McCarthy has stated at paragraph 37 that at the debrief meeting on the 7th March 2012 it was clear that HSE was "*inherently opposed to awarding a contract for two lots at one location*". He states also that there was a good deal of discussion on this issue, and that the HSE had stated, inter alia, that "*its core goal was to have separate units and there were many other disadvantages apart from noise and activity in having a 40 station unit*". I will return to this question when addressing the arguments put forward in relation to the alleged failure to disclose this alleged criterion against having both units in a single location. Nevertheless, Mr McCarthy clearly feels that this bias against a single location bid fed into the HSE's marking down of this section of the applicant's tender, but that the applicant was never given any reason to suppose that such would be the case. In fact, it is evident that all tenders submitted on the basis of both units in a single location were awarded only 4 marks out of 10 for Section 11.9.

114. Mr Quinlivan addresses these complaints at paragraphs 110-125 of his first affidavit. A significant point made by Mr Quinlivan is

that it was not until the Final Tender stage that the applicant formulated its bids for Lots 3 and 4 on the basis of a single location. This option was not referred to at EOI stage or in its response to the Supplementary Clarification on 26th October 2011. Accordingly HSE was not given any opportunity during the dialogue meetings on the 18th October 2011, 28th October 2011 or 4th November 2011 or during the initial site visit on the 13th October 2011, to provide any feedback to the applicant as to the suitability of such a proposal at the Beacon location.

115. He states also that in fact HSE did not deduct any mark under Section 11.9 for factors such as more noise and/or activity where the tender was on the basis of a single unit in one location where bids were based on the specified amount of 80 patients or 20 stations, and he examples that the applicant's bid for the Beacon facility on a Lot 3 basis only attained full marks under Section 11.9. It was, according to Mr Quinlivan, the increase in noise and activity associated with a doubling of the patient throughput, rather than noise and activity as such, which informed the PEG's professional judgment that 2 lots in one location did not warrant full marks. He is at pains to point out that increased noise and activity were regarded as some of the disadvantages of a proposal for 160 patient units from the patient's perspective, and not criteria or sub-criteria. He says that they are consequences or negative outcomes of the doubling in size rather than criteria.

116. Mr McCarthy responded to these averments in his second affidavit. He does not understand why HSE did not raise any clarifications with the applicant with regard to the matters to which Mr Quinlan has averred, if the PEG considered there to be ambiguities in the applicant's tender in relation to the building layout for the combined bid. He points to the fact that the tender documentation clearly envisaged that clarifications would be raised with tenderers during the evaluation process, and that instead of seeking to clarify matters of concern the HSE proceeded to make a number of incorrect and groundless assumptions. He examples that Mr Quinlivan had stated in his first affidavit that the applicant had only provided a 31 station layout plan over three floors, and had not submitted any alternative layout plan for the additional stations which would be required to accommodate its 160 patient option in its combined bid, which he stated could not be accommodated in a 31 station layout over the specified two shifts per day provision. Mr McCarthy also refers in this regard to what Mr Quinlivan stated at paragraph 123 of his first affidavit. In that paragraph he has stated that the proposal for forty stations to accommodate 160 patients suggested a likely expansion onto a fourth floor at the Beacon facility which presently houses the boardroom and training areas. Mr McCarthy regards as incorrect and groundless the assumption that an expansion onto the fourth floor would be required. He does not explain why it is a groundless and incorrect assumption in that affidavit.

117. Mr Quinlivan has responded to this matter in his second affidavit. He makes a number of points. He points out that the applicant put in a tender for Lot 3 alone at the Beacon facility, as well as putting in a combined bid at that location for Lots 3 and 4 together. But it appears that the same layout plan submitted applied to both bids, and accordingly HSE evaluated both bids by reference to that one layout plan, and it was this that caused HSE to presume that the latter combined bid would involve an expansion onto an additional floor. He refers to the fact that at the dialogue meeting which took place on the 18th October 2011 the applicant had in fact mentioned that there was additional capacity available at the Beacon facility by utilising an additional floor. However, by that time, the applicant had not made known to HSE its intention to put in a combined bid for Lots 3 and 4 at that facility, and accordingly, there was no opportunity for HSE to make any observations or comments on such aproposal.

118. Mr McCarthy in his second affidavit also refers to the fact, as set forth in paragraph 83 above, that Mr Quinlivan has stated that increased noise and activity were regarded as some of the disadvantages of a proposal for 160 patient units from the patient's perspective, but that he appears to be confused in this regard as Section 11.9 relates to the "Facility" and not to the "Patient Experience" section of the tender. I regard that point as being specious, disingenuous and an exercise in semantics. There is quite clearly an overlap in terms of patient satisfaction or experience between the facility itself and the patient's experience within the facility. Mr Quinlivan states in his second affidavit that at a dialogue meeting on the 28th October 2011 Dr Plant advised the applicant that "*the evaluations of locations will be considered from the patient experience perspective and will involve some subjective judgment on the part of the evaluation team*" and he refers to notes of that meeting which are exhibited.

119. The above provides a summary of the facts grounding this point of objection to the tender process. I do not say it is an exhaustive account, but it is sufficient in my view. It provides an adequate factual background for a consideration of the legal principles which Ms. Barrington submits apply and from which she seeks to urge that the HSE has breached the general principles of equal treatment and transparency, and has been guilty of manifest error by applying these undisclosed principles.

120. It is submitted that the principle of equal treatment and transparency require that where a contracting authority evaluates a tender bid by reference to particular criteria, those criteria must be disclosed in advance so that tenderers may know in advance what criteria are applicable and have to be satisfied. Ms. Barrington has referred to, inter alia, C-*470/99 Universale-Bau AG & others v. Entsorgungsbetriebe Simmering GmbH* [2002] ECR I-11617 for authority for the proposition that the requirement to inform tenderers of the criteria by which the tenders will be evaluated is in order to ensure that the EU primary law general principles of equal treatment and transparency are complied with, and that this applies as much to Annex IIB contracts under general principles, as they do to Annex IIA contracts via requirements set forth in the relevant articles of the Directives which apply only to the latter. She submits that these conclusions are supported and endorsed by the ECJ in its judgment in *C-226/09 Commission v. Ireland*, and also in its judgment in *C-340/02 Commission v. Repubic of France*.

