

**THE HIGH COURT****JUDICIAL REVIEW****[2013 No. 211 JR]****BETWEEN**

**COPYMOORE LIMITED, CORK OFFICE MACHINES AND SUPPLIES LIMITED, CUSKEN LIMITED, EMS COPIER SERVICES LIMITED, EUROTECH OFFICE EQUIPMENT LIMITED, INEST LIMITED, MBE MALLOW LIMITED, O'ROURKE OFFICE SUPPLIES LIMITED, SHARPTX CORK LIMITED AND TOS IRELAND LIMITED**

**APPLICANTS****AND****COMMISSIONERS OF PUBLIC WORKS OF IRELAND****RESPONDENT****JUDGMENT of Mr. Justice McDermott delivered on the 11th of November, 2016**

1. This is an application for judicial review in which the applicants seek the following reliefs:-

1. An Order pursuant to Regulation 8(1) of the European Communities (Public Authorities Contracts) (Review Procedures) Regulations 2010 (hereafter "the Remedies Regulations") suspending the procedure for the establishment or award by the respondent of a Multi-Supplier Framework Agreement for the supply of Monochrome and Colour Printers, Monochrome and Colour Multi-Function Devices (hereinafter "the proposed Framework Agreement").
2. An Order pursuant to Regulation 9(3) of the Remedies Regulations setting aside the Economic and Financial Standing Qualification Criteria specified in s. 3.2.A of the Request for Tenders to establish a Multi-Supplier Framework Agreement for the supply of Monochrome and Colour Printers, Monochrome and Colour Multi-Function Devices dated 31st January, 2013 (hereinafter "the Request for Tenders").
3. An Order restraining the respondents from taking any further steps to establish a Multi-Supplier Framework Agreement for the supply of Monochrome and Colour Printers and Monochrome and Colour Multi-Function Devices under the Request for Tenders.
4. An Order pursuant to Regulation 9(3) of the Remedies Regulations setting aside the Technical and Professional Ability Qualification Criteria specified in s. 3.2.B of the Request for Tenders.
5. An Order restraining the respondent from taking any further steps to establish or award the proposed Framework Agreement pursuant to the Request for Tenders or otherwise.
6. An Order declaring the Economic and Financial Standing Qualification Criteria (specified in s. 3.2.A of the Request for Tenders) to be discriminatory and/or contrary to the provisions of s. 4(1) of the Competition Act 2002.
7. An Order declaring the Technical and Professional Ability Qualification Criteria (specified in s. 3.2.B of the Request for Tenders) to be discriminatory and/or contrary to the provisions of s. 4(1) of the Competition Act 2002.

2. Following the initial leave to application for relief, an application was made to amend the grounds which was granted by the Supreme Court on the 7th November, 2014 [2014] IESC 63. A statement of grounds of opposition was initially delivered on 15th August, 2013. Further affidavits were exchanged in the course of the application for the amendment of grounds. Although the case was said to be ready for hearing additional affidavits were exchanged during the course of the hearing. As discovery was not completed by the time of the hearing additional documents were introduced and exchanged between the parties during the course of the hearing. At various stages of the hearing, discovery was said to be "ongoing". There was extensive and detailed cross examination of expert and other witnesses during the hearing. The exchange of affidavits during the course of the hearing and the "ongoing" discovery was a most unsatisfactory aspect of the hearing which gave rise to considerable difficulties for the court.

**Background**

3. The applicants are engaged in the sale, supply, service and maintenance of monochrome and colour printers and similar multi-functional devices in the Republic of Ireland. They supplied printers and devices under well-established procedures with a number of public bodies or entities. Each applicant tendered individually to an individual client for the sale, supply and servicing of printers and related services. Each of the applicants is described as a "small/medium sized enterprise (SME) operating in the market place". They claim that between 40% and 80% of their sales of "photocopiers/multi-functional devices" are made to State bodies or entities.
4. The nature and extent of this business is set out in the affidavit of Mr. Eddie Davis in respect of each of the applicants. Copymoore Ltd. supply primary schools, secondary schools, third level colleges, Government departments, hospitals and State agencies and have in excess of 2,000 machines placed with these organisations with different support contracts ranging from finish print services to toner supply. Cork Office Machines and Supplies Ltd. supplied copier equipment and service agreements to 74 schools and managed print services to 12 national schools. It provided a further 12 secondary schools, 2 hospitals, 2 County Councils and 4 Youth Reach centres with copier equipment and service agreements. Cusken Ltd. has approximately 300 agreements with Public Sector Bodies including educational bodies, the Health Service Executive, VECs, FÁS, and various local and national government agencies, funded projects and community projects. EMS Copier Services Ltd. operated managed print agreements with 80 to 90 schools, colleges, Youth Reach Projects and Adult Education Centres and community and national schools. It had service agreements with 150 to 160 schools, colleges, Youth Reach and other centres. Eurotech Office Equipment Ltd. had agreements with 7 local authorities, 2 VECs, 56 schools, 7 other State agencies including FÁS, of which 67 were service agreements and 5 were managed print service agreements.
5. INEST Ltd. supplied copier and printer equipment and service agreements to 123 primary schools, 32 secondary schools, 3 Third Level Institutes of Technology and 1 university. It also supplied printers and service agreements to 7 hospitals, 4 of which had total managed print and copy solutions under which 112 machines were operated under service contracts. It supplied copier and service agreements to 5 County Councils operating 74 machines under service contracts. It supplied all copier printers and colour multi-

functional printers nationally to the Marine Institute including total managed print and copy solutions since 2006 under which 36 machines were contracted. MBE Mallow Ltd. supplied 180 schools service contracts and 25 managed print contracts. O'Rourke Office Supplies Ltd. supplied copier equipment and service agreements to 40 schools and 15 secondary schools. It supplied copiers and printers to 4 hospitals, copier equipment and service agreements to 2 County Councils and 10 machines with service arrangements to the VEC and other colleges. Sharptext Cork Ltd. supplied managed print contracts and service agreements including toner and parts to 2 County Councils, 1 City Council, 4 hospitals, over 100 primary and secondary schools, VECs in Cork city and County and 2 third level colleges. TOS Ireland Ltd. supplied copier equipment and service agreements to 115 national and secondary schools, 7 universities, 2 VECs in 20 locations, 16 hospitals, 4 County Councils, 25 Youth Reach centres, 9 Government departments, 15 Government funded organisations including FÁS and other charities, and 12 semi-state bodies.

### **The Request for Tenders**

6. The Commissioner of Public Works of Ireland was established and appointed under the State Authorities (Development and Management) Act 1993 as amended by the Commissioners of Public Works (Functions and Powers) Act 1996 and is charged with the provision to State Authorities and persons specified by the relevant Minister with such goods and services as may reasonably be required for the purpose of the function of the authority or person in question. Since 2009 the respondent operated the "National Procurement Service" (NPS) which is responsible for procuring goods and services and achieving economies of scale for the Irish Public Sector for the purpose of achieving cost and administrative efficiencies.

7. On 31st January, 2013, the respondent issued a Request for Tenders through the NPS inviting tenders from service providers for participation in a proposed framework for the supply of printers and related services. The Request for Tenders states that the respondent proposes to enter into "Framework Agreements" with a maximum of seven "Framework Members" as set out in Appendix 3 to the request for an initial two year period extendable for up to four years. The "Framework Clients" are defined at Appendix 6 of the Request for Tenders as:-

"Ministers of the Government of Ireland, Central Government Departments, Offices and non-Commercial Agencies and Organisations which have a formal reporting and legal relationship to Central Government Departments, including all Local Authorities in Ireland (themselves including Town Councils, Regional Assemblies, County Enterprise Boards and Library Bodies)

Contracting Authorities in the Irish Health Sector including the Health Service Executive (HSE) and the Health Information and Quality Authorities (HIQA)

Contracting Authorities which are third level Educational Institutions (including Universities and Institutes of Technology), Vocational Education Committees (VECs) and VEC Schools and Primary, Post Primary, Special and Secondary schools as well as VECs acting on behalf of school, groups and clusters of schools in centres.

An Garda Síochána (police)

The Irish Prison Service

Defence Forces

The National Lottery Company Limited."

8. The "Request for Tenders" is "to establish a Multi-Supplier Framework Agreement for the supply of Monochrome and Colour Printers, Monochrome and Colour Multi-Function Devices".

9. Each of the applicants claims that they are suppliers of such devices to clients in the public sector and have an interest in obtaining the contracts for which the Framework provides throughout the country. They are fearful that if the proposed Framework Agreements are concluded, they would effectively be excluded from the market place for the supply of such devices to the designated public sector bodies and related service agreements.

10. The Commissioner of Public Works is nominated as the "Contracting Authority" in the Request for Tenders and a reference to the NPS is deemed to be a reference to the contracting authority.

11. The competition in respect of the request relates to the purchase of Monochrome and Colour Printers, Monochrome and Colour Multi-Function Devices and provision of service maintenance repairs customer and technical support and the supply of information communications technologies consumables (ICT consumables).

12. The Request for Tenders divided the Framework Agreement into five Framework Agreements Lots. Each Lot would result in a separate Framework Agreement. A separate tender or submission was required in respect of each Lot. The designated Lots were:

(a) Lot 1: Purchase of three different sizes of monochrome printers

(b) Lot 2: Purchase of three different sizes of colour printers

(c) Lot 3: Purchase of two different sizes of Monochrome Multi-Function Devices

(d) Lot 4: Purchase of two different sizes of colour multi-function devices

(e) Lot 5: Purchase of A3 (Monochrome and Colour) printers and A3 (Monochrome and Colour) Multi-Function Devices.

The successful tenderer for a particular Lot would be designated as a "Framework Member" in respect of that Lot.

13. Apart from a number of desk top devices described in the Request for Tenders which will be purchased under a three year warranty all other devices would require the provision of services for the maintenance and repair of the devices, customer and technical support and the supply of ICT consumables. A charge would be made on a "per printed page" basis as set out in a pricing

schedule. Apart from the respondent the other Framework Clients who may participate in the Framework Agreement were those set out in Appendix 6 listed above. Tenders were to be received by not later than 16:00 hours on 20th March, 2013.

14. The Contracting Authority estimated that the expenditure on goods and/or services to be covered by the proposed Agreement might amount to some €25 million (exclusive of Value Added Tax) over its term and it was estimated that this would be divided almost evenly between the five Framework Agreement Lots described.

15. Clause 1.1.2 of the Request for Tenders stated in relation to Small and Medium Enterprises:-

"The Contracting Authority policy seeks to encourage participation on a fair and equal basis by Small and Medium Enterprises ("SMEs") in this competition. SMEs that believe the scope of this competition is beyond their technical or business capacity are encouraged to explore the possibilities of forming relationships with other SMEs or with larger enterprises. Through such relationships they can participate and contribute to the successful implementation of any contracts, agreements or arrangements that result from this Competition and therefore increase their social and economic benefits.

Larger enterprises are also encouraged to consider the practical ways that SMEs can be included in their proposals to maximise the social and economic benefits of the contracts that resulted from this tendering exercise."

16. Clause 2.1.3 provided that the Request for Tenders did not constitute an offer to enter into a Framework Agreement and/or any goods and services contract and the conclusion of a Framework Agreement with a Framework Member did not guarantee the awarding of any contract. It was expressly provided that:-

"No enforceable commitment of any kind, contractual or otherwise will exist unless and until a formal written Framework Agreement has been executed by or on behalf of the Contracting Authority and/or a formal written goods and services contract has been executed by or on behalf of the Contracting Authority/Framework Client/arising as a result of a Mini Competition ("Mini Competition") initiated by way of a Supplementary Request for Tender ("SRFT") in accordance with the processes set out at clauses 5 and 6 of the Framework Agreement furnished at Appendix 6 to this SRFT."

Once a Framework Agreement is entered into with the successful Tenderer (a Framework Member), it would thereafter, be invited to enter various "Mini Competitions" for the sale and/or supply of goods and services covered by the Framework Agreement. If successful, a Framework Member would then enter a Service Contract with the Framework Client on the terms set out in the Request for Tenders.

17. Clause 2.5 of the Request for Tenders in respect of Consortia and Prime/Subcontractors provided that where a group of undertakings submit a tender the Contracting Authority would deal with all matters relating to the competition through the entity which carries overall responsibility for the performance of the goods and service contract (the Prime Contractor) irrespective of whether or not tasks are to be performed by a Subcontractor or a Consortium Member. In this regard, the Tenderer was obliged to clearly set out the name of the Prime Contractor and the names of all Subcontractors and/or Consortium Members who will be involved in the supply of the goods and services together with a description of the role to be fulfilled by each.

18. Part 3 of the Request for Tenders sets out the Qualification and Award Criteria. Clause 3.2.A under "Economic and Financial Standing" provides that Tenderers are obliged to demonstrate that they could meet the Financial and Economic Standing requirements set out in the Tender. They were required to demonstrate a minimum annual turnover to be eligible to tender for each Lot as follows:-

"(a) Lot 1: An average of €2 million turnover;

(b) Lot 2: An average of €2 million turnover;

(c) Lot 3: An average of €2 million turnover;

(d) Lot 4: An average of €2 million turnover;

(e) Lot 5: An average of €2 million turnover."

To tender for more than one lot, one must demonstrate a cumulative turnover in respect of the tender. (eg. a Tenderer for lots 1 and 2 would have to demonstrate a turnover capacity of 4 million (2 x 2 million). Each Tenderer was required to furnish evidence to demonstrate that they met their compliance with the required turnover in the form of an auditor's statement confirming financial turnover for the three years following 2009. Clause 3.2.A also provided that "Tenderers will either pass OR fail this qualification criterion."

19. Clause 3.2.B of the Request for Tenders provides that Tenderers must demonstrate a defined Technical and Professional Ability supported by documentation. This clause also provided that "Tenderers will either pass OR fail this qualification criterion". The minimum requirements under this heading may be summarised as follows:-

(i) Lot 1: 3 orders (each order being at least 30 of the devices covered by this Lot) to a client in the past 3 years or 250 in total to clients over the past 3 years.

(ii) Lot 2: 3 orders (each order being at least 30 of the devices covered by this Lot) to a client in the past 3 years or 250 in total to clients over the past 3 years.

(iii) Lot 3: 3 orders (each order being at least 20 of the devices covered by this Lot) to a client in the past 3 years or 150 in total to clients over the past 3 years.

(iv) Lot 4: 3 orders (each order being at least 20 of the devices covered by this Lot) to a client in the past 3 years or 150 in total to clients over the past 3 years.

(v) Lot 5: 3 orders (each order being at least 10 of the devices covered by this Lot) to a client in the past 3 years or 100 in total to clients over the past 3 years.

20. The Request for Tenders was published on E-Tenders (a dedicated website) on 2nd February, 2013 with a stated deadline of 20th March, 2013 for receipt of completed Tenders. In the meantime, queries were raised as to the terms of the Request for Tenders pursuant to clause 2.7.1. Clause 2.7.4 states that:-

"The Contracting Authority reserves the right to update or alter the information contained in this document at any time up to seven days before the final date for receipt of Tenders. Participating Tenderers will be so informed through the E-Tenders website. In the event of such updates or alterations the Contracting Authority reserves the right to postpone the deadline for the receipt of Tenders so as to allow Tenderers sufficient time to respond."

21. On 20th February, 2013 a "Queries and Clarification" Notice was posted by the respondent clarifying and amending the terms of the Request for Tenders. In particular, Tenderers were advised that:-

"Occasionally some Framework Clients may require high specification (80 to 120 pages per minute – but not limited to) Printers or Multi-Functional Devices. The specifications of these Printers or Multi-Functional Devices will be higher than the specifications (originally) listed."

22. Mr. O'Brien, when giving evidence on behalf of the third named applicant, EMS Copier Services Ltd., stated that prior to that clarification the absence of a requirement that a machine should have a capacity to print up to 55 pages a minute from the Request for Tenders meant that there was no barrier at all for his company to continue to service and supply that type of equipment. However, the clarification amended the terms of Lot 5 to a higher specification of 80 to 220 pages per minute. This was an area which EMS had been specifically targeting and was the main stay of its business. Furthermore, there was no maximum pricing requirement when submitting a Request for Tenders. If EMS failed to obtain a place in Lot 5 it would be totally excluded from the key area activity of school supply and no bench mark would be put in place for the price that would apply to those key devices. Up to this point the limit required in each of the Lots did not exceed 30 pages (and a maximum of 50) per minute and EMS had been selling into the secondary school market printers that had the capacity to print 50 pages plus per minute. In effect the Request for Tenders, as previously framed, would not have any influence on its sale of machines to its clients. He feared that EMS would be locked out of the market on the application of the new criteria following the clarification made.

