Neutral Citation: [2015] IEHC 756

THE HIGH COURT

Record No. 2015/176 JR

IN THE MATTER OF COUNCIL DIRECTIVE 2004/18/EC (AS AMENDED)
AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES' CONTRACTS) REGULATIONS 2006 (S.I. 329 OF 2006)
AND IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC (AS AMENDED)
AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (S.I. 130 OF 2010)

BETWEEN:

BAM PPP PGGM INFRASTRUCTURE COOPERATIE U.A.

Applicant

AND

NATIONAL TREASURY MANAGEMENT AGENCY AND MINISTER FOR EDUCATION AND SKILLS

Respondents

JUDGMENT of Mr Justice Max Barrett delivered on 1st December, 2015.

PART 1: BACKGROUND.

1. This case concerns the tendering process for a contract to build part of the new DIT campus at Grangegorman,. On 27th March last, BAM commenced judicial review proceedings seeking, *inter alia*, an order setting aside the decision of the respondents to accept a late tender submitted by a consortium called 'Eriugena'. This challenge was brought under the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (the 'Principal Regulations'). As a consequence of BAM bringing this challenge, an automatic suspension arose by operation of law whereby the respondents are precluded from concluding the contract to build, pending a decision on BAM's challenge. At the start of this year, the Supreme Court, in *OCS v. DAA* [2015] IESC 6, indicated that the Principal Regulations did not permit a court to lift such a suspension. However, in the course of this year, new retroactive regulations, the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2015 (the 'Amending Regulations') were adopted. The Amending Regulations introduce an entitlement for a contracting authority to apply to the High Court for an order to lift an automatic suspension arising. This judgment follows just such an application.

PART 2: AN IRISH SOLUTION TO AN IRISH PROBLEM?

i. Overview.

2. BAM contends (a) that the Principal Regulations, as amended by the Amending Regulations (together the 'Amended Regulations') must be dis-applied as incompatible with the 'new' Remedies Directive(i.e. Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (O.J. L335, 20.12.2007, 31)) (hereafter the 'Directive of 2007'), because (b) the Directive of 2007requires that the automatic prohibition on concluding a contract should stay in place until the determination of the within proceedings. This contention, with respect, is wrong. It fails to have regard to the fact that the Directive of 2007does not provide for automatic prohibition on concluding a contract when there is not a review of a contract award but rather a review, as here, of an interim decision.If one looks to recital 4 of the Directive of 2007, it states that:

> *"[W]eaknesses…noted [in the then EU-wide procurement régime] include in particular the absence of a period between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award proceeding very quickly to the signature of the contract. In order to remedy this weakness…it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended…".*

3. The purpose of this 'standstill period' is explained as follows in recital 6*:"The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure…".* These objectives are given effect by a new Article 2a inserted into the 1989 Remedies Directive (i.e. Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (O.J. L395, 30.12.1989, 33)). It provides that: *"The Member states shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c ['Time limits for applying for review']…".*This minimum standstill period has no application in the within proceedings because there has been no contract award decision thus far.

4. The Directive of 2007 also seeks to allow a review body sufficient time to hear an application to extend that standstill period without the contracting authority signing the contract, even if the minimum standstill period has elapsed. So, recital 12 of the Directive of 2007 states as follows:

> *"Seeking review shortly before the end of the minimum standstill period should not have the effect of depriving the body responsible for review procedures of the minimum time needed to act, in particular to extend the standstill period for the conclusion of the contract.[1]It is thus necessary to provide for an independent minimum standstill period that should not end before the review body has taken a decision on the application[2]….Member States may provide that this period shall end either when the review body has taken a decision on the application for interim measures…or when the review body has taken a decision on the application for interim measures , including on a further suspension of the conclusion of the contract or when the review body has taken a decision on the merits of the case, in particular on the application for the setting aside of an unlawful decision.[3]"*
>
> [1]The Directive's authors clearly mean to refer here to the extension of the minimum standstill period that arises when there has been a contract award decision, i.e. the period referred to in recital 4 (considered above).
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> [2] Recital 12 justifies an "independent" minimum standstill period that lasts until there is a decision. The effect of this independent standstill period is to extend the initial standstill period. Even so, it is an independent, free-standing minimum standstill period of its own.
>
> [3] The effect of this text is that if, e.g., a court decides to treat the hearing of an application for further suspension of the conclusion of a contract as in fact the hearing of the review proper, its decision at end-hearing will bring the free-standing second standstill period to an end.