121. Ms.Barrington has placed much emphasis also on *Case 331/04 ATI EAC Srl v. ACTV Venezia SpA and others* [2005] ECR II-154 as authority for saying that it is necessary on an application such as this only that the applicant demonstrates that the non-disclosure could (and not would) have made a difference to the preparation of the claimant's tender. In that regard the Court stated at paragraph 28 of its judgment:

> "*... it must be determined whether the decision contains elements which, if they had been known at the time the tenders were prepared, could have affected that preparation."(emphasis added)*

Ms. Barrington submits that the evidence provided on affidavit by Mr McCarthy satisfies this requirement.

122. Mr Healy has submitted that the applicant is attempting to persuade the Court that the rules applicable to Annex IIA contracts in the Directive are in fact those which must apply in the case of an Annex IIB contract, even if this is achieved by means of general principles unde EU primary law of equal treatment and transparency. He submits that this is incorrect, and that he is supported in his view by the judgment in *C-226 Commission v. Ireland* - an Annex IIB contract case. However, it seems to me that the judgment is not an authority for precisely what Mr Healy is saying in this instance since it is really stating, inter alia, that while in an Annex IIA case Article 53(2) of the Directive meets the requirement of ensuring compliance with the principles of equal treatment and transparency by requiring that the relative weighting given to each criteria shall be specified, that does not mean that in order to satisfy the two principles in any other contract, i.e. an Annex IIB contract, it is necessary that the weightings of each criterion should be specified. Whatever about it not being necessary, for the purpose of satisfying the two principles, that weightings be

specified in Annex IIB cases, I cannot see how those two principles can be satisfied if the tender documents do not even specify the criteria by which the tender will be evaluated. I do not see *Commission v. Ireland* as authority for that.

123. However, before the applicant can win on the law, it must win on the facts. In my view he has not done so. I am satisfied that noise and activity have not become criteria which were not disclosed to the applicant. That is to read far too much into the brief comment on the score sheet in an effort to contrive a challenge to the tender result. Section 11.9 is a weighted section for which marks ranging between 0-10 could be awarded. Unless a contracting authority is expected to set out its requirements in the form of multiple choice questions with a box beside each to be ticked, so that the task of evaluation is reduced to a simple mathematical calculation, there must be scope within the tender evaluation process for the evaluation team to reach a score by means of applying its professional judgment to each question. That process avoids the mere adding of marks from ticked boxes, which would render pointless the experience and expertise available among members of a team such as the PEG in this case. Such bodies must be permitted to exercise a degree of discretion in how a section is scored. It must also be allowed to briefly comment on how or why a less than perfect score was considered appropriate. In my view, the applicant is being overly pedantic in attempting to establish fault on the part of the PEG by its use of the words "*more noise and activity anticipated in a 40 station unit*" on the score sheet. That is not the introduction of new criteria. There will always be some noise and activity in any area where people gather. The fact that the PEG was of the view that a 40 station unit would have more of such noise and activity that a unit half that size is not something which it had to announce in advance, particularly in circumstances where the applicant at no stage forewarned that it would put in a bid for two units in one location.

124. I have to say also that the applicant has only itself to blame if it feels taken by surprise that HSE considered that a 40 station unit would be noisier and have more general activity within it than a 20 station unit, if it believes that this is wrong, and it certainly should not be characterised as a manifest error on the part of the HSE such that the entire process should be recommenced. After all, it was the applicant's decision not to disclose to HSE in advance of its final tender that it was proposing to bid for Lots 3 and 4 in a single location, in addition to bidding for each at separate locations. It was perfectly entitled either to keep its powder dry in that regard, or to change its mind at the last minute and put in such a bid. But in conducting itself in that way, it not only deprived itself of being able to avail of the dialogue phase of the process for the purpose of clarifying any matters of concern to it which it felt might benefit from clarification, or asking relevant questions.

125. But it also deprived the HSE of an opportunity to volunteer comments that the applicant may have found of assistance in formulating its tender. In this case the applicant simply went in blind, and must have just hoped for the best. It cannot put the blame on the HSE for not seeking out clarifications before evaluating its tender bid in the way it has sought to urge upon the Court. Dialogue is a two-way process, and particularly in an Annex IIB contract, I would have thought that it served a very useful purpose which, in this case, could easily have assisted the applicant in relation to its intention to put in a combined bid. Inevitably, the HSE would have been in a position to point out what it felt may be problems relating to increased noise and activity, and to have expressed a view in relation to that problem as they saw it. No doubt, if Mr McCarthy is correct, he would have been able to explain why he felt that these concerns were not soundly based. But none of that sort of dialogue was possible because the applicant never indicated prior to its final tender that it was bidding for two lots in one location. That cannot be laid at the door of the HSE on the basis of lack of transparency and equal treatment, or on the basis of any manifest error on the part of HSE.

(b) Location:
126. The applicant submits that the HSE, in its evaluation of its 2 lots in one location bid for Lots 3 and 4 together, applied an undisclosed criterion by regarding negatively, without advance disclosure, a tender for two lots at one location. Again, the applicant says that if it had known that such an undisclosed criterion was in play it would have tailored its tender so as to address that requirement in order to optimise its prospects of success. It is suggested that the tender documentation should have indicated the HSE's preference not to award the contract to a tenderer who put in a combined bid. Mr McCarthy has averred in his first affidavit that it was clear from the debrief meeting on the 7th March 2012 that there was fundamental opposition by HSE to such a combined bid proposal, and that if it was so fundamental to HSE then it ought to have been so stated in the tender documents, and that its failure to do so is a breach of transparency and equal treatment principles.

127. Mr Quinlivan on the other hand says that the documentation made it clear that what HSE was seeking was four satellite units for treating up to 80 patients each in both Dublin Mid Leinster and Dublin North East, and that this was its preferred option. He accepts however that there would be commercial benefits for the applicant if two units could be accommodated in one location. He also says that while the documents did not exclude such a possibility, a bid for two lots in one location is not in accordance with the requirements and was not the preferred solution.