23. On 27th July, 2012 a Circular 6/12 was issued in respect of Public Procurement (Framework Agreements), the purpose of which was to inform public bodies of a mandatory requirement to utilise central contracts put in place by the NPS when procuring a range of commonly acquired goods and services including managed print services. This also changed the terms and conditions of the Request for Tenders that had already been issued. This Directive was reviewed by the High Court in *Copymore Ltd. v. Commissioners of Public Works in Ireland* [2013] IEHC 230 (Copymore 1) in which Hogan J. found that the Minister had acted *ultra vires* his power in issuing Circular 6/12. The mandatory nature of this circular was rescinded in September 2013.

24. A further Circular 16/13 replacing Circular 06/12 issued on 28th September, 2013. It noted that the functions of the NPS and the National Public Procurement Policy Unit would be transferred to the Office of Government Procurement (OGP) from 1st January, 2014. Public bodies were encouraged to use central frameworks for procurement and reminded that it was Government policy that public bodies, where possible, should make use of all such central arrangements.

25. The circular also emphasised the role of Accounting Officers and Accountable Persons. They were reminded that systems of internal control within public service bodies should support compliance with the requirements of the circular. Emphasis was placed on the fact that procurement practices were subject to audit and scrutiny under the Comptroller and Auditor General (Amendment) Act 1993 and that Accounting Officers were publicly accountable for expenditure. It stated that management in Government departments and offices should ensure that there is an appropriate focus on good practice in purchasing and that procedures are in place to ensure compliance with all relevant guidelines. Clause 4 stated:-

"Where public bodies do not utilise Central Procurement Frameworks they should be in a position to provide a value for money justification. Value for money justifications should take into account the full costs of running a public procurement competition. Public bodies must comply with their obligations under national law and guidelines."

26. This was followed on 16th April, 2014 by Circular 10/14 "Initiatives to assist SMEs in Public Procurement". This explains that the Department of Jobs, Enterprise and Innovation and the OGP had set up a group to develop and monitor strategies for SME access to public procurement. The circular recommends the "positive measures buyers should take to promote SME involvement in public sector procurement" including the subdivision of contracts into lots, consortium bids, capacity requirements and turnover requirements. It stated in relation to consortia that "suppliers considering forming a consortium to bid for public sector opportunities should seek legal advice in relation to the structure and operation of the consortium to ensure that it is fit for purpose and complies with their legal obligations particularly in relation to competition law". It also noted in respect of turnover requirements that:-

"In assessing the financial capacity of a supplier to do a job, buyers, as a matter of general policy, should not for routine (e.g. low value high volume) goods and services competitions set company turnover requirements at more than twice the estimated contract value. This is in line with revised EU rules and is designed to support SME involvement in public procurement. The turnover limit for Framework Agreements should be set in general vis-à-vis the likely size of individual contracts or drawdowns in the framework. It is appreciated that for non-routine services and goods competitions it may be necessary to apply higher turnover requirements".

27. The Request for Tenders stipulates that a maximum of seven successful tenderers may be chosen in respect of each Framework Agreement Lot. The Framework Agreement will then operate pursuant to the rules set out at Appendix 6 to the Request for Tenders. A successful tenderer becomes a "Framework Member". This does not give the Framework Member any guarantee of obtaining a contract. The procedure for "Supplementary Tenders" in accordance with which contracts may be obtained under a further "Mini Competition" is set out at clause 5.1. A Framework Client may issue a "Supplementary Request For Tender" (SRFT) under a prescribed procedure based on "Award Criteria" set out in clause 6.3. It is open to any Framework Members to apply for the contract but there is no obligation on any of the Framework Members to tender for any particular contract. The proposed Award Criteria at clause 6.3 are:-

"1. Delivery of goods and services weighting 10% to 40%

2. Price weighting 60% to 90%".

It is also possible for the Framework Client to invite a tender from outside the Framework Agreement, but in doing so the client would have to have regard to clause 4 of Circular 16/13 quoted above.

28. By letter dated 15th March, 2013, solicitors on behalf of the applicants wrote to the respondent raising objections to the Request for Tenders issued on 31st January, 2013. They complained that the amended Request for Tenders had not been published in the Official Journal of the European Union contrary to Regulation 13 of the Public Procurement Regulations. The applicants also complained that they were prevented from participating in the process of tendering commenced by the NPS because of the qualification criteria which were said to be disproportionate, bore no relation to the subject matter of the contracts and had the effect of preventing and restricting or distorting competition in the relevant market in breach of competition law. The applicants complained about the turnover requirement and the technical and professional ability requirements including the requirement in relation to the provision of a nationwide service. The Framework was also said to be contrary to the "European Code of Best Practices facilitating access by SMEs to public procurement contracts and Department of Finance guidance". Since the applicants did not receive what they regarded as an adequate response to this letter, these proceedings were initiated.

### **Grounds**

29. A number of preliminary and other issues were raised by the parties including whether the applicant had *locus standi* or satisfied the conditions of eligibility for the initiation of proceedings challenging the Framework Agreement. The respondent also submits that the applicant did not make this application within time. The following is a summary of the further substantive grounds relied upon by the applicants as set out at Grounds L, (a) to (i) inclusive.

### **Qualification Criteria**

30. The applicants claim that, in setting the minimum qualification criteria, the respondent acted contrary to the provisions of, *inter alia*, Regulations 17, 33, and 52 of the European Communities (Award of Public Authorities Contracts) Regulations 2006 (S.I. 329 of 2006) ("the Public Contracts Regulations"). The criteria set are said to be disproportionate and discriminatory under the two headings of "Economic and Financial Standing" and "Technical and Professional Ability". The

31. The applicants have identified the relevant market as the market for all printers and multi-functional devices in the Republic of Ireland with total sales in 2012 of €75.2 million distributed between 200 to 250 operators. The respondent estimates that the total expenditure covered by the proposed Framework Agreement may amount to €25 million over its initial two year term. In summary, the applicants claim that it is impossible for the applicants to meet the criteria for economic and financial standing in that only seven to eight undertakings within the State are capable of doing so. It is, therefore, claimed that the criteria adopted are manifestly disproportionate to the relevant market and the pre-request for tender position of competitors in the market place.

### **Technical and Professional Ability**

32. The applicants claim that the criteria adopted under this heading merely measures the volume of sales to the particular clients of a tenderer over particular periods. It is said that this is not a real or meaningful measure of a tenderer's technical and professional ability in that a criterion related only to volume does not measure a tenderer's "technical and professional ability" and could not be regarded as a lawful measure of same.

### **Competition**

33. The applicants also claim that the Framework Agreements will prevent, restrict or distort competition in the market for printers and multi-functional devices in that it will:-

(a) Limit competition to supply the relevant products to all public sector purchasers to the successful tenderers for a minimum of two and a maximum of four years;

(b) The criteria disproportionately and in a discriminatory manner prevent the applicants from bidding for one or more of the Framework Agreement Lots; and

(c) The Framework Agreement is likely to foreclose the entire market for the duration of the Agreement resulting in higher prices for private sector purchasers.

Therefore, it is claimed that the qualification criteria are contrary to the provisions of s. 4(1) of the Competition Act 2002.

34. The applicants also claim that it is not possible for them to form relationships as envisaged under clause 1.1.2 of the Request for Tender with other SMEs or larger enterprises under clause 2.5 in respect of consortia so as to meet the criteria set out in the Request for Tenders as this would be in violation of ss. 4(1) and 4(5) of the Competition Act 2002.

### **The Respondent's Capacity: *Ultra Vires***

35. The applicants seek a declaration that the respondent does not have the capacity or lawful authority to enter into or conclude the proposed Framework Agreements on behalf of the public bodies identified as the proposed Framework Clients in Appendix 3 and, in particular, that the respondent does not have the capacity or authority to conclude Framework Agreements through the National Procurement Service (NPS).

36. Clause 1.1 of the Request for Tenders recites that the NPS was established in April 2009 and that the Contracting Authority for the competition is the Commissioners of Public Works in Ireland but that references to the NPS are deemed to be references to the Contracting Authority. It is said that the Framework Agreement (a specimen of which is set out at Appendix 6 of the Request for Tenders) provides for agreement between the Contracting Authority and the successful Framework Member. It is claimed that the respondent is engaged in procurement on behalf of the Framework Clients because the Framework if established will result in the entry of the respondent into Framework Agreements between it and the successful Framework Members. It is claimed that a specific power has not been conferred upon the respondent nor is it vested with any authority to establish a Framework and enter into Framework Agreements to procure goods and services on behalf of third party public sector clients.

37. Under s. 1(ii) of the Ministers and Secretaries Act 1924, the Minister for Finance had been responsible for the administration and business of public finances in the State and

"the supervision and control of all purchases made for and on behalf of and all supplies commodities and goods held by any department of State and the disposal thereof, ..."

Under s. 8(2) of the Ministers and Secretaries (Amendment) Act 2011 these functions were transferred to the Minister of Public Expenditure and Reform. Furthermore, under s. 9(4) of the 2011 Act the functions of the Minister for Finance concerning the respondent were also transferred to the Minister for Public Expenditure and Reform. The new Minister's functions as defined under s. 10(1) include the promotion of value for money in the provision of public services and the formulation and development of policies in respect of the procurement of public goods and services by Departments of State or other public service bodies and to develop procedural frameworks for the procurement of goods and services by them. The definition of public service bodies in s. 3 includes all of the proposed Framework Clients.

38. The respondent is a "State authority" under s. 1(b) of the State Authorities (Development and Management) Act 1993. As a State authority it has and is "deemed always to have had power -

"(d) To supply goods and to provide services whether upon payment or free of charge".

Under s. 2(2) it is vested with "such incidental, supplemental, ancillary and consequential powers as, in the opinion of the authority, are necessary or expedient for the purposes of the exercise by it of the powers aforesaid". Section 2(4) provides that powers under subs. (1) and (2) of s. 2 "conferred on a State authority (other than the Minister) shall be exercisable after the passing of this Act only with the consent (which may be general or particular) of the Minister".

39. On 21st December, 1994 the Minister for Finance gave a general consent under the 1993 Act as follows:-

"I am directed by the Minister for Finance to refer to your letter of 4 October 1994 in connection with the request of the consent of the Minister for Finance as referred to in s. 2(4) of the State Authorities (Development and Management) Act, 1993.

The general consent of the Minister for Finance under s. 2(4) of the Act is hereby conveyed to the exercise, both up to now and in the future, by the Commissioner of Public Works of the powers referred to in ss. 2(1) and 2(2) of the Act."

The general consent therefore applied to the respondents' power to supply goods and provide services whether upon payment or free of charge. It also applies to the respondents' incidental, supplemental, ancillary and consequential powers as in its opinion were necessary or expedient for the purpose of the exercise of its power *inter alia* under section 2(d).

40. The powers of the Commissioner of Public Works were further enhanced under the provisions of the Commissioners of Public Works (Functions and Powers) Act 1996. Section 2 provides *inter alia*

"(1) It shall be, and be deemed always to have been, a function of the Commissioners - ...  
(b) to provide for a State authority or a person specified by the Minister such goods and services as may reasonably be required by the authority or person for the purposes of the functions of the authority or person, ..."

Section 3 provides *inter alia*

"(1) The Commissioners shall have and be deemed always to have had, power - ...

(e) to procure the performance or exercise by another person on their behalf, upon and subject to such terms and conditions as they may determine, of any of their functions or powers ...

(3) The functions and powers specified in section ... 2 of this Act and in this section shall be performed or exercised only with the consent (which may be general or particular) of the Minister.

(4) The Commissioners shall have, and be deemed always to have had, all such powers as, in the opinion of the Commissioners, are necessary or expedient for the purposes of the performance or exercise of the functions and powers specified in section ... 2 of this Act and in this section."

Section 1 defines the "Minister" as the Minister for Finance.

41. By letter dated 1st September, 1997 the general consent of the Minister in accordance with s. 3(3) was sought by the

respondent from the Minister in the following terms:

"The Commissioners carry out functions and exercise powers specified in sections 2, 3 and 4 of the Act under existing delegated or specific sanctions of the Minister for Finance.

Having regard to s. 3(3) of the Act, and for the avoidance of any possible doubt, the Commissioners request the general consent of the Minister, in accordance with s. 3(3), to be exercised by the Commissioners of the functions and powers set out in the Act, in accordance with existing practices, delegated authorities and specific sanctions, from the passing of the Act and in the future."

By letter dated the 3rd September, 1997, Mr. Thompson, principal officer wrote as follows conveying the general consent of the Minister:-

"I am directed by the Minister for Finance to refer to your letter of 1 September 1997 concerning the above.

In accordance with the provisions of s. 3(3) of the above Act, I am to convey the general consent of the Minister for Finance to the exercise by the Commissioners of the functions and powers set out in the Act, in accordance with existing practices, delegated authorities, and specific sanctions, from the passing of the Act and in the future. Exercise of powers under s. 3(1) (a) of the Act will, however, require the specific sanction of the Minister for Finance."

The reference to s. 3(1)(a) refers to dealings in land.

42. The applicants submit that s. 2(1) of the 1993 Act does not extend the powers and functions of the respondent to the procurement of goods and services on behalf of other public sector clients. Furthermore, it is submitted that s. 3(3) of the 1996 Act does not authorise the procurement by the respondents of goods and services on behalf of other persons such as public service clients under the Framework Agreement.

43. The applicants rely on the judgment of Costello J. (as he then was) in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 in which the learned judge accepted the submission that the respondent had no statutory power to carry out a proposed development of a visitor's centre in the heart of the Burren, Co. Clare. Having examined the statutory powers under which the respondent operated, he held that there was no general power conferred on the Commissioners to erect buildings or to provide public amenities or supply services to the public. The judgment was upheld by the Supreme Court on the separate and distinct basis that the Commissioners were obliged to seek planning permission for such a development; consequently, the former point was not determined by the Supreme Court.

44. The 1993 Act was enacted within a matter of days of this judgment. The principle of statutory interpretation as applied by Costello J. is said to be no less relevant to this case. He stated (at pp. 112 to 113):-

"It has long been established as a general principle of the construction of the powers of statutory corporations that whatever may be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires* (*Attorney General v. Great Eastern Railway Company* (1880) 5 App. Cas. 473, 478). In more general terms the powers of statutory corporations have been stated as follows:—

"The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited."

(Halsbury's Laws of England (4th ed.) vol. 9, paragraph 1333)."

I do not consider that this principle of statutory interpretation of itself requires the court to determine that the actions of the respondents in this case in respect of the Framework Agreement are *ultra vires*. There have been a number of significant statutory developments enhancing and extending the powers of the respondents since the decision in *Howard*. I am satisfied that the statutory framework in which the Commissioners of Public Works operate under the 1993 and 1996 legislation is now much wider than that considered in the *Howard* case. It is the function of the Commissioners under s. 2(1) of the 1996 Act to provide goods and services reasonably required by an authority or person specified by the Minister for the carrying out of their functions. Section 3(1)(e) confers the power on the Commissioners "to procure the performance or exercise by another person on their behalf of any of their functions or powers". These functions and powers may only be performed with the general or particular consent of the Minister for Finance under section 3(3). This general consent has been granted. I am also satisfied that the respondent operates under a general consent in relation to s. 2(1)(d) in respect of the supply of goods and services and has all such supplementary ancillary and consequential powers as are necessary for the purposes of exercising this power. I am satisfied that these statutory amendments provide sufficient basis for the exercise by the respondent of a power to enter into Framework Agreements for the benefit of Framework Clients in this case having regard to the purpose and intention of the statutory changes effected since the *Howard* case.

45. These powers must also be interpreted in the context of the purpose and intention of the overall statutory framework concerning public procurement which now applies. The Minister for Finance has overall supervision of the control of purchases made for and on behalf of the State. The Minister for Public Expenditure and Reform now exercises these functions under the 2011 Act. The Minister has an overall function and obligation to promote value for money in the provision of public services and to develop procedural frameworks for the procurement of goods and services by Departments of State and the public service bodies defined in section 3. The vehicle for the implementation of that policy and for the purchase of goods bought for State and public service bodies are the respondents. I am also satisfied that s. 3(1)(e) enables the respondents to procure the performance or exercise by the National Procurement Service (NPS) of any of its functions or powers regarding Framework Agreements in respect of Framework Clients in the Request for Tenders process. I am satisfied that this necessarily follows from the ordinary meaning of the statutory provisions set out above and is entirely consistent with their purpose and intention.