5. Notably, the recitals to the Directive of 2007 say nothing about any standstill arising out of an interim decision (e.g. a late tender acceptance decision), as opposed to a contract award decision.

6. If, in light of the above consideration of the recitals to the Directive of 2007, one looks to Art.2(1) and (3)–(5) of the 1989 Remedies Directive, as inserted by Art.1 of the Directive of 2007, those provisions now seem clear in their meaning. The court quotes Art.2(1) and (3)–(5) and includes certain annotations as to the purport of the quoted text:

> *"1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:*
>
> *(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the 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 any decision taken by the contracting authority.[1]*
>
> *(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;[2]*
>
> *(c) award damages to persons harmed by an infringement[3]….*
>
> *(3) When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).*
>
> *(4) Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.[4]*
>
> *(5) Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.*
>
> *A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures."*
>
> [1] Sub-paragraph (a) refers to measures in respect of interim decisions in tender processes. These would include, e.g., late tender decisions. The provision requires in effect that there be a facility to correct alleged infringements in connection with those decisions *"at the earliest opportunity".*
>
> [2] This provision refers to setting aside decisions about unlawful specifications in the Invitation to Tender and such like.
>
> [3] The effect of this provision is that there must be a power to award damages.
>
> [4] The effect of Art.2(3) and (4) is that – other than in the situation of an application for interim measures in a challenge to a contract award decision, in which context Art.2(3) requires that there be a standstill until the application or challenge itself is decided upon – there is no need to provide for an automatic suspensive effect in respect of *"review procedures".*

7. It can be seen from the foregoing that by providing in the Principal Regulations for an automatic prohibition to arise upon review of an interim decision, Ireland 'gilded the European lily', introducing a benefit that European Union law did not require. So by providing for a means whereby that automatic suspension can automatically be lifted, Ireland was and is in Irish 'territory' and, subject to the usual constraints upon our lawmakers,couldproceed as it has. The above analysis shows that what the State has done via the Amending Regulations is entirely compatible with, albeit that it sits separate from,what is required by the Directive of 2007.

PART 3: REGULATION 8 OF THE AMENDED REGULATIONS.

i. A detailed analysis of Reg.8.

8. Regulation 8 of the Amended Regulations is the main provision in issue in the within proceedings. It provides as set out hereafter. (All references to the "Court" in Regulation 8 are to the High Court).

> *"Application to Court*
>
> *8.–(1) An eligible person may apply to the Court*
>
> *(a) for an order to correct an alleged infringement or prevent further damage to the eligible person's interests, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract concerned or the implementation of any decision taken by the contracting authority, or*
>
> *(b) for review of the contracting authority's decision to award the contract to a particular tenderer or candidate.[1]*
>
> *(2) If a person applies to the Court under paragraph (1), the contracting authority shall not conclude the contract until –*
>
> *(a) the Court has determined the matter, or*
>
> *(b) the Court gives leave to lift any suspension of a procedure, or*
>
> *(c) the proceedings are discontinued or otherwise disposed of,*
>
> *but this is subject to paragraph (2A).[2]*

(2A) Notwithstanding that–

(a) an application has been made under paragraph (1), and

(b) the matter concerned has not been determined by the Court,

the contracting authority may conclude the contract if, on application to the Court under Regulation 8A, the Court so orders.[3]

(3) A person who is an eligible person in relation to a reviewable public contract that has been concluded may apply to the Court for a declaration that the contract is ineffective.