128. Mr McCarthy on the other hand sees things differently, and has stated that the applicant was encouraged by HSE to bid on a combined basis as a result of a comment which he says was made by Mr Quinlivan at a dialogue meeting on the 4th November 2011. He has exhibited notes of that meeting which include the following:

> *"Comment made that we could bid for lots 3 and 4 in one building i.e. Beacon. While preference from the clinicians is for 2 discrete buildings if we offer a very competitive price for both lots at Beacon the clinicians may have to compromise on the separate buildings issue."*

129. Mr McCarthy avails of this note to state that Mr Quinlivan is incorrect when he states that the 2 lots in one location bid did not emerge until the final tender, as the note in his opinion indicates that such a proposal was discussed at the meeting on the 4th November 2011. However, in my view that is stretching matters. Obviously the concept must have arisen but it cannot be credibly said that it is evidence that the applicant put forward a proposal in that regard. All it indicates is that the possibility of such a bid was mentioned or at least not ruled out. The characterisation of this note, in para. 37 of Mr McCarthy's second affidavit, as being Mr Quinlivan's suggestion that the applicant submit a bid for two lots in one location is going to far. It is disingenuous of Mr McCarthy to suggest that because it was Mr Quinlivan's own suggestion "*there was no necessity to raise a question in relation to its suitability ...".* In fact, as was subsequently averred by Mr Quinlivan in his second affidavit, Mr McCarthy did not attend that meeting on the 4th November 2011.

130. Mr Quinlivan was at that meeting and has described what happened as far as discusson about a combined bid is concerned. Contrary to Mr McCarthy's averment , Mr Quinlivan has stated in his second affidavit at para. 43 that "*the query in relation to submitting a proposal for 2 Lots in 1 location was in fact first raised by Baxter during the dialogue meeting on 4 November 2011*", and that he indicated that such a proposal would be considered. He goes on to state that the second sentence of the note exhibited by Mr McCarthy confirms that HSE's preferred option was two separate units "*but that each bidder had the option to put forward such attractive financial proposals which could establish that an alternative option (such as two lots in the one location) would be the most economically advantageous*".

131. Mr Quinlivan has also stated in his first affidavit that at no stage did the applicant seek any clarificationin in relation to the specification contained in the initial Invitation to Tender which issued on 29th July 2011, and neither did it raise that matter at any of the three dialogue meetings with the PEG where it might have been canvassed and discussed as to its suitability.

132. I have seen no replying affidavit from Mr McCarthy in relation to what occurred at the meeting of the 4th November 2011. He does not seem to dispute Mr Quinlivan's version of that meeting. He was not at the meeting, and seems to have simply examined the note of the meeting of the 4th November 2011, and having parsed and analysed the final paragraph has seized upon the words "*comment made that we could bid for Lots 3 and 4 in one building*" in the note, and in the hope that that if he gave no context for that comment or how it arose at the meeting, he might concoct an argument to the effect that it was Mr Quinlivan's own suggestion all along, and go on to express surprise that Mr Quinlivan should swear on oath that a bid for two lots in one location was not in accordance with the preferences and requirements of HSE as set forth in the tender documents.

133. That does no credit to Mr McCarthy in my view. I have no doubt whatsoever that the version of events at that meeting of the 4th November 2011 as described by Mr Quinlivan is correct. It makes perfect sense that it should have happened in that way. It is not clear who from Baxter was at that meeting, but certainly Mr McCarthy was not. But if he wished to challenge what Mr Quinlivan has said, he couldhave done so by having sombody from Baxter who attended the meeting contradict what Mr Quinlivan stated.

134. The idea that HSE has applied an undisclosed criterion regarding location in the circumstances described is unstateable in my view. The tender documents were clear in stating that what was sought was four satellite units, two being in the South Dublin/Evvirons area as described in Sections 4 and 5 of the Invitation to Tender. I fail to see why having so described its requirements it was obliged as a matter of transparency and equal treatment to go further and say something like "*by the way, if anybody proposes to bid on the basis of a combined lots basis, they should know that our preference is for a single location*". In my view, the applicant had every opportunity to canvass such an idea ahead of putting in its final tender bid. They could have raised the possibility at any of the dialogue meetings, and discussed it openly, even if such a bid had not occurred to them in July 2011 when preparing its initial tender. They could have sought a clarification at any stage. The fact is that apart from some mention being made on the 4th November 2011 at the meeting that date, no effort seems to have been made by the applicant to seek out the views of the HSE.

135. The applicant has sought to rely on views allegedly expressed by Dr Plant at the debrief meeting on the 7th March 2012 for submitting that the "*HSE was inherently opposed to awarding the contract for two units in one location*". Mr McCarthy has averred that at the debrief meeting Dr Plant stated that HSE did not want what were called "*super units*", and that he also expressed that his own personal preference was not for a split floor unit. Dr Plant in response has stated that Mr McCarthy has misrepresented his views in this regard, and avers that he made it clear to Mr McCarthy that a two site solution was to be favoured over a single site solution. He states that HSE had allowed the specification to incorporate such a solution *"in case no other better solution was achieved",* but he states that he never stated that "*the HSE was inherently opposed to awarding a contract for two lots at one location*". He also feels misrepresented by Mr McCarthy in relation to what he may have said during a general discussion about split floor units versus sngle floor units.

136. As I have said, this issue is whether the HSE unlawfully failed to disclose a criterion, namely that the facilities could not be in one location, or at least that such a bid would be looked upon less favourably. It is pleaded that if this had been known to the applicant it would have "*tailored its tender so as to address this requirement and so as to optimise its chance of success*". But, as we know, the applicant did in fact bid on a single location basis as well as on a combined bid basis. I am unclear as to how the applicant feels it could have tailored its combined bid any differently had it been aware of what it characterises as the undisclosed criteria.

137. I am satisfied also that the HSE are not guilty of breaching the principles of transparency and equal treatment in the circumstances argued. It was up to the applicant to seek clarifications if it sought to depart from the requirements specified in the tender documentation. By not doing so, other than by whatever brief discussion took place on the 4th November 2011, it deprived itself of information it may otherwise have gained through the dialogue process or by way of written clarification.

Issue 4: Unlawful Evaluation of the Model of Care criterion:
138. The issue raised under this heading of complaint in the Statement of Grounds has been confined now to arguing that the respondent failed to take into account, for the purpose of evaluating the applicant's tender against the Model of Care criterion, "*[the] confirmation in the tender submission that the applicant would ensure that sufficient staff would be employed to provide the required quality of patient service to include cover for holidays, sickness and other absences*".