46. The respondents rely also upon the principles set out in *Carltona Limited -v- Commissioners of Works* [1943] 2 AllER 560 in which Lord Greene M.R stated in respect of the delegation of ministerial powers to civil servants that:

" There is no point in the argument at all that the Commissioner of Works as such did not take the matter into consideration, nor is there , in my opinion , any substance in the argument that at any rate the First Commissioner did not personally direct his mind to the matter. In the administration of Government in this country the functions which are given to Ministers ... are functions so multifarious that no minister could ever possibly attend to them. The duties imposed upon Ministers and the powers given to Ministers are normally exercised under the authority of the ministers by responsible officials of the Department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is ,of course, the decision of the Minister..."

47. The principle has been applied in its proper context in this jurisdiction by the Supreme Court in *Devanney v. Shields* [1998] ILRM 81 and other cases. The respondents submit that each minister operates as a corporation sole under s.2(1) of the Ministers and Secretaries Act, 1924. It is submitted that the respondents act as a "comparable alter ego" of civil servants in the Department of Public Expenditure and Reform because historically the respondents have carried out functions by and on behalf of the Minister for Finance. I am satisfied that the civil servants in this case acted in accordance with the statutory powers conferred upon them and do not consider that it is necessary to consider any wider application of the *Carltona* principle in this case.

### **The Regulations**

48. The process for tendering for public service or authority contracts is now regulated. The European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. 329 of 2006) were enacted to give effect to Directive 2004/18/EC of the European Parliament and of the Council of the 31st March, 2004 on the Coordination of Procedures for the Award of Public Supply and Service Contracts (as amended by Directive 2005/51/EC dated 7th September, 2005 and Directive 2005/75/EC dated 16th November, 2005). For the purposes of the Regulations a "contracting authority" means *inter alia* the State, a local authority or a public authority. A "public authority" means any body corporate not having an industrial or commercial character established for a public purpose and financed wholly or substantially by the State, a local or regional authority, or another public authority subject to management supervision by such a body, or having an administrative, managerial or supervisory board more than half of whose members are appointed by the State, a local or regional authority, or another public authority and includes any body listed in annex III to the Public Authorities' Contract Directive. An "economic operator" means a person or a group of persons that carries out works or supplies products or services. A "framework agreement" means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a specified period (including the terms relating to price and, where appropriate, the quantity of works to be carried out, or the products or services to be supplied).

49. Regulation 8 provides that a contracting authority may enter into a contract or Framework Agreement for work products or a service with or through a central purchasing body and if it does so through such a body, the contracting authority is taken to have complied with these regulations to the extent which the purchasing body has so complied.

50. Part 3 of the Regulations sets out the "Principles and Rules for Award of Public Sector Contracts". Regulation 17 provides:

"In awarding a public contract, a contracting authority shall—

- (a) treat all economic operators equally and without discrimination, and
- (b) act in a transparent way."

Regulation 19 (3) provides:

"A group of economic operators may submit a tender or present itself as a candidate."

49. Part 5 of the Regulations provides for "Specific Rules Governing Specifications and Contract Documents".

50. Regulation 33 provides:

"(1) A contracting authority may enter into a framework agreement as provided by this Regulation.

(2) In entering into a framework agreement, a contracting authority shall follow the rules of procedure prescribed by these Regulations for all phases up to the award of contracts based on the agreement. The parties to the framework agreement are to be determined by applying the award criteria set in accordance with Regulation 66.

(3) A contracting authority that proposes to award a contract by means of a framework agreement shall award the contract in accordance with the procedures specified in Regulations 34 and 35. Those procedures are applicable only between the contracting authority and the economic operators that were originally parties to the agreement.

(4) In awarding a contract on the basis of a framework agreement, the parties may not make substantial amendments to the terms specified in the agreement, in particular in the case referred to in Regulation 34.

(5) The duration of a framework agreement may exceed 4 years only in an exceptional case that is justified by factors such as the subject matter of the contract.

(6) A contracting authority may not use framework agreements in such a way as to prevent restrict or distort competition."



51. Regulation 35 provides that a Framework Agreement may be entered into with several economic operators:

"(1) A contracting authority may enter into a framework agreement with several economic operators, but in that case the number of economic operators must be not less than 3, unless there is—

- (a) an insufficient number of economic operators to satisfy the relevant selection criteria, or
- (b) an insufficient number of admissible tenders that satisfy the relevant award criteria."

52. Part 8 of the Regulations governs "how the award procedures are to be conducted". Regulation 52 of Chapter 1 governs the procedure for verifying the suitability of participants, for the choosing of participants and the awarding of public contracts and provides:

"(1) A contracting authority shall award a public contract on the basis of the criteria prescribed by Regulation 66 after having checked the suitability of the economic operators (other than those excluded under Regulations 53 and 54) in accordance with –

- (a) The criteria of economic and financial standing referred to in Regulation 55 and
- (b) The criteria of professional and technical knowledge or ability referred to in Regulations 56 to 59, and
- (c) If appropriate, the non-discriminatory rules and criteria referred to in paragraphs (3) to (7)....

(3) A contracting authority can require candidates and tenderers to meet minimum capacity levels in accordance with Regulations 55 to 59.

(4) A contracting authority –

- (a) shall ensure that the extent of the information referred to in Regulations 55 to 59 and the minimum levels of ability required for a specific contract are related to and are proportionate to, the subject matter of the contract, and
- (b) shall specify those minimum levels in the contract notice..."

53. Chapter 2 of Part 8 provides criteria for qualitative selection. The criteria in respect of "economic and financial standing" are addressed in Regulation 55(1) which provides *inter alia* that the contracting authority may accept a statement showing an operator's overall turnover and if appropriate, the turnover in the kind of business covered by the proposed contract for a specified period, normally not exceeding the preceding three years, as proof of the operators economic financial standing. Regulation 55(2) provides that an economic operator may rely on the services of other persons regardless of the legal nature of the links that the operator has with them. The operator must satisfy the contracting authority that it will have available to it the resources necessary to perform the contract (for example by producing an undertaking by those other persons that they have available the necessary resources). Regulation 55(3) provides that a group of economic operators may rely on the capacities of participants within the group.

54. Regulation 56 concerns the assessment of the "technical and professional ability" of economic operators by the contracting authority and provides:

"In considering whether to award a public contract, a contracting authority shall, insofar as relevant, assess the technical and professional abilities of the economic operators in accordance with - ...

- (b) Regulation 58, if the contract is to supply products, or
- (c) Regulation 59, if the contract is to supply a service."

55. Regulation 58 provides that an economic operator may provide evidence of its technical ability by producing to the relevant contracting authority a range of information including a list of the principal contracts to supply the products concerned effected during the immediately preceding three years, the technical efficiency of its staff, and the nature and extent of the quality control assurance maintained in the supply or manufacture of the products.

56. Regulation 59 allows for the provision of similar information concerning the supply of services.

57. Chapter 3 of Part 8 concerns the awarding of public contracts. The criteria for the award of a public contract which must be applied under Regulation 33(2) are set out in Regulation 66 which provides:

"(1) A contracting authority shall, in awarding a public contract on the basis of a tender that is most economically advantageous to it, adopt criteria linked to the subject matter of the contract.

(2) Except as provided by para. (1), a contract authority should award a public contract on the basis of the lowest price.

(3) For the purpose of para. (1), the criteria may include (but are not limited to) –

- Quality,
- Price,
- Technical merit,

- Aesthetic and functional characteristics,
- Environmental characteristics,
- Running costs,
- Cost effectiveness,
- After sale service and technical assistance,
- Delivery date and delivery period or period of completion.

(4) The contracting authority shall specify in the relevant contract notice or contract documents or, in the case of a competitive dialogue, in the relevant descriptive document, the relative weighting that it gives to each of the criteria chosen to determine the most economically advantageous tender. That weighting can be expressed by providing for a range within an appropriate maximum spread ...”

### **The Review Procedure**

58. Under the European Communities (Public Authorities’ Contracts) (Review Procedures) Regulations 2010 and Order 84A of the Rules of the Superior Courts (S.I. 420 of 2010), “an eligible person” may apply to the High Court 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 a public contract, or the implementation of any decision taken by the contracting authority or for review of the contracting authority’s decision to award the contract within the scope of the Directive, or as decision taken during the course of the award procedure or a declaration that the contract is ineffective.

59. Regulation 8(4) provides that a person intending to make an application to the Court must first notify the contracting authority in writing of

- “(a) the alleged infringement
- (b) his or her intention to make an application to the Court, and
- (c) the matters that in his or her opinion constitute the infringement”.

60. The review procedures are available to “an eligible person” as defined by Regulation 4 as a person who

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

61. Order 84A, rule 4(1) provides that any application for judicial relief must be made in accordance with the time limits laid down in Regulation 7(2) which provides that an application under 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”.

In accordance with Regulation 10(2) if a notice of motion has not issued within the time prescribed, the court has power to grant leave to an intended applicant to bring the application if it “considers that there is good reason to do so” under Order 84(A), rule 4(2).

62. Regulation 9(1) provides that the court:

- “(a) may set aside, vary or affirm a decision to which these regulations apply,
  - (b) may declare a reviewable public contract ineffective, and
  - (c) may impose alternative penalties on a contracting authority and then make any necessary consequential order.
- (2) the court may make interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of a decision of the contracting authorities.
- (3) the court may set aside any discriminatory technical, economic or financial specification in an invitation to tender, contract document or other document relating to a contract award procedure ...”

63. The applicants seek an order suspending the procedure for the establishment or award by the respondent of the proposed Framework Agreement under Regulation 8(1) and an order setting aside the economic and financial standing qualification criteria

specified in Clause 3.2.A and the technical and professional ability qualification criteria specified in Clause 3.2.B of the Request for Tenders. Alternative declarations are sought that the criteria are discriminatory and/or contrary to the provisions of s. 4(1) of the Competition Act 2002. In addition, an order is sought restraining the respondents from taking any further steps to establish the Framework Agreement.

#### **Are the Proceedings Out of Time?**

64. In this case the applicants claim that they were faced with a lack of clarity in the Request for Tenders and raised queries with the respondent which under clause 2.7.1 might be raised "no later than 16.00 hours on 11/03/2013 unless otherwise published by the contracting authority". On 20th of February, 2013, a number of responses to queries were made *inter alia* concerning:

- (1) the valuation of €25 million applied to the proposed framework agreement;
- (2) the pricing of services covered by the request for tenders;
- (3) directions, clarifications and amendments on important issues concerning the price, capacity qualification criteria and scope of some lots in particular items 12 and 14 of the clarifications furnished; and
- (4) whether the framework would be mandatory for all "framework clients".

In paragraph 25 of the affidavit of Brendan Mulvey it is accepted that queries as to what was intended by certain matters in the Request for Tenders were received and clarifications were duly issued on 20th February, 2013 and various other dates thereafter. However, he states that except for the items numbered 12 and 14, these queries and clarifications did not amend the Request for Tenders as originally published and suppliers were referred to the relevant paragraphs in the request in response to the queries raised.

65. In evidence, Mr. Davis stated that when the Request for Tenders was issued it was a source of "great solace" to him because it did not contain a specification for a machine operating at 55 pages a minute and therefore there was no barrier at all for his company to continue to supply and service that type of equipment. However, the replies in respect of queries 12 and 14 were viewed by him as a "game changer" and precipitated the letter written by his solicitors to the respondent following which the application was made. I am satisfied to accept Mr. Davis's evidence in this regard that this change in specification caused him and the applicants to reassess what they hitherto regarded as the benign nature and effect of the proposed framework upon his and his colleagues' businesses. Mr. O'Brien's evidence, which I also accept, in respect of the fourth named applicant (see para. 22 ante) is to the same effect.

66. The relevant test for the determination of whether an application under the Regulation is made within time is well settled. As stated by Finlay Geoghegan J. in *Gaswise Ltd v. Dublin City Council* [2014] IEHC 56 at para. 53:

"the question is when did (the applicant) possess sufficient knowledge of the facts to enable it consider that it had reasonable grounds to challenge the decision of (the respondent) that "another tenderer" had passed the Turnover Requirement in the selection criteria."

67. The matter was further addressed by Peart J. in *Baxter Healthcare Ltd. v. Health Service Executive* [2013] IEHC 413 who stated that it was essential to bear in mind that the time limit applies equally to interim decisions as to the final decision to award the contract at the end of the process. A short time limit was 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". He added:

"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 ... 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."

68. In this case, I am satisfied that the applicants acquired the relevant knowledge on 20th February, 2013 and consequently, a time limit of 30 days runs from that date. Accordingly, this application is within time. If I am wrong in that conclusion, I am satisfied that, on the evidence, having regard to the course of events leading up to the clarification on 20th February, it would be appropriate to extend the time for the bringing of this application under O. 84(A), r. (2) on the basis that there is good reason to do so.

#### **Locus Standi – Eligibility**

69. The applicants did not each separately submit a tender in the course of this process. The applicants submit that because the qualification criteria were set at a level which was disproportionate, discriminatory and in breach of the principles of competition, their chances of successfully submitting a tender were nonexistent because of the unlawful nature of the qualification criteria. The onus is on the applicants to establish this fact.

70. The reason furnished by Mr. Davis for the failure to submit a tender is that the majority of the applicants were not in a position to meet the qualification criteria and were excluded from the Request for Tenders at the very outset because of the disproportionate and discriminatory level at which they were set. Furthermore, the applicants claim that forming relationships with other SMEs or larger enterprises in order to formulate and submit a tender was unrealistic because the applicants were competitors in the relevant market and had no desire to collude on price for the purpose of inclusion in the Request for Tenders. They were advised that the coming together of the applicants as SMEs would invariably lead to agreeing prices for the tender process in breach of Irish competition law. The applicants believed that the formation of any such relationship would have the effect of distorting competition and leading to foreclosure in the relevant market. In those circumstances, the applicants claim that as suppliers of printer and multifunctional devices in various locations throughout the country, and to clients in the public sector they had an interest in obtaining the contracts for which the Framework Agreement provides. They claim that they would be effectively excluded from the market for the supply and servicing of these devices to public sector bodies and thereby harmed by the respondents' infringement of public procurement law.

71. The respondent submits that each applicant company which did not submit a tender or participate in a consortium submitting a tender, must demonstrate that the decision not to do so was involuntary and stemmed from the fact that a tender was rendered impossible by the requirements of the Request for Tenders. It is also submitted that the applicants only contend that they did not submit tenders as part of a consortium because participation in a consortium would have been unlawful and contrary to s. 4(1) of the Competition Act 2002 but the first, fourth, sixth, and tenth applicants submitted tenders as part of consortia or groups and did not demonstrate any potential harm that might be suffered by them as a result of the alleged infringement of the procurement code by the specifications of the Request for Tenders.

72. The evidence on behalf of the first and fourth applicants is that both had been engaged in the supply of printer and multi-functional devices the subject of the Framework Agreement for between twenty and thirty years. They assessed the potential loss to their respective businesses at 70% and 60% when the Framework Agreement is put in place. They concluded that if they lost that business their companies would have to close. They therefore decided to submit tenders as participants in a group application. They maintain that their participation in the consortium also adversely affected their business. The prime contractor in the group was the manufacturer and supplier of the machines. It will sell into the market and they cannot deal directly with any client under the terms of the new service contract and the Request for Tenders. The prime contractor will invoice and retain all control over the transactions and they would be assigned such business as the prime contractor thinks appropriate for the delivery, installation or servicing of the machines.

73. UTAX UK Ltd. presented the tender as a consortium or group of operators with the first and fourth applicant. The prime contractor would be UTAX UK Ltd. which was working in partnership with their distributors, their subcontractors. The prime contractor would be the lead contact for the Framework Agreement and all support and call initiation would be controlled by the helpdesk at the UK head office. Subcontractors will not receive any enquiries directly and will not issue any invoices to clients for equipment or services. They will be totally reliant on commissions and callout fees for income which, it is contended, will greatly impact upon their ability to trade in their existing format. These applicants claim that they were compelled to act as subcontractors because they wished to have "any opportunity to be active in a vitally important arena".

74. Mr. Martin O'Sullivan, a director of the tenth named applicant, also entered into a relationship with Toshiba Tec (UK) and is contracted to provide that company with services for the installation and maintenance of equipment sold under the Framework. All contact under the terms of the Request for Tenders will be with the prime contractor. As a subcontractor, the tenth applicant will act on the instructions of Toshiba and will invoice the prime contractor for the services rendered. Mr. O'Sullivan states that the company only entered into this subcontracting arrangement as a last resort in an attempt to save approximately 20% of its staff whose jobs would otherwise be lost if, as the Framework envisages, they were excluded from the public sector contracts. The subcontracting arrangement will result in a reduction in turnover of between 70 and 80% in respect of each client involved.