(4) A person intending to make an application to the Court in accordance with this Regulation shall 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.

(5) A person who has applied to the Court under paragraph (1), (2) or (3) shall give the contracting authority concerned notice of the application by serving a copy of the originating motion on the authority as soon as reasonably practicable.

(6) Nothing in this Regulation prevents an eligible person or the contracting authority from applying to the Court for any other remedy that may be available in the particular circumstances.

Exception to prohibition in Regulation 8(2)

8A.(1) On application made to it under this Regulation by the contracting authority, the Court may, notwithstanding the matters referred to in Regulation 8(2A)(a) and (b), make an order permitting the contracting authority to conclude the contract referred to in Regulation 8(1).

(2) When deciding whether to make an order under this Regulation–

(a) the Court shall consider whether, if Regulation 8(2)(a) were not applicable, it would be appropriate to grant an injunction restraining the contracting authority from entering into the contract, and

(b) only if the Court considers that it would not be appropriate to grant such an injunction may it make an order under this Regulation.

(3) The Court may, if it considers it just to do so, specify in the order it makes under this Regulation that the order shall operate subject to there being satisfied one, or more than one, condition that it determines to be appropriate and specifies in the order.

(4) A person who has applied to the Court under this Regulation shall give the eligible person concerned notice of the application by serving a copy of the originating motion on the eligible person as soon as reasonably practicable."[4]

[1] Two types of challenge are envisioned by reg. 8(1) of the Amended Regulations, viz. (1) applications for orders to correct an alleged infringement (reg. 8(1)(a)), and (2) applications for review of a contracting authority's decision to award the contract to a particular tenderer or candidate (reg.8(1)(b)). The within proceedings, being an application to correct an alleged infringement, were commenced pursuant to reg.8(1)(a) of the Principal Regulations. Notably, these proceedings do not involve a review of the NTMA's decision to award the Grangegorman contract to a particular tenderer or candidate within the meaning of Regulation 8(1)(b), such an award decision not having yet been made.

[2] Where proceedings are instituted pursuant to reg.8(1), reg.8(2) has the effect that, subject to reg.8(2A), the Respondents may not conclude a contract with any tenderer until: a determination of the underlying substantive proceedings; the Court grants leave to lift the suspension; or the proceedings are discontinued or otherwise disposed of.

[3] Regulation 8(2A) provides that a contracting authority may conclude a contract if the High Court so orders on application to it under reg.8A. It is in pursuit of this option that the within application has been brought.

[4]As mentioned elsewhere above, it is clear that the amendments introduced to reg.8 by the Amending Regulations address the 'issue' identified by the Supreme Court in its decision in OCS, viz. that the Principal Regulations did not provide for any possibility of the lifting of a stay on the conclusion of a contract. Thus reg.8A(1) of the Amended Regulations provides that the High Court may, upon application being made to it by a contracting authority, and notwithstanding that application pursuant to reg.8(1) has been made and such application has not yet been determined, make an order permitting the contracting authority to conclude the contract referred to in reg.8(1).

ii. Timing of applications pursuant to Reg.8A(2).

9. No constraint, temporal or otherwise, is placed on the ability of a contracting authority to bring an application to lift a suspension where the decision under challenge is an interim decision and the proceedings have been issued pursuant to reg.8(1)(a). There is not even a requirement that a contract award decision have been taken in order for the lifting of the prohibition on contract conclusion that arises by virtue of reg.8(1)(a) proceedings. And it would be odd if there was: how could it be that a prohibition on contract conclusion could not be lifted because a contract award decision had not yet been made, in circumstances where it is the very prohibition on contract conclusion that is impeding the making of that decision?

PART 4: APPLICATION OF REGULATION 8A TO THE FACTS AT HAND.