139. The applicant has made submissions under three headings: (i) Failure by HSE to seek clarifications from the applicant; (ii) HSE misconstrued the applicant's tender and/or took into account an irrelevant consideration; and (iii) HSE failed to disclose its methodology for evaluating the Model of Care Sub-criterion. The last of these is not one of the grounds set forth in the Statement of Grounds in this case, and for which leave was granted, or in the Amended Statement of Grounds, and therefore may not now be raised. But in any event, having heard argument on it, I would not consider it to be a meritorious ground in this case.

140. The issues which have been properly raised arise from Section 10.4 of the Revised Tender Specification which provided as follows:

> *"10.4 – Tenderers are required to outline how they propose to meet a requirement that they must retain a sufficiency of staff to provide an acceptable level of service. The* ***minimum requirements*** *are as follows:*
>
> • *To provide at all times a* ***minimum*** *ration of 1RGN:4 patients on treatment; and*
>
> • *In addition a supernumerary unit/shift manager* ***must*** *be present in the treatment area.*
>
> • *In order to maintain this ratio at the treatment area, the provider may wish to contemplate retaining a sufficiency of other staff to support the delivery of this requirement.*
>
> *Clinical staff* ***must*** *have the skills, competence and expertise necessary and appropriate for the proper performance of the services and to undertake the tasks that may be assigned to them.*
>
> *Sufficient staff* ***must*** *be employed to provide the required quality of patient service to include cover for holidays, sickness and other absences. The staff must be competent in dealing with medical emergencies."*

> *There must be an appropriate skill mix and the staffing level must be acceptable to the referring Consultant Nephrologist/Parent Renal Unit.*
>
> *It will be an essential element of performance monitoring of this contract that the provider is in compliance with this ratio at all times. [all emphases in original]*

140. It is the part of the above which provides that "*sufficient staff **must** be employed to provide the required quality of patient service to include cover for holidays, sickness and other absences. The staff must be competent in dealing with medical emergencies*", and the applicant's response thereto, which base the issue raised by the applicant. In its response to 10.4 the applicant commenced by stating that its details of staff ratios, staffing levels and types were included in its response to section 10.8. It went on to deal with the other matters set forth in 10.4. In relation to the passage just quoted, the applicant's response was:

> *"We will ensure that sufficient staff will be employed to provide the required quality of patient service to include cover for holidays, sickness and other absences. Our proposed staff ratio, detailed below, provides for such cover. Staffing will be planned and organised by the Nurse Manager supported by our Human Resources personnel. As an employer of more than 1000 personnel in Ireland, we are confident that we have the necessary resources and procedures to manage the staffing requirements of the Satellite Units." [my emphasis]*

141. The applicant was scored 4 marks out of 10 for Section 10.4. The remark on the score sheet is: "*No demonstration of contingency factor. Complement of staff outlined does not adequately demonstrate adherence to HSE's requirement*" [my emphasis]. This was raised by the applicant at the debrief meeting, and according to the Minutes of that meeting HSE advised the applicant as to why that mark was appropriate by reference to what was stated on the score sheet to which I have just referred.

142. Mr Quinlivan places emphasis on the requirement in 10.4 that the tenderer demonstrate "*how they propose to meet a requirement that they must retain a sufficiency of staff to provide an acceptable level of service*" (my emphasis), and states that what the applicant did was simply to state that it would "*ensure that sufficient staff will be employed to provide the required quality of patient service to include cover for holidays, sickness and other absences*", but without any demonstration as to how that could be achieved with the staff levels set forth in Section 10.8. In that regard, one can see that in its opening paragraph, section 10.4 required that tenderers "*are required to outline how they propose to meet a requirement that they must retain a sufficiency of staff to provide an acceptable level of service*" [my emphasis].

143. The affidavits explain how the HSE did its own calculations in order to calculate how the staff levels proposed by the applicant as shown in its answer to 10.8 would meet its specifications. Having done that exercise it came to the conclusion that the levels set forth at 10.8 by the applicant fell short of what was required. Mr Quinlivan sets out the methodology applied by the PEG when making its calculations. He refers at paragraph 40 of his second affidavit to the fact that the applicant did not provide any staff rosters "*or any other information*" by which it might have demonstrated, as required, how the applicant would fulfil the staffing requirement with the 11 RGNs which were proposed. In those circumstances the PEG applied what he describes as "*standard working practice*" and found by doing so that the applicant's proposal fell short, and indicated a ratio of 1RGN:4 patients whereas the specified requirement in 10.4 is "*to provide at all times a minimum ratio of 1RGN:4 patients on treatment*".

144. According to the PEG's measurements, a minimum of 12.9 RGNs would be required to fulfil the specified staffing requirements, including contingencies, and therefore any tender which specified 13 RGNs or more would achieve full marks on this section. Mr Quinlivan states that the winning bid specified 13 RGNs to be deployed, and achieved 10/10 on this section. In the view of the PEG the staff level proposed by the applicant would lead to a situation whereby for over half of every year the required staff ratio could not be achieved, and this accounted for the fact that only 4 marks out of a possible 10 were awarded. But it would have been open to the applicant to answer 10.4 in a manner which demonstrated the applicant's rationale for its proposed staffing levels, and to have shown how that level would meet the requirement. It was the absence of any such demonstration that left the PEG to make its own calculations by reference to standard practice, and reach its conclusion.

145. Mr McCarthy states in his first affidavit at paragraph 69 that at the debrief meeting on the 7th March 2012 HSE indicated that there had been some confusion among members of the PEG regarding the staffing levels submitted by the applicant, and submits that in such circumstances it was incumbent upon the HSE to seek to clarify matters with the applicant if it considered there to be an ambiguity. On the other hand, Mr Quinlivan states in reply that there was no confusion, but rather the problem was that the applicant's tender had not demonstrated how the level would be met by the staffing proposed and that no staff roster was submitted to assist in that regard. The applicant points to the fact that the Invitation to Tender made no requirement to provide a staff roster.

146. It is submitted also that in so far as the PEG applied its own methodology by reference to "standard practice" when calculating whether the staffing levels proposed by the applicant would meet the minimum level specified, it failed to disclose that methodology to the bidders in advance. It is submitted that by so doing the HSE fell into error, and also that if there were any doubts in the mind of the PEG as to how the applicant's staffing levels would meet the minimum requirements, then it should have availed of Rule 18 of the Tender Competition Rules whereby it may require a tenderer to clarify its tender. Ms. Barrington has referred to *Case T-211/02 Tideland Signal Ltd v. Commission* [2002] ECR II-3781, and also to the judgment of McCloskey J. in *Clinton v. Department for Employment and Learning and Department of Finance and Personnel* [2012] NIQB 121 in support of her submissions in this regard.