75. It is submitted that the four applicants did not form part of a consortium but were nominated subcontractors and consequently, it is not accepted by the applicants that they submitted tenders as pleaded by the respondent.

76. The respondents submit that the applicants are not "eligible persons" and are not entitled to maintain these proceedings because the jurisprudence of the CJEU has established that, save where the specification of a Request for Tenders unlawfully excludes a person from submitting a tender, an applicant must have submitted a tender, whether on its own behalf or as part of a group or consortium in order to demonstrate that it has the necessary interest in obtaining the award of the contract. In addition, it is submitted that a person who submits a tender as part of a group or consortium is not entitled to challenge a Request for Tenders or the award of a public contract under the tender process, unless all members of the group or consortium join in the challenge. Therefore, it is submitted that each of the applicants which did not submit a tender or participate in a group or consortium submitting a tender, must establish that the submission of the tender was rendered impossible by the requirements of the Request for Tenders. The respondents emphasise that the evidence adduced on behalf of the applicants does not establish that it was not possible to participate in a group or consortium because of the requirements of the Request for Tenders. It is said that the applicants did not wish to participate because participation in a group or consortium would have been unlawful and constitute a cartel contrary to s. 4(1) of the Competition Act 2002, as amended. However, a number of the applicants participated in groups or consortia and submitted a tender. The applicants have not demonstrated any potential harm that might be suffered by them as a result of the alleged infractions of procurement law or the specifications of the Request for Tenders.

77. The applicants submit that each of them has substantial business with public sector clients in the sale and servicing of printers the subject of the Request for Tenders. I am satisfied that this is so. They claim that, in challenging the tender process, they are not obliged to wait for the outcome of the process before instituting proceedings. It is submitted that the reliefs contemplated under Regulation 8 and O. 84(A) are consistent with the exercise of a jurisdiction by the court during the tender process. It is submitted that the case law also permits an application when an applicant faces a tender which was so demonstrably discriminatory that it would be pointless to insist on the parties submitting a tender which was bound to be unsuccessful. It is claimed that the €2 million annual turnover requirement set in respect of each lot as a basis for eligibility was a barrier to entry. The applicants claim that they did not submit a tender because the terms were regarded as discriminatory, disproportionate and in breach of competition law and concluded that they had no chance of success. However, they claim that the Framework Agreement, if concluded, will be harmful to their businesses because they will be excluded from the market for the sale, supply and servicing of printers and multifunctional devices (monochrome and colour) to public sector bodies.

78. Both sides relied upon the decision in *Grossmann Air Service v. Austria (Case C-230/02)* [2004] 2 C.M.L.R. 2. In that case the Austrian authorities invited tenders for the provision of certain air transport services. The applicant having previously tendered for a similar contract in a tendering procedure that was annulled obtained documents for the invitation to tender but did not submit them. He was informed of the intention to award the contract to a rival. He applied to have it set aside. A question arose as to whether the applicant, not having tendered for the contract, could establish an interest in bringing proceedings challenging the award procedure when he had not submitted a bid in that process.

79. The court ruled:

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

29. On the one hand, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures

provided for by Directive 89/665 (then applicable) against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications.

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

The court also stated that a failure by a person to seek review of a decision of a contracting authority determining the specifications of an invitation to tender which in its view discriminates against it and disqualifies it from participating in the award procedure but awaits notification of the decision to award the contract would not be in keeping with the objectives of speed and effectiveness of the Directive. It would impair the effective implementation of the Community Directive on the award of public contracts. The court therefore determined that the provisions of the Directive did not preclude a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive, if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which the bids were invited because there were allegedly discriminatory specifications in the documents relating to the invitation to tender in circumstances where he did not seek review of those specifications before the contract was awarded.

80. It is clear from the *Grossmann* case that an applicant must establish that it is eligible to bring proceedings on the basis that it has or had an interest in obtaining the reviewable public contract. The Member State has an obligation to grant standing to those who have participated in the tendering process. Those who have not done so are not entitled to standing save in exceptional circumstances where the applicants' successful participation in the process is made impossible due to the conduct of the Contracting Authority for example by setting unlawful requirements. The consequence of the illegality for the applicant must be established on the evidence. This will vary from case to case but an applicant must demonstrate a sufficient interest in the proposed tender (*Student Transport Scheme Ltd. v. Minister for Education and Skills* [2012] IEHC 425; *Ryanair v. Minister for Transport* [2009] IEHC 171; *Copymoore and others v. Commissioners of Public Works of Ireland* (No. 1) [2013] IEHC 230).

81. In this case a challenge is made by the applicants during the course of the tendering process. It is maintained on the basis that six of the applicants find it impossible to participate in the tendering process and four find it impossible to participate as individual companies in that process. The latter four consider that it was in their interest to join in a group in submitting a tender. If successful, they may still suffer some loss. However, they have entered into an agreement with other members of the group to make the tender on the basis that as a group they comply with the specifications set out in the documents. The group does not complain of any illegality in the specifications or any discrimination between the group, as an applicant, and other individuals or groups who have submitted a tender. They do not complain that in making their agreement they were in any respect in breach of s. 4(1) of the Competition Act 2003 nor do they complain that any other group or consortium was in breach of those provisions or has committed an offence under s. 6 of the Act. They will benefit if successful in making a tender. They maintain that they are still entitled to continue these proceedings because as individual companies they have been precluded from submitting a tender on the basis of the specifications provided because it is impossible for them individually to comply with those specifications.

82. I am not satisfied that there is any substance in the submission that the four applicants who have engaged in a group or consortium and submitted tenders in the course of this process can also maintain that the process in which they have engaged is unlawful. It seems to me that the entitlement of operators to enter into agreements with each other and make a joint tender under the Request for Tenders, the Regulations and the Directive reflect the reality that in the market place smaller entities must be provided for if they are to compete at a reasonable level with larger entities. The consortia hoped to satisfy the qualification criteria in respect of the €2 million turnover per Lot provision and the professional and technical qualifications. If successful they will become Framework Members. They gain the benefits of the Agreement and must fulfil the obligations that flow from the Agreement.

83. I am satisfied, therefore, that the four applicants who entered into agreements to submit tenders pursuant to the Request for Tenders are not eligible to bring and maintain these proceedings in the circumstances.

84. I am also satisfied that the other six who have not submitted a tender are entitled to maintain these proceedings on the basis of their submission that the specifications set out in the Request for Tenders is such that it renders it impossible for them to succeed on such a tender. The question remains as to whether there is any substance to this claim.

#### **Was the Request for Tenders Amended in an Impermissible Manner?**

85. The applicants claim that the Request for Tenders was amended by the queries and clarifications published on the website notice on 20th February, 2013. They claim that it was substantially amended by the matters set out at items 1, 2, 3, 8, 10, 12 and 14 of the queries and clarifications.

86. The reply at Item 1 is a correction of a typographical error and is of no consequence. The reply at Item 2 is simply a clarification of the basis upon which the NPS estimated the expenditure on goods and services covered by the proposed Framework Agreement of €25 million over its term divided evenly between the five lots proposed. Item 3 simply clarifies that applicants should submit pricing for premium service hours. Item 8 clarified that in a Supplementary Request for Tenders (SRFT) a Framework Member may quote a lower price than the maximum price per device and the maximum cost per printed page. It is noted that Framework Members were free to quote a price in a supplementary tender. There was no lower limit set but the higher limit was the maximum price quoted in the tender submission. Item 10 clarified that there were no special conditions provided for in the Request for Tenders. I am satisfied that these clarifications on the evidence do not carry the weight and substance suggested by the applicants and were not impermissible having regard to the nature and extent of the information already supplied and their relative importance to the applicants and others.

87. Two other items in the queries and clarifications document are said to amount to significant changes. Item 12 reads as follows:

**"Clarification – Minimum Specification – the capacity of the Multi Purpose Tray for all devices in all Lots 1 to 5 (p. 53 to 68) has been reduced from 100 sheets to 50 sheets."**

Item 14 states:

**"Clarification – The scope of Lot 5 has been expanded and additional wording (red) has been added. This has implications to the text of the RFT in two places**

**(1) - Part 1: Introduction, Section 1.3, page 5,**

Framework Agreement Lot 5 Purchase of A3 (Monochrome and Colour) Printers and A3 (Monochrome and Colour) Multi-Function Devices – now:-

These are devices which are capable of dealing with A4 and A3 size paper (hereinafter referred to as "A3 (Monochrome and Colour) Printers and A3 (Monochrome and Colour) Multi-Function Devices".

There are eight subdivisions in this category (Framework Agreement Lot 5) depending on the type of printers/multifunctional device, its level of functionality and its ability to do colour or monochrome printing. Detailed specifications of the A3 (Monochrome and Colour) Printers and A3 (Monochrome and Colour Multi-Function) Devices can be found in Appendix 1 Requirements and Specifications of this RFT.

Please be aware that occasionally some Framework Clients may require high specification (**80 to 120 pages Per Minute – but not limited to**) Printers or Multi-Functional Devices. The specifications of these Printers or Multi-Functional Devices will be higher than the specifications listed on pages 61 to 68 of the Request for Tenders.

The Framework Client will set out the required specifications at Supplementary Request for Tender stage.

As the exact specifications of these Printers or Multi-Functional Devices is unknown there will be no maximum pricing required when submitting the Request for Tender.

The pricing will be submitted at Supplementary Request for Tender stage and the Award Criteria as set out in Appendix 6: Framework Agreement, section 6. Award Criteria, 6.3 will apply."

88. Regulation 33(1) of the Procurement Regulations provides that:

"In awarding a contract on the basis of a Framework Agreement, the parties may not make substantial amendments to the terms specified in the agreement, in particular in the case referred to in Regulation 34".

89. The applicants' statement of grounds states very little in relation to the alleged amendment of the Request for Tenders. The amended statement of grounds at para. M(vi) states that the Request for Tenders was subject to queries on its contents and the respondents issued a notice dated 20th February, 2013 thereby amending the terms of the Request for Tenders.

90. The respondents in the statement of opposition at para. 4 deny that the Request for Tenders was amended in any manner contrary to the Procurement Regulations. At para. 9, the respondents state that the originally published Request for Tenders was only amended in a minor respect which did not alter its nature and scope as originally published. Furthermore, it is submitted that the Request for Tenders incorporates the queries and clarifications and that tenderers were required to submit their tenders based on the Request for Tenders as so interpreted. The Contracting Authority reserved the right to alter or update the Request for Tenders as originally published in accordance with the terms of para. 2.7.4 up to seven days before the date for receipt of tenders. Tenderers who accepted the invitation to view documents on e-Tenders were notified that any such alterations or updates would be published on the e-Tenders website. Queries which were received were answered and duly issued to all tenderers and suppliers on e-Tenders on 20th February, 2013.

91. The respondents acknowledged that in respect of Item 12 the clarification reduced the multipurpose trade capacity for all devices in all lots by 50% from 100 sheets to 50 sheets because the technology in the area moved on and the trade capacity of 50 sheets had become more common. In respect of Item 14, the respondents claim that the Request for Tenders was amended only to notify the market that insofar as the Request for Tenders related to the specification for Lot 5 Devices certain Framework Clients might, during the currency of the Framework require a higher capacity for printed page per minute. Since this did not form part of the specification of the Lot 5 Devices the additional information did not amend the specification or the Request for Tenders. It was therefore denied that there was any obligation to publish the queries and clarifications in the Official Journal.

92. Prior to the publication of the queries and clarifications, the applicants concluded that they could offer higher speed machines at the same price as lower speed machines and hoped to avoid the provisions of a Framework Agreement by offering a higher speed machine. The vast majority of the machines furnished by firms represented by Mr. Davis and Mr. O'Brien were of a higher specification than that set out in the various lots. The amendment was said by Mr. Davis and Mr. O'Brien to be a "game changer", the scope of Lot 5 being expanded by the additional wording added in the response at 14. It was now stated that occasionally "some Framework Clients may require higher specification 80 to 120 pages per minute" which covered the machines which the applicants were selling into the market. They complained that since no benchmark price was put in place in relation to these higher specification machines not only would exclusion from the Framework Agreement now cover their high specification machines but these machines would be excluded from the maximum price set. The change in specification took in every speed the applicants could offer. This, they say, prompted the "letter of notification of infringement" to the respondents and the issuing of proceedings on 19th March, 2013.

93. It is clear from Clause 2.7.4 of the Request for Tenders that the Contracting Authority retains the right to update or alter information contained in the document at any time up to five days before the final date of Receipt of Tenders. It is not suggested that the clarifications furnished in this case were outside that time framework. No application was made to postpone the deadline for the Receipt of Tenders as a result of the information published. It is not suggested that the applicants had insufficient time to respond to this information or to submit a tender.

94. The applicants rely upon *Presstext Nachrichtenagentur GmbH v. Austria (C-454/06)* in which the CJEU considered the amendment of provisions of a public contract "during the currency of the contract" and whether it constituted a new award of a contract within the meaning of Directive 92/50 when the terms are materially different in character from the original contract and therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract. In particular, the applicants rely upon the following paragraphs:

"35. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.

36. Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Article 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part services listed in Annex I A thereto, restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract.

37. An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract."

95. The court is not satisfied that the applicants' submissions on this issue are correct. The court is satisfied that the clarification at Item 14, was one which the Contracting Authority was entitled to make. It did so within the terms of the Request for Tenders and within the timeframe set under Clause 2. This clearly influenced the applicants' view of the Request for Tenders. They made a decision not to submit a tender notwithstanding the implications as they understood them, of the clarification issued. The court is not satisfied that this clarification was of such a substantial nature as to change the basis of the Request for Tenders document. It was not necessary to publish the queries and clarifications in the Official Journal. It did not change the competence or entitlement to the applicants to submit a tender. The process was still ongoing. The Contracting Authority was entitled to ensure that the reality of the potential sales likely to be covered by the various Lots was fully understood by the contending tenderers. Different consequences might flow if the clarification had issued after the closure of the tendering process. However, Item 14 only extends to the sale of higher specification machines "occasionally". I am not satisfied on the evidence advanced that the clarification made was such as to alter the "economic balance" of the proposed Framework Agreement. As already noted, four of the applicants were satisfied to submit Request for Tenders as part of a group. The others made their decision in the knowledge of the clarification issued.

#### **The Standard of Review – Manifest Error**

96. The standard of review applicable to the assessment of bids in a procurement case was reviewed and discussed by Peart J. in *Fresenius v. HSE* [2013] IEHC 414 in which he stated at pp. 17 to 19:-

"39. ... The court will allow an expert body, such as in this case the Procurement Evaluation Group (PEG), a margin of appreciation or discretion as to the mark which it considers appropriate and will defer to that body in this respect. That body has a degree of discretion permitted to it since its members have been tasked as an expert body by HSE 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 review is adjudicate upon the process by which the tender process was conducted, including by ensuring that what rules were set 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 evaluated. Insofar as clarifications are sought and/or provided during the tender process, the court will have to ensure that all tenderers were 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 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.

40. That margin of appreciation discussed, 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 (emphasis supplied by Peart J.) 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."

97. Peart J. also cited with approval a statement by O'Neill J. in *Clare Civil Engineering Ltd. v. Mayo County Council* [2004] IEHC 135 that "the applicant carries the onus of and must satisfy this Court that the decision of which he complains is being made in clear error".

98. Fennelly J., in delivering the judgment of the Supreme Court in *SIAC Construction Ltd. v. Mayo County Council* [2002] 3 I.R. 148, noted that the same standard of judicial review was applied by the European Court of First Instance in *Adia Interim v. Commission* (Case T-19/95) [1996] E.C.R.II-321 and *AISC v. Parliament* (Case T-139/990 [2000] E.C.R.II-2849. In the latter case, the complaint concerned the manner in which the European Parliament awarded a public service contract for the supply of transport; the procurement procedure was governed by a council directive. The following principle was applied by the court and quoted by Fennelly J.:

"Like the other institutions, the Parliament has a wide discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the court's review should be limited to checking that there has been no serious and manifest error ..."

99. The learned judge added that it was well established that a community institution, when in a comparable situation to the awarding authority of a member state, enjoyed "a wide discretion" as to the criteria by which it will judge tenders and, that its decisions will be annulled only if a "manifest error" can be demonstrated.

100. The applicants submit that the "manifest error" test was formulated and applied by these authorities in the context of tenders pursuant to a set procedure. It was submitted that the challenge in those cases was to the basis upon which the analysis of tenders was conducted and that the decision makers had a margin of appreciation in making a decision or exercising a discretion in respect of scoring and assessing tender bids. In such cases the court is not concerned with the merits of the award but whether there was "manifest error" by the body in assessing the tenders received. It is submitted that there is no comparable wide margin of appreciation or discretion vested in the respondent in setting the qualification criteria and that the normal principles of judicial review should apply in determining whether there was an error of law such as to vitiate the "Request for Tenders" formulated.

101. The applicants rely upon the decision of Kelly J. in *Whelan Group Ennis v. Clare County Council* [2001] 1 I.R. 717 which pre-dates the *SIAC* decision and in which the test applicable under judicial review in a procurement case does not appear to have been canvassed. The applicant failed to procure a contract following a competition in which the respondents stipulated that a contractor might tender only if it demonstrated that it had satisfactorily completed an individual road-works project to the value of €10 millions within a four year period. The applicant submitted that the criterion set meant that only the largest construction undertakings within the European Union or the State could compete and that this infringed the principles of European Union procurement law which prohibited discrimination, inequality of treatment, lack of transparency and lack of proportionality. The respondent submitted that the criteria set out were objectively justified, non-discriminatory and respected the principle of equal treatment. Kelly J. held in dismissing the proceedings that member states were free to maintain or adopt substantial and procedural rules regarding public works, contracts and condition provided that they comply with all relevant provisions of European law. The learned judge concluded that the prequalification criteria concerning the contractor's financial and economic standing were adopted by reference to the financial scale and technical complexity of the project and proportionate as both necessary and appropriate in light of the objectives sought. It was held that the criterion applied to all potential contractors and was therefore transparent, non-discriminatory and was an objective criterion capable of objective assessment and application. It is submitted that in determining the case, the learned judge did not apply a "manifest error" test to the actions of the respondent.

102. I am satisfied that the test of "manifest error" applies in this case to the formulation of the criteria set out in the Request for Tenders. It is, like the actual tendering process itself which will follow in respect of contracts under the framework agreement, subject to the same principles of proportionality and non-discrimination applicable in the area of public procurement. The protection of these principles in respect of the Request for Tenders which has been issued as part of the procurement process also falls to be protected under a remedy which is derived from and sought under the Directive and Order 84A. I am satisfied that the same standard of judicial review applies in this case in respect of the domestic application of the principles established by Directive 2004/18/EC and the regulations made thereunder. As Fennelly J. noted at p.176 the courts must be ready to render effective the general principles of public procurement and to grant a remedy when there is a "manifest error" which gives rise to a failure to respect the principles of equality, transparency or objectivity. Though there is margin of appreciation vested in the decision-makers within the procurement framework of law, it is not unlimited and the courts will act to ensure that the principles underlying the Directive are rendered effective.

#### **Other Substantive Grounds**

103. The grounds of challenge under this heading are set out at paras. 1(e),(f),(g),(h) (i) to (j) of the Amended Statement of Grounds. The applicants claim that the relevant market for all printers and multifunction devices in Ireland is evidenced by total sales in 2012 of €75.2 m which were distributed across 200 to 250 undertakings or competitors including them. They contend that they are unable to meet the Economic and Financial Standing requirements that are set out in the Request for Tenders and that only 7 or 8 entities in the State are capable of so doing. It is submitted that the criteria adopted are manifestly disproportionate "to the position of the market ... at the pre-Request For Tenders position of competition in the marketplace". The criteria are said to operate disproportionately and in a discriminatory way so as to preclude the applicants from bidding for one or more of the 5 Lots. It is alleged that the resultant Framework Agreement will operate to prevent, distort or restrict competition and to exclude the applicants from the market for the two years of its operation.

104. The applicants claim that, from its inception, the formulation of the proposed Framework Agreement and request for tenders were fundamentally flawed. The applicant submits that no or no adequate valuation of the development market occurred and that such analysis as was carried out by the respondents was factually flawed and failed to provide a reasonable opportunity for the applicants as small and medium enterprises to participate in the tendering process. It is submitted that these errors and failures resulted in the formulation of criteria for "Economic and Financial Standing" and "Technical and Professional Ability" which were disproportionate and discriminatory and excluded the applicants from participation in the tendering process.

#### **Valuation of the Market**

105. Article 1.5 of Directive 2004/18/EC defines a Framework Agreement as:

"An agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged."

The valuation of a Framework Agreement is determined by Article 9.9 of the Directive which states:

"With regard to framework agreements ... the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement ..."

106. Annex VII A of the Directive provides that the public notice required under Article 35 must contain the estimated total value of the supply of goods and services for the entire period of the Framework Agreement and as far as possible, the value and frequency of the contracts to be awarded. It is important to note that an estimate only is required.

107. Article 32.4 provides that contracts based on Framework Agreements concluded with several economic operators may be



awarded either by the application of the terms laid down in the Framework Agreement without reopening competition or by means of a mini competition. In this instance the option favoured was that of a mini competition between the 7 successful tenderers in respect of each Lot.

108. It is clear from the evidence that, at an early stage, it was concluded that a Framework Agreement was an efficient and cost effective basis upon which to procure printers and consumables for the public service and that the successful tenderers should be required to have a capacity to supply and service them nationally. The Court is not satisfied that there is any legal obligation on the respondents to conduct any formal survey to enable them to come to that conclusion. The respondents were also entitled to conclude that for reasons of economy there was a value to the State in ensuring continuity of supply and service on a national geographic basis. There is, however, a legal obligation to endeavour to estimate the value of the market and give notice of that estimate in accordance with the Directive.

109. It is also submitted by the applicants that their status as small and medium enterprise companies (SMEs) was not given any consideration by the respondents when setting the criteria contrary to guidelines issued by the Department set out in Circular 10/10 issued on 13th August 2010 and entitled "Guidelines for Public Contract Authorities Facilitating the Participation of SMEs in Public Procurement". This circular was issued to facilitate effective access by SMEs to competitions for public contracts. It emphasised that criteria levels set for suitability in tendering processes, especially in relation to the tenderers turnover, must be "justified and proportionate to the needs of the contract." The guidelines were said to be in accordance with the "European code of best practices facilitating access by SMEs to public procurement contracts". They are not intended to favour SMEs but to assist in the operation of a "level playing field" in the tendering process. It was emphasised that guidelines were to be implemented by contracting authorities in accordance with the principles of European Union law and in a manner that is fully compliant with public procurement law and national guidelines. A summary of the measures advised in the circular to facilitate the participation by SMEs states *inter alia*

"...

- Contracting authorities must ensure that any capacity levels they set for tenderers are relevant and proportionate to the circumstances of the particular contract (s. 4)...
- Contracting authorities should avail of the possibility to award contracts in "lots" where this can be done without compromising efficiency and value for money (s. 9).
- Contracting authorities should ensure that Framework Agreements facilitate the inclusion of smaller businesses where these could meet requirements or compete for particular lots (s. 10).
- Contracting authorities should encourage joint bidding among SMEs and subcontracting in the case of larger contracts... (s. 11)."

110. This circular was replaced by Circular 10/14 on 16th April, 2014 after the initiation of these proceedings. Circular 10/14 was not in force at the time the decision in this case was made. However, particular emphasis was placed by the applicants during the hearing on the existence of this circular. It is submitted that the improved guidance set out in Circular 10/14 sets out the proper procedure which should have been adopted by the respondents in framing the request for tenders. In particular, Clause 4.1 states that buyers should undertake market analysis prior to tendering in order to better understand the range of goods and services on offer, market developments and innovation, what commercial models are available, the competitive landscape and the specific capabilities of SMEs. Clause 4.5 provides that buyers should ensure that any capacity levels set for candidate tenderers are relevant and proportionate to the circumstances of particular contracts. Clause 4.6 in respect of turnover requirements provides that

"buyers frequently use the ratio 'company's turnover to contract value' as a measure in deciding whether a business has the financial capacity and strength to perform a contract. In assessing the financial capacity of a supplier to do a job, buyers, as a matter of general policy, should not for routine (e.g. low value, high volume) goods and services competitions set company turnover requirements at more than twice the estimate contract value. This is in line with revised EU rules and is designed to support SME involvement in public procurement. The turnover limit for Framework Agreements should be set in general vis-à-vis the likely size of individual contracts or drawdowns in the framework. It is appreciated that for non routine services and goods competitions it may be necessary to apply higher turnover requirements."

111. The applicants complain that there was

- no adequate market analysis as required under Circular 10/14 and as required by good procurement practice;
- no engagement with or consultation with SMEs in advance so as to understand and identify the market;
- no consideration of alternatives other than turnover levels and
- no consideration as required by Circular 10/10 and 10/14 of the needs of the individual contracts under the framework rather than the overall estimated value of the Framework Agreement.

112. The applicants claimed that they are small and medium sized enterprises. The following breakdown was furnished to the court of their geographical involvement in the market and annual turnover.

Number	Applicant	Type	Geographic Area	Employees	Turnover
1	Copymoore Ltd	Distributor/Authorised Dealer for Utax UK	Nationwide	18	€2.5 m approximately
2	Cork Office Machines	Authorised Dealer for Toshiba	Cork	4	€300,000

3	Cusken Ltd	End user Supplier/Authorised Dealer	Mainly North East Region	9	€875,000 -€900,000
4	EMS Copiers	Distributor and Authorised Dealer of Utax UK	Leinster and surrounding areas	20	€2.6 m
5	Eurotech Ltd	Authorised Dealer for Utax UK	Tipperary, Waterford, Cork	4	€500,000
6	Ines Ltd	Authorised Dealer for Ricoh and Utax	West, Midwest, Midlands, East Coast	11	€1.6 m
7	MBE Mallow	Authorised Dealer for Olivetti	Cork, Tipperary, Kerry, Waterford (Munster Area)	7	€1.3 m approximately
8	O'Rourkes Office Supplies	End user suppliers, Authorised Dealer	Cavan, Leitrim Monaghan, Meath, Roscommon, Longford	8	€1 m
9	Sharp Text Cork	Authorised Dealer for Kyocera, Samsung and Sharpe	Munster	11	€1.8 m
10	TOS Ireland	Distributor for Toshiba	Nationwide providing direct and dealer sales service in Republic of Ireland	20	€2.8 m

113. I am satisfied to accept the evidence furnished in relation to these figures by the applicants which was unchallenged.

114. The applicants fall into different types of SMEs as defined in EC Commission recommendations 6th May, 2003 OJL 124/36. There are three categories. An SME is regarded within the European Union as an organisation of less than 250 employees with a turnover of €50 million or less and a balance sheet net asset value of €43 million. A small business is regarded as one which employs 50 people with a turnover of €10 million and a net asset value of €10 million. Anything above that is regarded as a medium sized business. A micro enterprise is one employing ten or less with a €2 million turnover or less and a net asset value of €2 million. Of the ten applicants all are SMEs: at least five are micro enterprises and the balance are small businesses.

115. A number of witnesses estimated the percentage of business transactions by each of the applicants which involves the sale of photocopiers and multifunction devices to the proposed clients on the Framework Agreement. Mr. Davis on behalf of all applicants estimated the 40-80% of the applicants' sales of the devices were sold into the public sector. Specifically, evidence was given that 50-60% of EMS Copier Limited sales, 30% of Eurotech and 35% of TOS Ireland Limited business involved sales into the public sector.

116. The geographic coverage provided by the applicants varies widely. Copymoore Limited and TOS Ireland Limited provide a nationwide service. EMS are based in the Dublin and Leinster areas. Eurotech has a more limited regional business operating two vans and two engineers and though competent to operate nationally had no real interest in doing so. Mr. O'Brien of TOS Ireland Limited indicated that very few firms could provide a national service. Further details of the applicants' business are set out earlier in the judgment.

117. The applicants claim that no adequate consideration was given by the respondents to the effect upon SMEs of the proposed Framework Agreement or upon their share of and likely exclusion from fair access to the market.

118. They claim that the complete failure to ensure proportionality and fairness in the setting of criteria in the Request for Tenders is evident from *inter alia* the very high turnover requirement which is beyond most of them even in respect of one Lot.

#### Evaluation of the Market

119. Mr. Brendan Mulvey is a higher executive officer employed by the property maintenance section in the Office of Public Works prior to which he was the procurement manager at the Office of Government Procurement. On 20th December, 2010, he moved to the national procurement section. His line manager was Mr. Seamus O'Neill. He familiarised himself with the procurement process including the various Directives and Circulars applicable and was furnished with copies of recent Requests for Tenders issued by the National Procurement Service (NPS). He worked in a section of the NPS with responsibility for stationary, paper and ICT consumables and was tasked with the assessment of public service requirements in respect of office equipment. He compiled a list of office equipment not covered by a then existing national contract and assessed two national contracts (CMOD Framework contracts) due to expire in the subsequent twelve months; one contract covered mono laser printers and the other colour laser printers. The office equipment covered by the CMODs included printers, multifunctional devices, photocopiers, shredders, laminators and binders.

120. Mr. Mulvey working with up to eight colleagues carried out preliminary work which led to the valuation of the relevant market for the initial two year period of the proposed Framework Agreement at €25m. He was directed to produce a Request for Tenders in respect of a proposed Framework Agreement that would operate nationally for the purchase of printers and multifunctional devices within the state together with relevant consumables and related services.

121. Mr. Paul Quinn is the chief procurement officer of the Office of Government Procurement which succeeded the NPS in 2013. He emphasised in evidence, the importance that a contracting authority should place on the risk of supply disruption when adopting a procurement strategy on behalf of the State. He noted that savings and efficiencies delivered by procurement would be significantly undermined if the State's access to goods and services is dependant upon a business which fails for financial or any other reason during the course a contract.

122. Mr. Quinn stated that Circular 10/14 emphasised that procurers should understand the market, how it works and the players involved in order to get value for the state and facilitate SME participation in any proposed arrangement. It was critical that a proper market analysis be carried out in respect of large scale centralised arrangements. It was important to ensure those who succeed in the tender offer true competition in the market place which is why their capability to provide the goods and services through established criteria should be set out. He acknowledged that Circular 10/14 reduced the recommended threshold for turnover to twice contract value. The 2004 Directive and Circular 10/10 were silent in relation to turnover level save that it could be used in relation to

determining financial capacity. A survey had been carried out within the Department of Finance as to the turnover levels used by public procurers in Ireland and elsewhere. It found a range of turnover requirements which varied from 0.5% of the contract value up to three times the contract value for a given contract. This informal survey informed the guidance given at para. 4 (iii) of Circular 10/10 that:-

"responses indicate that appropriate amounts for annual turnover can range from half the value up to three times the value of a contract, depending on the size, duration nature and complexity of the contract."

However, it was emphasised in the same paragraph that the key consideration is that the turnover level be proportionate to and justified by the needs of the contract.

123. Mr. Mulvey gave evidence that he estimated the value of the market in accordance with the guidance set out in Circular 10/10 following a survey of the market place which was within the guidance given. I accept his evidence in that regard.

### **Survey**

124. The purpose of Mr. Mulvey's survey was to assess the 2010 public sector spend. He issued emails to 262 public sector bodies and created a spreadsheet recording the name of the body, the date the email issued to each and replies were received. He created separate spreadsheets for each of the separate devices (photocopiers/multifunction/mono/laser/colour printers etc). He then summarised the contents of the spreadsheets and forwarded this to his line manager Mr. O'Neill. Mr. Mulvey determined that a total of 94 (38.52%) responses were received to the 244 requests for information made. This included 10 government departments, 35 agencies, 8 third level institutions, 27 VECs, 7 local authorities, 6 enterprise boards and some parts of the HSE.

125. He estimated that the annual expenditure on printing devices would be €2.18m. He assumed that the 38.5% who responded also represented 38.5% of purchases and therefore estimated the total annual expenditure as €5.6m or a total of €11.33m over the projected two years of the Framework Agreement. This survey did not include requests for information in respect of consumables which it is clear, were a substantial part of the cost of procuring and servicing many of the devices included in the proposed Framework Agreement.