147. The facts in *Tideland* are important to note so that one sees the basis for the conclusion therein that there was an ambiguity in the tender response rather than a "formal error". In *Tideland* the Commission had sought tenders for a particular project. The Instructions to Tenderers required that they confirm that they would remain bound by their tenders "*for a period of 90 days from the deadline of submissions of tenders (29 April 2002)"* which period expired on 28 July 2002. Tideland submitted a tender on 25th April 2002, and included with it a letter giving the required confirmation. However, the Commission returned unopened all tenders to bidders submitted by the 25th April 2002 deadline, following its decision on the 7th May 2002 to modify the description of Lot 1, and indicated that it was allowing extra time so that tenderers might if necessary amend their offers and resubmit new tenders by the new deadline of 11th June 2002.

148. Tideland did not consider it necessary to amend its tender despite the amendment in respect of the description of Lot 1, and resubmitted precisely the same tender, including the same letter of confirmation which had stated that "*this tender is valid for a period of 90 days from the final date for submission of tenders, i.e. until 28/07/02*". In other words the letter had not been altered to take account of the extended deadline for submission, namely 11th June 2002. On being opened, this tender was rejected on the basis that "*the validity of the offer was not reflecting the requested 90 days from the date of the submission of the tender*".

149. It was against that background that the ECJ stated its conclusion, and decided that the statement contained in the letter which accompanied the re-submitted tender was ambiguous and not a "formal error". It was in such circumstances that the Court

considered that since the Commission had the power to seek clarifications provided that such clarifications "*must not seek the correction of formal errors or major restrictions affecting performance of the contract or distorting competition*", it ought to have exercised that power. At paragraph 37 of its judgment the Court stated:

> *"While the Commission's evaluation committees are not obliged to seek clarification in every case where a tender is ambiguously drafted, they have a duty to exercise a certain degree of care when considering the content of each tender. In cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then in principle, it is contrary to the requirements of good administration for an evaluation committee to reject a tender without exercising its power to seek clarification." [my emphasis].*

150. Ms. Barrington submits that where the PEG considered that it was not clear from the responses to 10.4 how the applicant considered that the requirements would be met from the staffing levels set forth in 10.8, or that further information was needed in the form of staff rosters, it was obliged to have that matter clarified under its power to seek clarifications, before concluding that the response merited a mark of 4 out of 10. She refers to the fact that, as described earlier, the HSE had sought clarification from Beacon Dialysis Services Limited at EOI stage in relation to how it could meet the minimum qualification criteria.

151. I reject the argument that the HSE should in this case have sought to clarify matters with Baxter after its Final Tender was submitted. I accept of course that there can be cases where a tender contains an ambiguity in some respect, and where the power which the contracting authority has to seek clarification ought to be exercised, and also that in such a case not exercising the power could breach principles of good administration and even proportionality. But in my view the ambiguity described in *Tideland* is far away from what is contended in the present case. For example, in the present case, 10.4 was a weighted question where it was necessary for the PEG to apply its professional judgment and experience in order to arrive at a score for the applicant's response. It was not, as in *Tideland*, a pass/fail question.

152. It is easy to see why in *Tideland* the issue was considered to be one of ambiguity rather than a formal error, particularly in circumstances where it was the Commission's own action by which it extended the deadline and returned all submitted tenders, which had produced the problem in the first place. It was a matter that was capable of quick and easy resolution if the Commission had sought to have the matter clarified, since a new letter reflecting what was inevitably going to be the intention of Tideland could easily and quickly be furnished.

153. The matter at issue in the present case is entirely different. I cannot see any ambiguity as such in the applicant's response to 10.4 such that the HSE was obliged to seek out clarifications. In fact there is no lack of clarity. The problem for the applicant is that it simply did not answer the question asked. It was asked to say or show how they propose to meet a requirement that they must retain a sufficiency of staff to provide an acceptable level of service, and then the minimum requirements were set forth. The applicant simply stated that it would ensure that those requirements were met, and in 10.8 stated what staff it proposed. That was not a measurable response. It did not demonstrate how that level of staff would meet the minimum requirements, and it ought to have done so. If it had, then the PEG would not have been left to its own devices and applied a methodology based on what it considered to be "standard practice" in the industry. It is no answer to say that the HSE never indicated that it required a staff roster. It was not necessary for a full response that a roster as such be provided. It might have helped, but so would an explanation in a form other than a roster as to how the provision of 11 RGNs was sufficient cover for core hours as well as contingencies. That is not an ambiguity such that *Tideland* applies. I am satisfied that the HSE are not guilty of manifest error in relation to this matter.

154. There was not in my view any requirement upon the PEG to get back to the applicant so that the applicant would be given an opportunity to mend its hand in its tender, by giving a better answer, or being given an opportunity to change its tender. It is not a similar situation to what happened at the EOI stage and where the HSE sought to clarify matters with Beacon Dialysis Services Limited. That was a pre-qualification procedure, and not the scoring of a submitted tender. It is perfectly reasonable for a contracting authority at EOI stage to do its best at EOI stage to ensure that as many as possible entities have the opportunity to submit a tender. Different considerations must come into play after tenders have been submitted.

Issue 5: Various manifest errors:

155. There are six remaining matters which the applicant submits amount to manifest errors on the part of HSE in relation to its evaluation and marking of the applicant's tender. I have already set forth the applicable principles to the question of manifest error. The applicant must demonstrate a clear error on the part of HSE in its evaluation and scoring of its tender. It is not sufficient that the applicant simply explains why it considers that a better mark should have been achieved. As I have said, the PEG is entitled to avail of its professional experience and expertise in arriving at a particular mark. It will be permitted a margin of appreciation or discretion in the score which it awards. It may not, of course, apply an undisclosed criterion, as that would infringe the principles of transparency and equal treatment. Where a breach of either of these principles is established, then it is clear that no element of discretion can save the day.