126. Mr. Mulvey also consulted with and outlined the proposed plan for centralised purchasing of the devices to eleven manufacturers and suppliers. A detailed summary of what transpired during the course of these consultations was set out in an email which he sent to colleagues. He met with representatives of Danwood, which supplied all types of printer equipment to public and private sector bodies. He also met separately with representatives of Hewlett Packard, Cannon, Xerox Ireland, Independent Photocopy Services to which he was referred by Lexmark (a manufacturer of devices), Oki, Hibernian Business Systems, Brother Ireland, Bryan S. Ryan, Irish Business Systems, Dell and Kycera, one of the largest manufacturers of equipment in the world. Some of these manufacturers had been involved in the CMOD Framework Agreement still in place. Mr. Mulvey sought to ascertain from these consultations, the strength and weaknesses of previous agreements and obtain recommendations for possible improvements. From these meetings he concluded that a number of public sector buyers were purchasing unsuitable equipment. Many did not have any procurement expertise and had agreed excessive callout and monthly minimum charges because of lack of clarity in the initial contract proposals and terms.

127. Mr. Mulvey also consulted with a number of client public bodies including the Revenue Commissioners, the Department of Social Protection and An Garda Síochána.

128. It was necessary to estimate also the value of annual expenditure on associated services and consumables. Mr. Mulvey used information from the CMOD colour laser printers Framework Agreement as a basis for this estimate. Printers from five suppliers, Cannon, Dell, Hibernian, Lexmark and Xerox were considered and an estimate of the average cost likely to arise calculated.

129. The results were set out in Appendix 2 of Dr. Bacon's report (August 2013). It is clear that consumables were by far the largest part of the overall cost of the contract. The costs of consumables for colour devices was 189% of the value of the device in year one. For monochrome printers the annual cost of consumables was 84.61% in year one. Thus for the two years the approximate expenditure on consumables was estimated to be €21.9m. The total estimated expenditure for devices and consumables was therefore calculated at €11.33m plus €21.9m yielding a figure of approximately €33m over two years. A further figure was allowed for a potential drop in the value of the Framework Agreement because of a likely take-up of a managed print service by various bodies within the public service whereby printing could be outsourced pursuant to the terms of a separate tender. The figure for this expenditure was unknown but "an indicative estimate" was provided in the amount of €8m. That sum was deducted from the estimate of €33m and an estimated valuation €25m was assigned to the Framework Agreement.

130. Mr. Peter Massey is an economist with over 30 years experience in the private and public sectors. He specialises in issues of competition law and gave evidence on behalf of the applicants. Dr. Peter Bacon is a highly regarded economist who has considerable experience in assessing the effect of policy innovation on competition in the market place and gave evidence on behalf of the respondents. Both produced very helpful reports and were cross examined at considerable length during the hearing on the effect of the proposed Framework Agreement and the request for tenders and competition in the relevant market place. They were in agreement that the relevant market in respect of the issue in suit was the market for printers and multifunctional devices within the state, noting that certain Lots in the proposed Framework Agreement are also related to the associated market for consumables. Both acknowledged that the eligibility requirements mean that some operators in the market will inevitably be precluded from tendering. However, they disagreed on the overall likely effect of this restriction in competition on overall economic welfare. I will return to these differences in the judgment.

131. The applicants challenged the estimated valuation reached by Mr. Mulvey of the Framework Agreement. Mr. Massey determined that the average contract price likely under the proposed Framework Agreement was approximately €26,000. Mr. Mulvey was criticised for not determining the average likely drawdown which was said to be particularly relevant to the level of risk or exposure for a contracting authority under the proposed Framework. It was noted that the contracts might be in the low thousands.

132. Mr. Mulvey emphasised as did Mr. Quinn that the risk element was related to the valuation of the Framework Agreement as a whole and not to individual contracts. Mr. Massey's figure for the average contract in the Framework was unchallenged and therefore accepted. I do not consider that it is a figure which should bind or determine the estimate of the turnover criteria determined in accordance with the terms of the Directive. I am satisfied that in accordance with the Directive the appropriate calculation under the guidelines applicable at the time was applied to an overall aggregate of the contracts the subject of the Framework Agreement and I accept the respondent's submissions and evidence on this issue. I am satisfied that this conclusion arises directly from the wording of the Directive and the provisions of the proposed Framework Agreement which incorporates further mini competitions in respect of

various contracts that may arise. Qualification criteria do not apply to the individual contracts that later arise under the Framework after a tenderer has qualified as one of the seven successful candidates in respect of a particular Lot. Once qualified the successful tendered may not be ousted from the process. They may compete with their fellow members in respect of any contract arising in the course of the mini competitions. Having regard to the overall size of the market I am satisfied that a reduction in the qualification threshold to a figure dependant upon an average individual contract price would likely defeat the purpose of the Framework Agreement and undermine the reliability and security of the supply of goods and services required by the contracting authority.

133. It is not always possible to arrive at a certain value in relation to a particular market. Mr. Massey acknowledged that Mr. Mulvey issued his survey to a very comprehensive group of public sector agencies and the limited nature of the hard statistical data. I am satisfied that Mr. Mulvey made a reasonable estimate of the market valuation having regard to the deficits in hard data under which he was operating.

134. Mr. Massey made a number of criticisms of Mr. Mulvey's work. He claims that critical decisions were made by line managers of which no evidence was furnished to the court including calculations based on data forwarded to more senior officials. Mr. Mulvey was directed to adopt turnover as a criterion for qualification when other options were available. This was said to be a policy decision by the NPS at the time.

135. Mr. Massey criticised the roughness of the calculation of the likely spend on devices based on a supposed 38.5% return to requests for information issued by Mr. Mulvey. Two errors, in particular were highlighted by Mr. Massey. Firstly it was said that there was a serious error in determining the overall market value insofar as the likely projected figures for purchases by schools was considerably underestimated which gave rise to difference of approximately two to four million euro. Similarly, a criticism was made that Mr. Massey made a single request in respect of the likely expenditure of VECs but got a response from 27 VECs which were then counted as 27 separate responses from a total of 94 which gave rise to a miscalculation of the response rate. It will be recalled that the response rate was given as 38.5% and the overall likely spend was calculated using that figure. The response rate was actually, therefore, on Mr. Massey's calculation 26% or 33%. If one assumes that these criticisms are valid, the net result is a significant increase in the valuation of the Framework Agreement. This would inevitably lead to a higher threshold when using the methodology applied by Mr. Mulvey in accordance with advice given under Circular 10/10. In that sense, the suggested flaws in calculations might have rendered it more difficult for the applicants to qualify.

136. Mr. Massey also criticises Mr. Mulvey's failure to include consumables in the original survey and that he had not specifically identified readily accessible information concerning consumables on the CMOD website which would have provided a more accurate basis on which to give an estimate of the demand for consumables.

137. Mr. Mulvey was originally directed to estimate the value of the market in respect of the devices which would be the subject matter of the proposed Framework Agreement. Consumables were not included, therefore, in his initial survey. He understood that consumables were the subject of a different Framework Agreement at that time. Subsequently, he became aware that consumables formed a considerable aspect of the calculation required following consultation with the public sector buyers. Having reached that conclusion he recommended, in respect of consumables, that the Framework Agreement should be in five separate lots with a charge for all printers that covered a maintenance, support and all ICT consumables. This was to provide an element of control by the NPS for a single package of devices and consumables because of the extremely high cost of the latter. The calculation of the cost of ICT consumables likely to be incurred was deduced from the previous CMOD agreements which were relied upon as providing guide figures. Mr. Mulvey accepted that the cost of consumables varied considerably. Though the applicants appear to accept that the cost of consumables was extremely high, Mr. Mulvey was criticised for not identifying the number of devices covered by the CMOD arrangements. Furthermore, calculations made by Mr. Mulvey were based on figures furnished in respect of consumables for monochrome and colour printers from ten different manufacturers.

138. Mr. Massey notes that there was considerable variation between the costs of the devices supplied by the various manufacturers/suppliers upon which the cost of consumables was ultimately based. He queried whether the CMOD equipment relied upon was a broad enough representation of printers sufficient to provide an accurate estimate for the purpose of the proposed Framework Agreement. Mr. Mulvey states that the CMOD framework figures gave the total cost of ownership of the devices over three years for each device which enabled him to arrive at an annual value of the consumables as a percentage of the value of the device. He carried out the exercise in respect of the five devices available on each Framework and determined that the annual value for the consumables for the colour Framework was 189.11% of the value of the actual device. He also calculated an annual value for multifunction devices. He then estimated the likely additional value of the contract over two years. In year one, the devices would cost €5.6 million and the accompanying consumables would cost €7.3 million. In year two, the estimated cost of devices would be €5.6 million and the consumables would now be €14.6 million. The total value therefore was €33.3 million.

139. Mr. Mulvey then deducted a figure of €8 million from this amount for which he was also criticised because there were no actual figures said to exist justifying this deduction. The reason for this deduction was because account had to be taken of reliance by elements of the public service on the management service contract for printing which outsourced printing requirements under a separate contract. Unfortunately, because the management service contract had only just been rolled out, no figures were available to him which would accurately reflect the likely expenditure under this contract. He estimated the total value of that contract was €50 million per year on the basis of the published Request for Tenders. He made a rough estimate of the likely commitment of the public service contractors which might purchase printers to this service which was €8 million by which the €33.3 million was then reduced.

140. I am satisfied that Mr. Mulvey made his valuation and set the turnover requirement in accordance with then applicable guidelines in respect of SMEs. His valuation is only an estimate as required by the Directive. The information gathered enabled the procurer to construct a profile of the market, how it operates and how the State is spending public money on printers and consumables. I am satisfied that the information and figures available to him and his staff enabled him to come to a reasoned conclusion as to the estimated value of the Framework Agreement over the two years and to determine an appropriate turnover requirement. I am satisfied also that the respondents were entitled as a matter of policy to set criteria for tenders to attract candidates who could best assure continuity of supply and service throughout the country for the public sector bodies who would ultimately be their clients.

### **Qualification Criteria**

141. The qualification criteria are set out in clauses. 3.2.A and B of the Request for Tenders. The economic and financial criteria are set in relation to the annual turnover of the tenderers. A tenderer must demonstrate a turnover of €2 million in respect of each of the years 2009-2011 in respect of each Lot for which they apply. This results in a cumulative turnover requirement for any applicant who wishes to apply for more than one Lot. Thus to apply for Lots 1 and 2 an applicant must have a turnover of €4 million. This may give rise to a maximum turnover requirement of €10 million if a tenderer wishes to apply for each of the five Lots. The applicants claim that of the 200-250 operators in the relevant market only seven or eight could possibly qualify. Mr. Massey is of the view that this

accumulator acted as an obstacle to SMEs' capacity to participate in the tender process and significantly reduced the total number of firms that could bid for all of the Lots.

142. The technical and professional ability criteria apply in respect of each Lot for which a tender is made. The tenderer must demonstrate a history of successful delivery of specified quantities of devices covered by the Lot to clients within a designated period. For example in respect of Lot 1, the tenderer must demonstrate three orders of at least 30 devices to a client in the previous three years or 250 devices in total to clients over the previous three years.

143. A failure to comply with the economic and financial criteria or the technical and professional ability criteria will result in the failure of the tender. The evidence is that 52 tenders in total were received in respect of the five Lots, nine for Lots 1 and 2, eleven for Lots 3 and 4 and twelve for Lot 5. All met the turnover criteria. Thirty-seven SMEs were named as sub-contractors in the tenders submitted. These included some of the applicants.

144. The turnover figure in respect of each Lot is set at less than half the value of each Lot. The applicants claim that this is disproportionate when one considers that the average value of any contract likely to be made under the Framework Agreement is €26,000 and that most devices the subject matter of the Framework Agreement have a value of between €300 and €5,000. It is submitted that neither the turnover value set nor the terms of compliance in respect of each of the Lots properly reflects the particular features of the project covered by the proposed Framework Agreement. These requirements are said to be too high and disproportionate.

145. Thus, the third named applicant contends that the €2 million requirement is disproportionate and gives as an example a typical secondary school which places an order for three different devices each of which falls under a separate Lot. A tenderer would need to demonstrate a turnover capacity of €6 million to tender for the entire contract. With a present turnover of €2.6 million, the third named applicant could only qualify for one Lot and would not be able to meet the needs of the whole school. An operator with turnover of €6 million could succeed in the tender process and become eligible to tender subsequently to supply all three devices under the Framework Agreement. It is submitted that this demonstrates the disproportionality of the criteria. However, the respondents submit that these criteria are set at a lower level of the range of turnover than might otherwise have been set in accordance with official guidance and lower than previous Framework Agreements in the same area.

146. The setting of a turnover requirement is permitted under Article 47 of Directive 2004/18/EC which provides that proof of economic and financial standing may be furnished by reference to an undertaking's overall turnover and where appropriate in the area covered by the contract for a maximum of the last three financial years. In this case, Mr. Quinn gave evidence that the measurement of financial capacity was appropriate as a mechanism to judge the resources available to a potential supplier to withstand the likely strains upon working capital and finances imposed for a tenderer. The requirement is a tool which operates to give reassurance to the State and clients that continuity of supply can be maintained by a successful applicant.

147. In *Edukovizig v. Kozbeszerzések Tanácsa Kozbeszerzési Döntőbizottság (KTKD) Case C218/11*, (18th October 2012) the CJEU considered the principles applicable under the Directive. The court was asked to consider whether Articles 44(2) and 47(1)(b) of Directive 2004/18 must be interpreted as meaning that a contracting authority may fix a minimum level of economic and financial standing by reference to a given item on a balance sheet, even if differences exist between the laws of the Member States as to the relevance and significance of that item. The court noted that under the first paragraph of Article 44(2) a contracting authority could require minimum levels of economic and financial standing in accordance with Article 47 which provided that tenderers may be required to provide proof of that standing through the presentation of their balance sheet. The court was satisfied that Article 47 left a degree of freedom to the contracting authorities to determine which aspect of the balance sheet would be relied upon:

"29. However, that freedom is not unlimited. Under the second paragraph of Article 44(2) of Directive 2004/18 a minimum capacity level must be related and proportionate to the subject matter of the contract. It follows that the aspect or aspects of the balance sheet chosen by a contracting authority to establish a minimum level of economic and financial standing must be objectively such as to provide information on such standing of an economic operator and that the threshold thus fixed must be adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose."

148. The setting of minimal conditions and criteria under a previous public procurement directive was accepted by the CJEU in *CEI v. Bellini* [1987] ECR 3347 and *Geborends v. The Netherlands* [1988] ECR 4635.

149. In *Whelan Group (Ennis) Ltd. v. Clare County Council* [2001] 1 I.R. 717, the applicant claimed that a minimum requirement that a contractor demonstrate that it had satisfactorily completed a roadwork project with a value exceeding IRE10 million excluding VAT for any one individual project ensured that only the largest companies could apply and was therefore discriminatory. It was also submitted that the criterion lacked transparency and proportionality. The respondent submitted that the criteria were objectively justified and non-discriminatory and respected the principle of equal treatment. Kelly J. noted that Article 22 of Directive 93/97 EEC which was applicable to the case, recognised the use of minimum conditions as a basis for selecting candidates based upon criteria of an economic and technical nature if there was an objective and non-discriminatory basis for choosing those criteria. The article provided a method for adducing evidence of compliance with the criteria. The court was satisfied that Articles 22 and 27(1)(b) of Directive 71/305 envisaged the use of minimum conditions as a basis for selecting candidates. Since evidence could be sought as to the value of works performed by the contractor in the preceding five years and furnished under the directive, it followed that the value of those works could be used as a minimum condition for tendering, provided there was an objective and non-discriminatory basis for choosing such a criterion. The learned judge found both an objective and a non-discriminatory basis for the criterion chosen. He was not satisfied that the conditions specified suffocated genuine competition. It was acknowledged that the applicant was excluded because of his inability to comply with the conditions set but once the stipulation was proportionate, had a rational basis and was applied objectively, it complied with European law. Kelly J. stated:

"The selection of the prequalification criterion which is sought to be impugned in these proceedings was made on the advice of an expert standing committee. It took the view that this criterion was necessary having regard to the financial scale and technical complexity of the project. It was taken in accordance with the practice determined by the National Roads Authority which took into account its experience nationally in relation to the use of the restricted tendering procedure. The stipulation was included in order to ensure the technical capability of tenderers. The stipulation sought to minimise the risk of delays to the project and the implications that would arise from that for public funds. This criterion applied to all potential contractors and I

cannot see how it can therefore be said to be discriminatory. It is an objective criterion. It is capable of objective assessment and application. There is a rational basis for it. It is transparent because every potential tenderer who was notified of the requirement had to comply with it. It manifestly relates to economic and technical conditions. The Directive does not attempt to set out the technical or economical criteria that are to be applied. It indicates the references or methods of proof by which technical and economic criteria are to be judged. That much is clear from the terms of the Directive itself and from the decisions of the European Court ...” (applying *CEI v. Intercommune pour les Autoroutes des Ardennes* (joined cases 27 to 29/86) [1987] ECR 3347).

150. The applicants submit that this case is distinguishable from the Whelan decision because there is no evidence that the respondents sought or secured the advice of an expert committee to set the level to which the qualification criteria should be set, the respondent had no regard to the market in the State or for SME participation, turnover levels were set based on undisclosed research which overestimated the spending on the framework over the proposed two year period and the blanket turnover requirement bore no relation to the size of the Irish market. I am not satisfied that this is so having regard to my findings in respect of the work carried out on behalf of the respondents prior to the issuing of the Request for Tenders and the setting of the qualification criteria already set out. The Directive itself provides that the criteria may be set provided they are proportionate and are applied in a non-discriminatory way

#### **Are the Criteria Disproportionate and Discriminatory?**

151. The applicants submit that the capacity levels set in the Request for Tenders must be relevant and proportionate to the circumstances of the contract. It is submitted that no evidence has been adduced concerning the assessment of the proportionality of the qualification criteria. Mr. Mulvey gave evidence that a figure of €2 million turnover as a qualification criteria was set having discussed the matter with his line manager who approved the figures upon which he relied. He was informed that the proposed turnover level was considered by his superiors to be proportionate. He did not calculate the value of any individual contract in the survey which he carried out. He did not have regard to the individual drawdown numbers when setting the €2 million turnover. The turnover criteria was “never going to be anything other than a percentage of the overall aggregated contract price”. The respondents submit that the proper value of the Framework is the value of all of the individual contracts that might be entered into within the Framework.

152. Mr. Massey gave evidence that an average spend in respect of an individual contract under the proposed Framework Agreement would be between €22,000.00 and €26,000.00. It was submitted by the applicants that the measure of turnover needed to be related to the conditions of the market and the likely level of purchases by individual customers rather than simply placing reliance on a blanket turnover figure. While it was accepted that the public sector might need some reassurance that the parties appointed could deliver under the Framework, a figure of €2 million as a threshold figure was disproportionate. He noted that the gross figure of €5 million over a period of two years would involve seven suppliers in respect of each Lot. If the successful tenderers had the opportunity to bid for business of up to €2.5 million per annum the seven entities who are successful in respect of each Lot would have an opportunity to bid for a proportionate amount of business. However, Mr. Massey stated that the turnover requirement should be attuned more closely to the level of business that any individual firm is likely to earn under the Framework.

153. I am satisfied however, that the spread of risk amongst seven tenderers gives comfort to the procurer in that it reduces the risk of damage arising if one or more of them are unable to deliver under the terms of the Framework in respect of the individual Lot. This was a legitimate, reasonable and proportionate reason for the qualification criteria set.

154. Dr. Bacon initially gave the view that the annual turnover of €2 million was actually below the lower limit of the range in the guidance under the circular and was proportionate to the contract as required under the Regulations. He said that given the estimated value of a contract under each Lot covered by the tender of €5 million an annual turnover criterion of €2.5 million to €15 million was appropriate and consistent with the guidance given. However, he later declined in evidence to give a view on the proportionality of the qualification criterion fixed under the Request for Tenders. He confined himself to an opinion that the amount set was 20% off the minimum prescribed in the guidance. He had not carried out any analysis as to whether the criteria under the Framework Agreements were proportionate.

155. The respondents submit that Article 9.9 of the Directive provides that the relevant value to be taken into consideration when estimating a value of the proposed Framework Agreement should be the maximum estimated value net of VAT of all the contracts envisaged for its two year term. This was stated at para. 1.7 of the Request for Tenders and is dealt with in a detailed clarification in reply to query number 2 raised in respect of the Request for Tenders. It was pointed out that the NPS did not have historical data on the goods and services covered in the proposed Framework Agreement. It estimated that the expenditure on goods or services covered might amount to €25 million over the term divided almost evenly between the five Framework Agreements Lots. It was emphasised that tenderers should understand that this figure was an estimate based on current and future expected usage. Notwithstanding the limited amount of hard statistical information, Mr. Mulvey arrived at an estimate which in turn gave rise to a division of the Framework into five Lots with an estimated value of €5 million over two years in respect of which a turnover requirement of €2 million per annum was required.

156. The respondents submit that, in accordance with Circular 10/10, the Framework Agreement was broken into Lots which is an acknowledged method of facilitating access by SMEs to such an agreement. Thus it fosters equality and may be viewed as a proportionate measure. Furthermore, it was submitted that, in setting the number of Framework members at seven, the respondents exceeded the minimum requirements of three to be placed on the Framework under Article 32(4). Only five members were allowed in respect of each Lot in previous CMOD Framework Agreements. The increase was based on consultations which were carried out by Mr. Mulvey with the industry and previous experience under CMOD Agreements. Evidence was given that each Lot was over-subscribed. The setting of the Framework number at seven was said to further increase competition and to be a further indicator of the proportionality of the qualification criteria set.

157. It was also submitted and it was Mr. Mulvey’s evidence that the value of turnover can be 0.5 to three times the value of the contract. Following discussions with his line manager, it was decided that the value appropriate to each Lot should be €2 million. He stated that he took that view because it would operate and complement the technical and professional ability criterion in assessing the ability of any successful tenderer to fulfil any contracts under the Framework Agreement nationwide on the basis that they had a proven track record in completing such contracts.

158. Mr. Mulvey had regard to previous CMOD contracts which had provided criteria, based on technical and professional ability, that evidence be demonstrated of deliveries of twenty printers over three deliveries and a total delivery of five hundred printers over three years. The CMOD also looked for pre-orders of fifty and fifteen hundred deliveries over three years in respect of monochrome printers. Mr. Mulvey took into account that the country was in the middle of a recession and that to set the criteria at the same level would

exclude certain operators from the competition. Therefore, he lowered the threshold in respect of each Lot to three deliveries of thirty printers and 250 deliveries over three years. The technical criteria were also relaxed somewhat in relation to the Lots for machines of higher specification. He did so having discussed it with his line manager. He carried out some comparative research in respect of similar competitions in Scotland, the United Kingdom and Australia to which the proposed Framework Agreement bore many similarities.

159. I am not satisfied on the evidence adduced that the applicants have demonstrated that the setting of the turnover requirement or technical criteria in respect of each Lot was the subject of a "manifest error" when measured against the principles of proportionality or equality or that under the old rules they could be regarded as irrational or unreasonable. I have heard extensive evidence outlining the rationale for the decisions made in setting the qualification criteria. I am not satisfied that there is any legal basis upon which to challenge the criteria set on the basis of proportionality or non-discrimination or otherwise for failure to comply with the terms of the Directive and the Regulations transposing it. I am satisfied to accept the evidence of Mr. Mulvey and Mr. Quinn on these matters and, insofar as there may be a conflict between their evidence and that of Mr. Massey, I prefer their evidence.

### **Competition**

160. The applicants submit that the qualification criteria set out in Clause 3.2 of the Request for Tenders contravene the provisions of the Competition Act 2002. They seek to restrain the tender process or set aside the qualification criteria on the grounds set out at para. 1(i)(e) to (j) of the amended statement of grounds summarised by the applicants as follows:

(a) The Framework Qualification Criteria offend s. 4(1) of the Competition Act 2002.

(b) By thus applying these criteria, the respondents have failed to have any or any adequate regard to the subject matter of the relevant market or of the goods and services to be covered by the Framework Agreement.

(c) Furthermore, the respondents have purported to establish the Framework Agreement and seek to conclude contracts thereunder to the exclusion of the applicants in a manner which prevents, restricts and/or distorts competition, contrary to Irish competition law.

(d) The applicants cannot "form relationships" so as to meet the criteria set out in the Request for Tenders as same would breach s. 4(1) of the Competition Act 2002 and any joint tender would not meet the requirements/conditions of s. 4(5) of the Competition Act 2002.

161. It is also alleged that the criteria infringe Regulation 33(6) of the Procurement Regulations which provides:

"A contracting authority may not use Framework Agreements in such a way as to prevent, restrict or distort competition".

### **Competition Act 2002**

162. The relevant provisions of the Competition Act 2002 are:

#### **"3. Interpretation**

(1) In this Act, unless the context otherwise requires—

...

"undertaking" means a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service."

#### **4. Anti-competitive agreements, decisions and concerted practices**

(1) Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which

(a) directly or indirectly fix purchase or selling prices or any other trading conditions,

(b) limit or control production, markets, technical development or investment,

(c) share markets or sources of supply,

(d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

(2) An agreement, decision or concerted practice shall not be prohibited under subsection (1) if it complies with the conditions referred to in subsection (5) or falls within a category of agreements, decisions, or concerted practices the subject of a declaration for the time being in force under subsection (3).

...

(5) The conditions mentioned in subsections (2) and (3) are that the agreement, decision or concerted practice or category of agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not -

(a) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives,

(b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

..."

### Undertaking

163. The question arises whether the Commissioner of Public Works is an "undertaking" within the meaning of the Competition Act 2002 when engaged in the procurement of monochrome and colour printers and multifunctional devices and/or consumables.

164. The applicants submit that the NPS operate as an undertaking under the Competition Act because they are making themselves active in the market and are seeking to order the market, charging a consideration of €1.00 for entry into the Framework Agreement.

165. In *Deane v. Voluntary Health Insurance Board* [1992] 2 I.R. 319, Finlay CJ., in interpreting "undertaking", stated:

"... the true construction of this section is that the words "for gain" connote merely an activity carried on or a service supplied, as it is in this case, which is done in return for a charge or payment" (at page 332).

166. The respondents submit that the list of clients who may avail of the Framework Agreements are not engaged in commercial activity. They are State agencies providing unremunerated public services. They are purchasers of printers and consumables and are the ultimate consumers of same. They are not engaged in selling on such goods or services within the market. It is submitted that the respondents do not constitute an undertaking for any purposes under s. 4 of the Act. I am satisfied that this is so.

167. The issue was addressed in *Nurendale Ltd. v. Dublin City Council* [2009] IEHC 588 in which McKechnie J. distilled a number of principles from domestic and CJEU case law in respect of undertakings as follows:

"60 i) An undertaking is any body, regardless of how it is established or how it is funded, or of its legal status, which is engaged in an economic activity, or to have the same meaning, in a commercial activity.

ii) An economic activity consists of offering goods or services on a market, usually although not necessarily for a fee or charge.

iii) The actions of any given body are severable so that it may act as an undertaking on some occasions, and not so act on others.

iv) The fact that a body pursues purely social or public objectives indicates that its activities are non-economic. However, where there are other activities which are not so, the existence of such social and public objectives will not of themselves preclude a finding that the action is economic in nature. Similarly with the fact that the function or body is non-profit-making.

v) Whether a private operator would be capable of carrying out the activity for profit under market conditions, is an important, but not a decisive factor, in determining if the actions in question are economic; this applies whether or not such activity is in fact carried out by private operators.

vi) The fact that a body engages in administrative acts, as well as economic, will not by reason only of the former, relieve it of the status of an undertaking.

vii) Where the act complained of is regulatory, the nature of that regulation may be examined so as to determine whether it is economic in nature, or else is purely administrative.

viii) Where administrative power is granted to an undertaking this may, in certain circumstances, breach Articles 82 and 86(1) of the EC Treaty where such power is not the subject of restrictions, obligations, and review."

168. The NPS, the Procurement Agency, carries out its functions in respect of a large number of public bodies. It operates as a public procurement body under the Regulations in accordance with Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The purpose of the Directive may be understood by reference to the recital which emphasises that the award of contracts concluded in the Member States on behalf of the State is subject to respect for the principles of the Treaty. It was thought necessary to draw up provisions for the Community's coordination of national procedures for the award of public contracts in order to guarantee the opening of public procurement to competition. Recital 4 states that Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers. Thus, the underlying principles of the Directive require that the qualification criteria be proportionate and non-discriminatory. Regulation 33(6), quoted above (transposing Article 32(2) of the Directive), imposes an obligation on the contracting authority not to use the Framework Agreement to facilitate anti-competitive conduct between undertakings. Member States are empowered to regulate the operation of public contracts. The respondents exercise that authority in respect of the listed public bodies. The ultimate cost of the purchases is borne by the State. The purchases are carried out by the respective bodies to enable them to carry out their public statutory duties. In doing so, I am satisfied that the respondents are not engaged in the production, supply or distribution of printers and/or consumables or the provision of services in respect of same or as an undertaking within the meaning of s.3(1).

169. In *FENIN -v- Commission* [1991] ECR I-1979 the Court of Justice stated that the concept of an undertaking encompasses every entity engaged in economic activity, regardless of its legal status or the way in which it is financed and that any activity consisting in



offering goods and services on a given market is an economic activity. At para 37 it stated:-

"...an organisation which purchases goods- even in great quantity- not for the purpose of offering goods or services as part of an economic activity, but in order to use them the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. While an entity may wield very considerable economic power, even giving rise to a monopoly, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purpose of Community competition law..."

170. In *Lifeline Ambulance Services v. Health Service Executive* [2012] IEHC 432, Cooke J. reviewed the case law on undertakings. The HSE had entered into Framework Agreements for the provision of ambulance services with a number of parties including the plaintiff. A Request for Tenders was issued whereby the HSE limited the scope of the service now required from tenderers. The court considered as a preliminary matter whether, in the market for the provision of ambulance services for inter-hospital transport of patients and emergency services, the HSE operated as an undertaking under s. 3(1) of the Act. Cooke J. noted that the case was exclusively concerned with services provided in respect of public patients, the cost of which was born by the State and with the role of the HSE as purchaser of services in discharge of its public functions as a health authority.

171. Cooke J. distilled a number of principles from the case law at para. 61 *inter alia* as follows:

"(a) A public body funded from public monies and exclusively engaged in the exercise of entrusted functions which have the object of securing some public interest benefit will not come within the scope of the prohibition as an economic activity even where it makes a charge for the services it provides and notwithstanding the possibility that those services could be provided by private undertakings: (*Euro Control*)....

(c) A public authority which occupies a dominant position in a service market by virtue of being entrusted with special rights in the public interest does not by virtue of that fact alone infringe Article 102, unless the very exercise of those rights lead it to commit an abuse;...

(f) A public agency exclusively engaged in providing services on a non economic basis in the public interest does not become engaged in an economic activity because it concludes contracts to purchase services from private operators provided it does so as an end user of those purchases in its non economic activity; (*FENIN*)

(g) Where, however, a public authority is itself also engaged in providing services for remuneration in the market on which it purchases services for its own use, its activities may be treated as economic activities and it will then come within the scope of a prohibition. (*Bettercare*)"

172. Cooke J. concluded that the issue before the court was not dependent upon the construction of the defendant's statutory obligations or powers but on the analysis of the nature of the functions which it actually performed in practice. The evidence before the court indicated that there was a distinction to be made between the defendant's functions in providing emergency services and non-emergency ambulance services for the transport of public patients on the one hand and its involvement in services provided to private patients on the other. He concluded that, in the use of its NAS Fleet both for emergency services and the transport of public patients, the defendant was not "engaged for gain in the provision of a service". No charge was made or remuneration obtained by the defendant. It might, on occasion, purchase ambulance services in the transport of patients for which it had statutory responsibility but this did not alter the position. The court was satisfied that this conclusion was consistent with the assessment made by the Competition Authority in an enforcement decision in which it decided that the HSE was not acting as an undertaking when it negotiated with the pharmaceutical industry to secure reductions in the ex-factory prices of certain drugs nor when purchasing pharmacy services from private pharmacy undertakings for provision to the general public. The court did not consider that there was any material distinction to be made between the role of the HSE and those activities and its role in purchasing supplementary ambulance services for the needs of its public patients. The court held that the defendant did not operate as an undertaking in the use of its ambulance fleet for emergency service and the transport of public patients because its provision of those services was not an economic activity in which it engaged "for gain".

173. In this case, the respondents are not engaged in procuring any goods or services at all nor do they enter any contracts for the purchase of same. On behalf of the State, the respondents have developed a public procurement process under a Framework Agreement in accordance with the Regulations and Directive. They are providing a regulated scheme for the procurement of printers and consumables; they do not do so for reward. They were executing a public duty thereby enabling the purchasing bodies using the Framework to perform their respective public services. The respondents were not making any purchases. The Framework however, seeks to maximise the purchasing power of the State in respect of these devices and consumables under which they may be purchased. It seems to me that the respondents thereby provide a public service which has an obvious public benefit for the public finances and the listed State service providers but it is not doing so as an "undertaking". I am therefore satisfied that the provision of the 2002 Act do not apply to the respondents in this case.