Tender Question 11.3 – route access for ambulance and emergency vehicles:

156. Section 11 of the Final Invitation to Tender document related to "Building Issues". One of the weighted criteria was Section 11.3 which stated:

> *"The physical location of the building and the building itself must demonstrate capability to:*
>
> *(a) be able to accommodate patients with physical and sensory disabilities;*
>
> *(b) Facilitate ease of access for patients with physical and sensory disabilities;*
>
> *(c) Have satisfactory set down and pick up facilities;*
>
> ***(d) Facilitate emergency ambulance and route access**;*
>
> *(e) Provide a suitable waiting area for patients;*
>
> *(f) Provide adequate free parking spaces, conveniently located to the unit for patients and any HSE clinical staff attending the unit." [my emphasis]*

157. The applicant scored 8 out of possible 10 marks on this question, but nevertheless takes issue with that deduction of 2 marks. It was the applicant's response to (d) above, and the PEG's concerns about the emergency vehicle access at the location which

resulted in the deduction of 2 marks. The applicant's response to this question in the tender document is simply "*An appropriate ambulance bay is in place for emergency vehicles when required*". On the score sheet, the PEG has noted "*Route access for emergency vehicles/ambulances via busy underground carpark*".

158. The applicant's Statement of Grounds makes its objection on the basis that "*[HSE] deducted marks from the applicant under the Facility Sub-Criterion on the basis that route access for emergency vehicles and ambulances was via a busy underground car park when the ambulance bay is in fact located beside the Beacon Hotel and not in the car park*". This is the manifest error contended for. Mr McCarthy in his first affidavit states that the ambulance bay in question is located at the entrance to Beacon Court at the rear of Beacon Hospital, and not in the car park. He then states that "*HSE carried out two site visits to the Baxter facility at Beacon and the location of the ambulance bay should have been obvious to the site visit team*" [my emphasis]

159. It will have been noted that the applicant's response to 11.3 did not identify where the particular ambulance bay was and did not identify the route. It simply stated: "*An appropriate ambulance bay is in place for emergency vehicles when required*". Mr Quinlivan in his first affidavit also pointed to the fact that in its response to 11.4 when addressing the question of a covered set down area having to be "large enough for ambulance access if emergency occurs", the applicant responded: "Patients enter the building through an underground car park and therefore not exposed to inclement weather. The car park is large enough for ambulance access". [my emphasis]

160. Mr Quinlivan also referred to the applicant's response at 16.5 dealing with procedures to be undertaken if a patient suffers a life threatening emergency. In its response it referred to the applicant's current emergency policy at the Beacon facility which states, inter alia, as follows:

> "*If patient is to be transferred to A&E Department, ring 999 or the ambulance control depending on the severity of the emergency;*
>
> *Continue treatment and follow instruction from Staff Physician until ambulance crew arrives;*
>
> *Instruct a staff member to coordinate access through Beacon Hospital for ambulance transfer." [my emphasis]*

161. In his affidavit, Mr Quinlivan states that since the lift at the current Beacon facility is not large enough to accommodate an emergency trolley, it was necessary that the patient be transferred to an ambulance via the covered bridge way to the Beacon Hospital and then brought in the Beacon Hospital lift down to the hospital ambulance bay which, he says, is underground off the ramp into the Beacon Campus car park. He states that the HSE was not, and is not, aware of any alternative ambulance bay at the Beacon Campus, and he refers again to the fact that the applicant, in its response, had not demonstrated any other. It had simply stated that "*an appropriate ambulance bay is in place for emergency vehicles when required*".

162. Mr McCarthy's response to Mr Quinlivan is to assert that he is surprised that the HSE did not raise a clarification with the applicant either at one of the site visits or at any time prior to or subsequent to those visits. He states also that if the applicant had been made aware of any confusion or concern in this regard it could have addressed those concerns.

163. I should add that Mr Quinlivan expressed some views on what Mr McCarthy in his first affidavit about the ambulance bay in fact being located at the entrance to Beacon Court at the rear of the hospital and not in the underground car park of the Beacon Campus. Mr Quinlivan states that this was the first occasion that the applicant had made this statement, whereas it could have specified it in its response if that was what they were referring to by way of "*an appropriate ambulance bay*". His view is that in any event that location is a very congested area involving taxi set down and waiting area for the campus and he says that it is susceptible to blockages. He opines that any such suggested ambulance bay facility would not have achieved any greater mark than that already awarded.

164. In my view there is no question of any manifest error under this heading. The problem for the applicant is the nature of its response. It was up to the applicant, as a diligent and competent tenderer to respond in a way that permitted the contracting authority to be aware of everything which is to be considered. The PEG was entitled to take the applicant's response into account, both on its own, and also by reference to any other parts of the tender responses such as the information contained at 16.5 to which Mr Quinlivan has referred. The PEG was not obliged to seek out additional information by way of clarification.. There was no ambiguity in the sense required by *Tideland* in my view.

Tender Question 11.4: same floor treatment areas:

165. Under a heading 'Preferences for Unit' in Section 11 of the Tender document, HSE specified a number of "preferences" which it said would attract a higher score in the marks awarded. One of those preferences was that:

> "*(b) patient treatment areas should be on the same floor level".*

The applicant answered that question by stating:

> "*(b) We have created five clusters of dialysis areas each with a dedicated nurse station and recovery area. Patients have access to their assigned area only and enter those areas directly from the elevator."*

166. The applicant received 4 marks out of a possible 10 under this question. The PEG commented on the score sheet "*treatment areas are on three floors*". Mr McCarthy has stated that while the facility is on three floors, the treatment which each individual patient will receive will be delivered on one floor only. Mr Quinlivan says that this response ignores the fact that the preference expressed was that patient treatment areas – not area – should ideally be on one floor. The preference was that all treatments areas in the unit should be on one floor. He says that the applicant's tender showed clearly that treatment areas would be on three floors, as indeed it is presently at the Beacon facility. At paragraph 235 - 241 of his first affidavit, Mr Quinlivan explains the basis for that preference, and he expresses the view that the applicant clearly understood this question, in view of the responses given to the same question in relation to its other bids in respect of Beacon Renal and Springfield locations. But Mr Quinlivan explains in these paragraphs that, for example, it would be "*challenging for a single nurse manager with overall responsibility for the unit in a treatment area that is not on a single floor*". He considers also that a single floor facility offers better ergonomics in terms of nursing supervision of patients and in facilitating emergency overlap should a problem develop.

167. Mr Quinlivan has also stated that at the dialogue meeting which took place on the 28th October 2011, Alan Markey from Baxter was present and specifically raised the question of the specification for a ground floor location with treatment areas on a single floor. He goes on to state that Mr Markey mentioned that these preferences were not in the original specification, and that the HSE

clarified the situation. He avers that the applicant did not raise any other issue in this regard, and goes on to state that of the 51 proposed locations put forward by tenderers, 50 were single floor treatment areas. In other words, the applicant's two Lots in one location tender was the only location where it was proposed to have treatment areas on more than one floor.

168. I fail to see how the applicant can argue successfully for a manifest error on the part of the HSE. It was a weighted question. In order to mark the response the PEG was entitled to have regard to the way the question was asked, and to apply its professional experience and judgment to the response given. The question was clear. I can see no ambiguity in the question. It is clear that the applicant understood the question as one sees by its response to the same question in respect of its other bids. No clarification was sought at any dialogue meeting, where there clearly was an opportunity to seek such where the applicant was considering a facility on three floors. There was no manifest error on the part of HSE in this matter.

Tender Question 5.1.5: Lot 4: Deduction of marks – not west of River Dodder:
169. This question made 5 specifications for the location of Lot 4. the tender question stated that Lot 4 "*should ideally be located (a) south of the River Liffey; (b) West of the River Dodder; (c) Within a 10 mile radius of AMNCH [Tallaght Hospital]; (d) Within the proximity of a large population centre; and (e) The unit must have the capacity to treat up to 80 out-patient haemodialysis patients*". The facility at the Beacon which was proposed for Lot 4 by the applicant is not "west of the River Dodder" and Mr Quinlivan states that the applicant does not seem to asserting otherwise. The applicant scored one mark out of a possible ten on this question, and in circumstances where the applicant's response complied with four out of five of the specified criteria, it is submitted that a manifest error has occurred in circumstances where the applicant lost 90% of the available marks.

170. Mr Quinlivan makes the point also that all the five proposals from bidders that involved locations that were not within the preferred catchment area scored only one mark out of ten.

171. There was no manifest error on the part of HSE in relation to the award of one mark out of ten. It was a mark consistently awarded for any such tender that was for a location which was outside the desired catchment area. It is not anomalous. The PEG was perfectly entitled to regard location as being of particular importance, and to mark it accordingly. The fact that the applicant considers that the mark is harsh given its compliance with the remaining four elements of the question is of no moment. It asserts that it is a disproportionate mark. But I do not consider that to be the case. The PEG is entitled to attach an importance to that element if it considered that it merited that importance.

Value Add Options:
172. Under Section 28 of the Invitation to Tender, a tenderer was given an opportunity to put forward any matter(s) which they considered would provide added value to the contract if awarded to it. The applicant put forward four such matters, but three only are the subject of submissions in this case.

Spare Capacity:
172. Under the heading of Spare Capacity the applicant stated it had capacity in its unit to treat up to 180 patients, and that if it was awarded the contract, that capacity would be available to all Parent Units, and would be available also for holiday and visiting patients. The PEG considered that this additional capacity was not of value since, and as had been made known to tenderers at a meeting on the 11th June 2011 and on other occasions according to Mr Quinlivan, the long-term plan of the HSE and the National Renal Office (NRO) is to commission additional units when capacity issues arose rather than expand existing units. This is put forward by Mr Quinlivan, and Dr Plant in his affidavit, as the reason why spare capacity was considered by the PEG in its professional judgment not to merit any additional marks.

173. This complaint cannot in my view amount to a manifest error by the HSE. The HSE has to be entitled to form its professional view on such a matter, and to see where the value add item in question fits into its longer term objectives. There is nothing "clearly wrong" about it failing to award a mark under this weighted question if it considered that it added nothing of value or significance. It was a matter for the HSE's professional judgment.

Self-Care Proposals:
174. Under Self-Care Proposals the applicant stated that if awarded the contract it would establish self-care facilities in each satellite unit, and went on to express the view that "*such facilities offer greater independence and flexibility for patients who are unable or unwilling or not fully suitable for home haemodialysis*", and described what it saw as the benefits to patients of such facilities, such as a greater sense of autonomy and well-being.

175. Mr McCarthy was surprised that no mark was awarded under this heading since Dr Plant stated at the debrief meeting on the 7th March 2012 that this was a service that all units would in the future be required to provide. To Mr McCarthy therefore it is irrational to be awarded zero marks for added value where it was being offered free from the start.

176. Dr Plant in his first affidavit addressed this matter at paragraph 46. He considers that Mr McCarthy has misrepresented what he said. In his affidavit he states that when patients perform self-care dialysis, there is a reduction in the need for nursing supervision, with a consequent reduction in cost to the provider. He states that self-care dialysis may well become a more widely accessible service in the future. He states also that he did not state at the meeting that HSE would mandate it in all units in the future, but rather that it was PEG's view that HSE was best placed to anticipate its broader acceptance as a desirable treatment modality, and that if such a view developed the HSE might well seek its application to all units. He expresses the view that "*there is very little value in an agreement to do something which may not happen for some time to come; which would be associated with a decrease in nursing resource use by the provider, and which could well be construed as likely to be a 'normal variation in practice*."

177. Mr Quinlivan stated that it was the PEG's professional view that when patients perform Self-Care Dialysis there is a reduction in the need for nursing supervision, with a consequent reduction in cost of the service of the provider. He went on to state that the PEG's view was that the Irish Nephrology community/National Renal Office would be best placed to anticipate the potential role for Self-Care in haemodialysis units in Ireland, and that if it is felt that this would be a benefit for patient care, with a reduction in cost, it was likely that the NRO would seek to implement it across all sites as part of normal practice, but that no such policy had yet been articulated. He went on to state that it was unclear how many patients would benefit from it and how clinical governance would be implemented.

178. Mr McCarthy in his second affidavit at paragraph 73 fails to understand, even in the light of the above averments, how the applicant's self-care proposals are not accorded any weight in the marking. He even refers to a portion of the Minutes of the dialogue meeting on the 28th October 2011 which noted in relation to this self care matter that HSE advised the applicant that "*it would be appropriate to include some aspects of the proposal within the value add section of the tender response*".