### Other Competition Issues

174. The parties sought to rely on the evidence Mr. Massey and Dr. Bacon in respect of the perceived effects, if any, of the Request for Tenders and Framework Agreement on competition in the relevant market. It is agreed that the relevant market was that for printers and multi-function devices within the State taking account that certain framework agreements also related to the associated market for consumables in respect of a number of the lots. The applicants sought to establish on the balance of probabilities that the Framework Agreement prevents, restricts or distorts competition. This general proposition is directed towards establishing that the contracting authority is in a dominant position in the market and/or that the framework agreement stands is anti-competitive.

175. Mr. Massey summarised his conclusions in respect of the framework agreement at para. 6.4 of his report of 18th March, 2013. In respect of these issues he was of the opinion that the framework agreement prevented, restricted or distorted competition in the market because:

- i. It would exclude all suppliers of the relevant products apart from the successful bidders from supplying the products to all public sector purchasers for a minimum of two years and possibly up to four years, thereby greatly reducing competition to

supply those customers;

ii. While the tender means that there is some competition for the market, the tender criteria greatly limited the number of undertakings that could bid for one or more of the framework lots so that the degree of competition for the market is severely curtailed so that any competition for the market is seriously restricted;

iii. The framework agreement is likely to foreclose the entire market for the duration of the agreement resulting in higher prices for higher private sector purchasers; and

iv. There is no obvious objective justification for the restrictions of competition included in the request for tenders and the framework agreement and no sufficient costs and efficiencies to offset the reduction of competition. In any event such benefits would not alter the fact that market foreclosure would result in higher prices to private sector customers and provide no offsetting benefits to such customers.

176. Mr. Massey contends that the framework agreement will have an adverse effect on competition in the entire market not just in respect of public sector purchases. He noted that the applicants indicated to him that sales to state agencies account for 40% and 80% of their sales. They will likely lose a large proportion of their current business and will be prevented from supplying such customers for the duration of the agreement. He maintains that all undertakings apart from the successful bidders will be limited to supplying between 20% and 60% of the market for the duration of the agreement. He states that by denying access to public sector customers to the vast majority of undertakings selling the relevant products the framework is likely to foreclose the entire market as many undertakings could not survive on the basis of sales to private sector customers alone. Market foreclosure would lead to significant lessening of competition in the overall market for the supply of the relevant equipment and reduce the number of competitors in the market while simultaneously creating a barrier to entry.

177. Mr. Massey also considered whether the exercise of buyer power by the State under the framework agreement could itself be anti-competitive. Purchasers under the framework would not be selling onwards into a competitive market and any benefit accruing to the State from lower prices was likely to be more than offset by harm to suppliers who are excluded from the market and to private sector customers who would end up paying higher prices as a result of the reduced competition in the market.

178. The basis for Mr. Massey's conclusions in respect of the market under discussion is derived in part from his client's instructions. He had no empirical evidence from the applicants but had to rely on their respective company or personal experiences without the advantage of market or qualitative surveys. For example the figure of 200-250 operators in the market was furnished by the applicants. Some reliance was placed on a market report by Infosource.

179. A significant difference between Mr. Massey and Dr. Bacon relates to the percentage of the market covered by the Framework Agreement. Mr. Massey believes that the public sector's purchases of products under the framework will amount to 20% of total sales. They could be even higher and could account for 30-40% of total sales because:

(a) Part of Lots one and two excluded consumables so it was incorrect to state that the relevant products would discount for only 50% of spending under the frameworks it would be higher than that;

(b) The public sector had postponed purchases of products in recent years and therefore data on past purchases which constituted the basis of Dr. Bacon's estimate understated the likely purchases of the products of the future; and

(c) Evidence that a significant proportion of the public sector's existing stock of printers is past its sell by date and obsolete and will need replacing suggests the higher figure is appropriate.

180. Therefore, Mr. Massey believes that because the public sector accounts for a very large share of total sales that the framework agreement will result in the foreclosure of the entire market, public and private, with the consequent reduction of competition in the overall market.

181. Dr. Bacon estimates that the public sector is likely to account for approximately 8% to 12% of total purchases of relevant products. He notes that the conclusion reached by Mr. Massey is based on information which had been supplied by the applicants that sales to the public sector accounted for between 40 and 80% of turnover in their businesses. On this basis a calculation was made by Mr. Massey that in effect all undertakings apart from the successful business bidders would be limited to supplying 20% and 60% of the market for the duration of the agreement. Dr. Bacon notes that other data in the Massey report and data related to the Request for Tenders did not support this conclusion.

182. An estimate of €75million per annum for the market for printers and multi function devices set out in Mr. Massey's report did not include the value of servicing or sales of consumables. Dr. Bacon noted that this contrasted with the tender document estimate of €25million which refers to the total value of purchases including devices, servicing and consumables over two years. He noted that this information was supplied by the NPS. While his statement that all purchasers of office equipment to the public service were contacted and details of devices purchased in 2010 obtained is open to some criticism, he deduced nevertheless, that the collated information showed that expenditure on printers and multi function devices in that year was €5 to €6 million while the annual cost of services including consumables was in the region of €6million. He noted that the NPS estimated the total expenditure would therefore be approximately €25million across all five lots over two years. Using this data Dr. Bacon concluded that the public sector accounts for about 8% of the market made up of devices worth €6million per annum out of a total sales of €75million. Therefore 92% of the market would not be affected by framework agreements. Therefore he concluded that the inference regarding the importance of sales to the public sector was misleading and the conclusion contained in the Massey report that only firms that are successful in obtaining a framework agreement could survive was not supported by the data.

183. Mr. Massey was subsequently criticised for his reduction of the €75million figure value of the market contained in the Infosource Report which he reduced to €52million on the basis that his clients had told him that there was a 30% to 40% reduction to be made in respect of prices actually paid. The €75million figure was determined by statistics provided by manufacturers. Mr. Massey rejected the suggestion that market share should be estimated on the basis of the value of purchases rather than sales. The estimate for the total value of the market of €75million grossly overstated total sales because it was based on an assumption that all the equipment was sold at the manufacturer's recommended price when in reality actual sales prices were 35% to 40% below the recommended price. On that basis public sector purchases in value terms under the framework were approximately 20% of total sales of the products in

question. In his report of 17th April, 2014 he states that taking various factors into account the public sector sales at around 20% of the total together with the pent up demand and a need to replace obsolete equipment made it reasonable to conclude that the public sector could account for 30% to 40% of total purchases of the products during the two year time frame of the agreement. He states at para. 9 that having made further enquiries of the applicants he had been informed that sales value figures provided by Info Source estimated the value of total printer / MFD sales on the basis of the number of printers / MFDs sold assuming that all sales are made at the manufacturer's recommended price where as in reality most were made at a substantial discount to that price. He was therefore informed that " actual prices are generally 30% to 40% lower than the manufacturer's recommended price. This implies that the actual value of sales is 30% to 40% lower than the Infosource figure of €75million. If actual prices are 30% lower than the manufacturer's recommended price, this implies total sales actually amount to €52.5million."

184. The disagreement between Dr. Bacon and Mr. Massey about these figures was debated during the course of the trial. The onus is on the applicants to establish the case and I am not satisfied that the figure of €75million contained in the Infosource report can be reduced €52.5million simply on unverifiable almost anecdotal evidence of the nature of reductions given on these prices. I prefer the evidence of Dr. Bacon to that of Mr. Massey in relation to this aspect of the case. While criticisms have been made of the estimates made by Mr. Mulvey and the extent and nature of his information, his conclusions appear to be somewhat more reliable than the basis advanced for reducing the figure put forward by Mr. Massey. I am not satisfied on the balance of probabilities to act on these figures for the purpose of concluding that the framework agreement will exclude many of the 200 to 250 operators in the market or that the State would become inappropriately dominant in the market and/or that the framework agreement is therefore inherently anti-competitive under the Competition Act 2002.

185. Mr. Massey also indicated that on the basis of his figures public sector sales were around 20% of the total but then when one added pent up demand and the need to replace obsolete equipment it was reasonable to conclude the public sector could account for 30% to 40% total purchases in the two year time frame. I am not satisfied to accept the opinion which was based *inter alia* on the numbers in the public sector work force and the fact that machines may need replacing. This was said to justify an estimate for a pent up demand and increase in purchases of a further 10% to 20% giving rise to a state sector share of 30% to 40% in the market. The evidence is simply not cogent enough to establish the claims made in that regard.

186. In evidence Mr. Massey accepted that it was only when the State element of the market reached a figure of between 20% and 30% that there was cause for concern. It would appear that had Mr. Massey maintained a figure at €75million this level of market share might have reached 16%. When he reduced it to €52.5million the level of market share under the framework passed the safety threshold of 20%. The additional percentages bringing it up to 30% to 40% were apparently attributable to future purchasers due to pent up demand and obsolescence. This in turn did not appear to take into account budgetary restraints. I am not satisfied that this evidence establishes that the framework agreements will result in the foreclosure of the entire market with a reduction of competition in the overall market since it has not been established that the public sector's share is large enough to result in such a consequence or that the State would assume a dominant position as a result.

### **Consortia**

187. The applicant submits that the only way in which they could possibly comply with the qualification criteria is by joining a consortium. This is said to be evidence of the disproportionate and discriminatory nature of the effect of the criteria. In this regard it should be noted that all of the applicants are small SMEs. It would appear that the first, fourth, sixth and tenth applicants were nominated as sub-contractors to prime contractors in submitted tenders. They did so on the basis that the prime contractor was in a position to meet the qualification criteria.

188. Mr. Massey and witnesses on behalf of a number of the applicants gave evidence of the difficulties posed for them in joining a consortium. Clauses 1.1 2 and 2.5 of the Request for Tenders encourages firms which are ineligible to bid to join with consortia in doing so. Mr. Massey observed that the opportunity to do so is limited because the lead undertaking must itself satisfy the eligibility criteria which would necessarily limit the number of firms. In addition, he pointed out the risk of breaching competition law which may discourage undertakings from participation. In particular, Mr. Massey claims that the framework agreement in advocating such arrangements between undertakings appeared to infringe s. 4 (1) of the 2002 Act and that the scope of arrangements must be presumed to be anti competitive under s. 6 (2) and would not satisfy the provisions of s. 4 (5).

189. Mr. Massey states that parties engaged in the sale and distribution of the printers were independent undertakings and any arrangement between them to jointly tender for one or more of the framework lots would by definition have to involve an agreement on prices to be charged and other terms and conditions. This constituted a cartel. He noted the warning in the Request for Tenders to would be bidders about the illegality of collusive tendering. Any arrangement between undertakings to cooperate with one another to supply the relevant products would almost certainly have to involve agreement on which of them would supply which customers whether by name or by area and how any business would be shared out in the event of the bid succeeding. This would constitute an agreement to share customers or markets. Those engaging in a consortium would necessarily be engaged in the sale and distribution of relevant products with competing undertakings in respect of equipment that would be regarded as interchangeable or substitutable by customers. Any agreement would be presumed to have the object of preventing restricting or distorting competition.

190. Section 4 (2) states that an agreement shall not be prohibited under s. 4 (1) if it meets the conditions set out in s. 4 (5). Section 4 (5) concerns agreements which having regard to all relevant market conditions contribute to improving the production or distribution of goods or provision of services or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit and does not impose on the undertaking concerned terms which are not indispensable to the attainment of those objections and affords undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question. Mr. Massey stated that price fixing arrangements could not contribute to improving the production or distribution of goods or provision of services or to technical or economic progress. They do not result in increased efficiency. It would most likely result in an increase of price and harm rather than benefit customers and consumers. Therefore he concludes that any arrangement between SMEs or between SMEs and larger undertakings for the purpose of submitting a joint tender would not appear to satisfy the requirements of s. 4 (5).

191. Dr. Bacon was of the view that the encouragement of collaboration has a number of advantages. He noted that the structure of the products and services requested in the tender indicated that collaboration could be beneficial since larger firms would likely be most competitive in supplying the devices while other smaller local suppliers might fulfil the maintenance service and consumables requirements. He concluded that the number of tendering consortia that could pass the qualifying test might exceed significantly the seven or eight contained in Mr. Massey's report if such applications were made. Dr. Bacon disagreed with Mr. Massey's conclusion that such arrangements would constitute an agreement presumed to be anti-competitive. He stated that SMEs need to form relationships because they are not operating nationally or otherwise not in a position to meet all the requirements of the tender. They are not competing with similar SMEs that are in other parts of the country and have only a limited capacity to meet all the requirements sought. Therefore, by forming relationships with partners to comply with the comprehensive requirements of the tender

they are not reducing competition and are not undertaking an arrangement the purpose of which is anti-competitive. He concluded that in making these arrangements SMEs will be increasing the number of entities competing for the framework agreements. He also concluded that it was reasonable that a large firm can be part of such a relationship whether as a manufacturer or large distributor because it would have the resources to undertake the services required. There was an opportunity to the smaller entity to participate in the tender. He was not satisfied that it was appropriate to represent such possible arrangements as "price fixing" since in many sectors it is not unusual for smaller firms to form consortia in order to bid for projects where they believe it increases their chances of doing so. Formation of a consortium to bid for a project simply involves a number of firms coming together in order to supply the goods and services nationwide and engage in a bidding competition against other firms (or consortia). This is intended to benefit a consumer.

192. Both experts were satisfied that there were risks under the Competition Act in becoming part of a consortium. Mr. Massey also noted a number of practical difficulties in that the operators would have to agree which of them was going to supply in particular parts of the country which might be interpreted as market sharing. These risks operated as a disincentive to participating in consortia.

193. It should be noted that Article 47 of the Directive permits economic operators to rely on the capacities of other entities regardless of the legal nature of the links which it has with them. It must prove that it will have at its disposal the resources necessary for example "by producing an undertaking by those entities that effect". Under Article 47 (3) a group of economic operators may rely on the capacities of participants in the group or of other entities. It would appear therefore that operators could pool their resources to meet the qualification criteria. It seems clear in this case that apart from one of the operators who would qualify in respect of one lot the remainder could not even qualify for one. The potential pooling of resources or acting as sub-contractors with a lead participant providing the resources to meet the qualification criteria is open to them as a matter of law.

194. In respect of price fixing Mr. Massey accepted that putting forward a joint price in a consortium bid is not automatically anti-competitive. Indeed the Competition Authority had issued advice in relation to SMEs participating in consortia for the purposes of tendering. Although Mr. Massey accepted that this could be done lawfully he reiterated that there were risks which are a disincentive to participation.

195. Dr. Bacon was satisfied that these were risks which businessmen incur insofar as many features of business activity are regulated under domestic or European Law with which operators the market must comply.

196. It is noteworthy that the Competition and Consumer Protection Commission issued a guide on SMEs engaged in consortium bidding in tenders (Dec. 2014) and stated that a consortium bid between actual and potential competitors would not itself breach competition law if according to the Competition Authority none of the consortium members could fulfil the requirements of the tender competition of the contract on its own, no subset of the consortium members could together fulfil the requirements of the tender competition of the contract, only the minimum amount of information strictly necessary for the formulation of the consortium bid was furnished and the performance of the contract, if awarded, was shared between the consortium members and restricted to relevant staff on a need to know basis. The consortium members were obliged to ensure that they compete vigorously as normal in all other contexts. It is clear from the evidence that a number of the applicants in this case are not competitors at all, operating as they do in different parts of the country.

197. I am not satisfied on the evidence that there is any basis on which to conclude as a matter of law or fact that participation in consortia under the terms of the proposed Framework Agreement gives rise inexorably to a breach of the Competition Act 2002. Both experts acknowledge this. I am satisfied that the Directive itself envisages participation by groups of operators. There are risks which attach to such participation which must be considered as a matter of course. Some people may be deterred by these risks, others may take steps having obtained advice to ensure that their participation in a consortium is carried out, as it can be, in accordance with the provisions of the Competition Act. I consider the evidence of Mr. Massey on this issue to be somewhat exaggerated and I prefer Dr. Bacon's evidence on the matter.

198. I am not satisfied having considered all of the expert reports and evidence in respect of competition, arising from economic theory and factual evidence that the Request for Tenders or the Framework Agreement are likely to give rise to any breach of competition law whether arising from their terms or upon implementation.

## **Conclusion**

199. For all of the reasons set out above I refuse the relief sought.