179. Again, I must conclude that the evaluation of whether what was stated under Self-Care Proposals added value is quintessentially a matter for the PEG. If it considered, for example for the reasons appearing, that this proposal did not add value from the HSE's perspective, it must be allowed to so conclude without being found to be in manifest error in that regard. It is not a clear error. It is simply a matter of its view differing from the view of the applicant. It is a matter where a margin of appreciation or discretion must be permitted to the expert body making the evaluation. There is nothing irrational about it in my view. The fact that the applicant may have been advised that it was appropriate that some aspects of it should be included in the Value Add Section cannot mean that a mark must be awarded. It simply means that it was appropriate to include it for consideration, and it was considered. From HSE's perspective, and as explained, this factor did not add value to the applicant's bid. If it was considered that it did not add value, then a zero score is not a manifest error.

Therapy Training:
180. Finally, under Therapy Training the applicant stated that it had a training unit at its Beacon facility which it had used to train both internal and external nursing and engineering staff, and that the unit was available to the HSE for staff and patient training. This training was available free of charge and the applicant stated that the market rate for such training would be about €1500 per module. Having noted that the current value to HSE of training carried out is €60,000, the applicant stated that it would continue to offer this training free of charge. Mr Quinlivan's response in his affidavit is that this offer of free training was not viewed by the PEG as of added value since it did not require such training at present, and that was why a zero mark was awarded as it was considered not to give added value to the HSE. Again, I must conclude that there is nothing clearly wrong or anomalous about receiving zero marks under this heading given the explanation. If it is considered to be of zero value, then no mark is merited, and it is within the discretion to be permitted to a body such as the PEG to so consider it. It is not a manifest error.

181. In so far as it is pleaded in the Amended Statement of Grounds under these headings that the HSE "*disregarded the applicant's proposals under the Value Add Sub-criteria*" despite what had been put forward by the applicant, there is no evidence that this is so for the reasons stated.

182. The penultimate point of objection under the Model of Care section is that the HSE erroneously awarded marks to the Beacon entity under the Value Add Sub-criteria for the following:

> (i) Joint Commission International ("JCI") accreditation providing additional comfort when the JCI accreditation relates to the existing facility operated jointly by the applicant and the Beacon entity, and relates to the applicant's facility including the treatment areas, the applicant's equipment, procedures and consumables.
>
> (ii) The provision of a physician and HaemoDefiltration ("HDF)" at no extra cost when this should have been evaluated under the cost criterion
>
> (iii) The assessment of the availability of a physician and value add when this had been deemed to be out of the scope of the tender.

183. In relation to (i) I fail to see how HSE could be found to be guilty of manifest error in awarding marks to the Beacon entity in relation to JCI accreditation if it considered that it merited same, and where the Beacon entity had offered it as a Value Add item in Section 28. The problem for the applicant is that it did not offer this accreditation as a Value Add item for consideration at all, and hence was not given a mark for it. I will return to that matter below.

184. In relation to (ii) Mr McCarthy has averred at paragraph 83 of his first affidavit that he was surprised that marks had been awarded to the Beacon entity under the Value Add section for the availability of a physician and the provision of HDF at no extra cost, since section 2.3.5 of the Revised Invitation to Tender had stated that proposals that incur quantifiable cost savings would be captured in Life Cycle Costs if appropriate. He refers to the fact that Section 14.22 of the Revised Specification required tenderers to include a quotation for HDF treatments in Appendix 3. He refers also to the fact the applicant had confirmed in its tender at Section 25.10 that it would not propose any additional charges for HDF patients and and this was confirmed in the Pricing Schedule at Appendix 3. He goes on to state that "*given the clear instruction in the Invitation to Tender that such items would be taken into account under Life Cycle costs, I say and believe that the assessment of these proposals should have been assessed under Life Cycle costs and that the HSE acted contrary to the principles of equal treatment and transparency in assessing these proposals under the Value Add Option*".

185. At first blush, this complaint has the appearance of some merit - but only until one reads Mr Quinlivan's response. He explains that at the final dialogue meeting on the 4th November 2011 the cost model was explained to bidders, including the applicant. Part of that explanation was that the cost model included a 10% level of HDF patients and a specified level of clinician cover (i.e. 10 hours GP cover). He says that these levels were included in the cost model. Mr Quinlivan then proceeds to explain that under the Value Add Option section of the tender the Beacon entity proposed an additional 10% over those levels included in the cost model and the availability of a renal physician at no extra cost, the latter being considered to be a higher level of clinician cover than the specified 10 hours of GP cover. It was these additional levels for which the Beacon entity was awarded marks in the Value Add section. Mr McCarthy does not respond in his second or later affidavits to this response by Mr Quinlivan. It is of course a complete answer to the issue raised in relation to this particular issue.

186. The final issue raised by the applicant under the Value Add Option is that while the HSE awarded marks to the Beacon entity for its JCI accreditation, it failed to do the same for the applicant in circumstances where that accreditation is in respect of the facility at the Beacon facility, being one operated by the applicant jointly with the Beacon Dialysis Services Limited.

187. Mr Quinlivan has explained that the applicant did not put forward JCI accreditation as a value add item in Section 28, and that if it had it would have been considered just as it was in the case of the Beacon entity. He points out also in his second affidavit at paragraph 56 thereof that tenderers were advised clearly in Section 2.3.5 of the Final Invitation to Tender that *"tenderers should ensure that all proposals which in their opinion should be considered under Value Add Options are included for mention in Section 28, even if there is further detail provided in the tender response*". This averment disposes of the point made by Mr McCarthy in his affidavit that the applicant had made a number of references elsewhere in the tender to the JCI accreditation. That may be the case, but since it was not mentioned in Section 28 the PEG was entitled to assume that it was not being put forward as a Value Add item. The PEG could not in such circumstances award any mark. It is not a manifest error that it did not, even in circumstances where it awarded marks to the Beacon entity. The PEG can only mark the tenders in accordance with the competition rules. Indeed, it would be open to criticism if it had awarded a mark to the applicant for something which it had not put forward as adding value. In so far as it is submitted that the HSE acted disproportionately I reject that. In so far as it is submitted that the HSE failed to take account of a relevant consideration, I reject that too in circumstances where the applicant failed to identify it as a relevant matter for consideration under Section 28, and for the same reason it cannot be maintained that HSE is guilty of breaching the applicant's right

to equal treatment.

188. For all the reasons outlined in this judgment, I refuse the reliefs sought.