10. In dealing with an application such as that now presenting, it is perhaps easiest to reduce Regulation 8A to a series of questions:

(1) Is the applicant therelevant 'contracting authority' (within the meaning of reg.2(1) of the Principal Regulations)?

(reg.8A(1)).

(2) If there was no reg.8(2)(a) prohibition on contract conclusion, would it be appropriate to grant an injunction restraining the contracting authority from entering into the contract? (Reg 8A(2)(a)). (If the answer, to (2) is 'yes', that is an end of matters. If the answer to (2) is 'no', the court must determine whether it is satisfied in any event to make an order permitting the contracting authority to conclude the contract (reg.8A(2)(b)). That said, it is difficult to conceive of circumstances in which the court would conclude that they were not circumstances in which it would be appropriate to grant an injunction but they were nonetheless circumstances in which it would be appropriate to maintain a suspension in place).

(3) Does the court consider it just to specify in any such order as it may make under reg.8A that the order shall operate subject to there being satisfied one, or more than one, condition that it determines to be appropriate? (reg.8A(3)).

11. Because one is dealing in these proceedings with an exclusively Irish-law matter, i.e. whether or not to lift an automatic suspension that was not required to arise as a matter of European Union law, there is no reason to consider that anything other than the usual *Campus Oil* criteria ought to apply when determining whether the circumstances presenting are circumstances in which, absent reg.8(2)(a) it would be appropriate to grant an injunction.

PART 5: WOULD IT BE APPROPRIATE TO GRANT AN INJUNCTION?

i. Overview.
12. The principles applicable to interlocutory injunction applications are those identified in Campus Oil v. Minister for Industry (No. 2) [1983] I.R. 88. The court must consider three questions: (1) Is there a fair question to be tried? (2) If so, would damages be an adequate remedy for either party? (3) If not, where does the balance of convenience lie?

ii. Is there a fair question to be tried (in the proceedings commenced by BAM)?
13. The first limb of *Campus Oil* involves ascertaining whether BAM has raised a fair, *bona fide* question to be tried. The papers in the substantive proceedings suggest that BAM handsomely passes this test. The NTMA has purported to select Eriugena as a preferred tenderer for a contract worth many millions of euro, and to exclude BAM from the process. BAM contends that there was no lawful basis for this decision, as Eriugena did not submit its tender before the specified deadline. The NTMA, for its part, has identified a number of provisions on which it could have reached its decision, albeit that it has not yet identified the provision on which it did in fact do so. BAM contends that in all of the circumstances presenting the decision of the NTMA to accept the late tender was unlawful and in breach of fundamental principles that this was so. These appear to the court to be fair, *bona fide* questions to be tried.

iii. If so, would damages be an adequate remedy for either party?

a. Damages truly available?
14. As a matter of Irish law, losses arising as a consequence of *ultra vires* acts are recoverable in damages only where the act is tainted by an additional element of illegality. So, for example, in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23, and *Glencar Exploration plc v. Mayo County Council* (No. 2) [2002] 1 I.R. 84 it was made clear that anultra vires action will only found an action for damages (i) if it involved the recognition of a recognised tort, (ii) if it is actuated by malice, and (iii) if the authority knows that it does not possess the power which it purports to exercise. The court does not understand that BAM is making allegations of any of (i), (ii) or (iii) in the within proceedings. As for breaches of statutory duty, as Fennelly J. made clear in *Glencar (No. 2)*, at 159, it is only in limited circumstances that a breach of statutory duty can successfully ground an action in damages:

> *"As a matter of principle, it would not be wise to rule out the possibility that a case may in the future present itself where the relationship between a person liable to be affected by a ministerial or other public law decision is entitled to expect that care will be exercised by a ministerial or other public law decision is entitled to expect that care will be exercised in and about the decision to take legal advice and the manner of its taking. At the least, I think it would have to be shown that the statutory power in question was of the type which is designed to protect particular interests and that the plaintiff comes within its scope. In addition it would probably be necessary for the claim to arise from the context of the type of individual transaction which was the subject-matter of Ward v. McMaster [1988] I.R. 337 or perhaps from the sort of reliance on the expertise of another which formed part of the background to Hedley Byrne v Heller and Partners Ltd [1964] A.C. 465."*

15. It is difficult to see how a significant decision taken by a contracting authority in the course of a procurement process, which decision has direct, predictable and perhaps adverse consequences for a very small number of tenderers relying on the contracting authority to discharge properly its obligations under the procurement law régime, could successfully be argued not to be a decision with such a foreseeable effect on so limited a number of persons as to require that the decision-making process be exercised with due care, and potentially yield a liability in damages if not so exercised. But even if damages are available as a remedy, are they an appropriate remedy for breaches of the procurement régime? BAM has drawn the court's attention to the fact that there areperhaps a number of reasons why disappointed tenderers may not generally see an action for damages as an appropriate mode of relief:

- first, such an action may not have the desired corrective effect if the contract proceeds or remains extant.

- second, as a matter of evidential proof it may be difficult if not impossible for an unsuccessful tenderer to prove that it had a serious chance of winning the tender.

- third, the cost of bringing proceedings if a tenderer loses them and the potential cost to its relationship with the contracting authority if it wins, are potentially significant costs for a tenderer to hazard.

16. These may, in theory at least, be well-founded concerns. But in case-law one must never sail too far on the tossing sea of theory, away from the firmer ground of fact.What then are the specific contentionsthat BAM has made regarding the inadequacy of damages for it in the within proceedings,and what is the court to make of those contentions?

17. First, BAM notes that case-law is not uniformly supportive of the notion that damages are an adequate remedy in procurement cases. So, for example, BAM points to divergence in the English authorities on the adequacy of damages in procurement cases. Thus, the English High Court has held in a number of cases, e.g.*European Dynamics SA v. HM Treasury* [2009] EWHC 3419 (TCC) and *Exel Europe v. University Hospitals* [2010] EWHC 3332 (TCC), that damages were an adequate remedy for the procurement breach alleged. On the other hand, other cases, e.g., the decisions of the Court of Appeal in *Letting International v. Newham LBC* [2007] EWCA Civ.

1522 and *DWF LLP v. Secretary of State for Business, Education and Skills* [2014] EWCA Civ. 900 and various decisions of the English High Court, have concluded that damages would not be an adequate remedy for a breach of the public procurement rules applicable in that jurisdiction. To this Court, such a divergence in the authorities seems an inevitable consequence of the application of *Campus Oil*-style (American Cyanamid) principles and is merely reflective of the fact that the specific facts presenting in some instances yield the conclusion that damages are an adequate remedy, and in others not. The divergence, in other words, is not indicative of a system that is not working but rather of a system that is as one would expect it to work.

18. Second, BAM contends that because of its exclusion from the Grangegorman project, it has been deprived of the reputational benefits and strengthened market position that winning a project of such scale and prestige would confer. BAM claims that this exclusion will have an effect on its ability to secure similar projects in the future, given that contracting authorities in Ireland and elsewhere in the European Union attach weight to a firm's prior experience on similar projects. BAM also claims that its exclusion from the Grangegorman project has an unquantifiable effect for certain BAM Group companies whose involvement in the project would have afforded them the opportunity to create and grow a 'presence' in Ireland. BAM also contends that its losing out on the project will make it more difficult for it to retain and develop key staff. When it comes to reputational loss, BAM has drawn the court's particular attention to the judgment of the English High Court in *Alstom Transport v. Eurostar International* [2010] EWHC 2747 (Ch.), in which Vos J. observed as follows, at para. 129:

> *"In my judgment, damages could not properly compensate ALSTOM for the loss of this contract [the contract to supply trains to Eurostar] is a highly prestigious contract which could undoubtedly enhance ALSTOM's international reputation…. [I]t seems to me that ALSTOM as the leading French train manufacturer, would obtain specific and uncompensatable benefits from the award of the Agreement. I accept that it could…'get over it', but that does not mean that damages would be an adequate remedy….I also accept that the assessment of ALSTOM's loss would be a complex process requiring the valuation of a lost chance which is always a somewhat difficult process. The evaluation of its reputational and market position losses would be very difficult indeed."*

19. The court is unconvinced by BAM's contentions in this regard. When it comes to tendering for contracts, to use a colloquialism, 'you win some, you lose some'. Yes, a lot of time and effort may have been expended on tendering for the DIT project, but losing it is not the end of days. BAM has won in other State-sponsored procurement exercises in Ireland since these proceedings were commenced and doubtless may do so again. Moreover, it does not seem to the court that any of the types of loss mentioned above are beyond the ability of a competent accountant to quantify. And although the DIT project is very large by Irish standards, and undoubtedly a prestigious tender for the eventual victor to win, the court is not convinced that it is in the 'super-league' of tendering that was at play in the *Eurostar* case in which the victor was to supply trains on what was perhaps the most significant rail-project in Britain since George Stephenson's day, as well as being a project of international significance.

20. Third, BAM points to the fact that the main reason European lawmakers took action to strengthen pre-contractual remedies was that they considered damages to be, in general, an inadequate remedy in public procurement cases. The types of concerns with which European lawmakers were occupied also present in the Irish context, and concern the integrity of the award process.

21. Having regard to all of the foregoing,the court is coerced to the conclusion that damages are an available and suitable remedy for BAM,albeit not,from its perspective, the most desired of remedies.

c. Damages inadequate for Respondents?
22. Notably, and the court considers this a significant concession in terms of the balance of convenience (considered hereafter),BAM accepts that if its proceedings are unsuccessful, the respondents could not be adequately compensated by damages for any inconvenience arising as a result of these proceedings.

iv. Where does the balance of convenience lie?
23. While evaluation of the balance of convenience turns on the specific facts of every case, the court nonetheless finds it of assistance to note factors that have been regarded by the United Kingdom courts as weighing in favour of lifting a suspension:

> - (1) the need to avoid closure of an educational campus. (*Indigo Services (UK) Ltd. v. The Colchester Institute Corporate* [2010] EWHC 3237 (QB)).
>
> The court notes in this regard that the respondents have indicated that if the new DIT campus does not proceed according to schedule, this will upset an efficient move to the new campus and generate cost increases, not least in the possibility of the State having to pay rents on built premises which cannot immediately be occupied due to the need to avoid interruptions to student services during the academic year.
>
> - (2) the fact that a contract was intended to deliver services to vulnerable and socially disadvantaged members of society. (*Rutledge Recruitment and Training Limited v. Department for Employment and Learning, Department of Finance and Personnel* [2011] NIQB 61; *Glasgow Rent Deposit & Support Scheme v. Glasgow City Council* [2012] CSOH 1999).
>
> The court notes that 50 per cent of current DIT students are schooled in buildings that are in need of significant reinvestment and refurbishment. Moreover, the new DIT campus will sit in a part of Dublin City that will undoubtedly benefit from the campus being sited there, both in the form of on-site jobs and off-site benefits to local businesses.
>
> - (3) the need to protect the welfare of specific communities. (*Shetland Line (194) v. Scottish Ministers* [2012] CSOH 99).
>
> In this regard, the court notes that the DIT campus development specifically aims to deliver social and community benefits, and will include training and/or employment opportunities for unemployed construction workers and other personnel in an area of Dublin City that has suffered from high unemployment (notably, 10 per cent of the labour expended on the project must be provided by the long-term unemployed, and 2.5 per cent must be done by apprentice trainees). The court notes too that the development of the DIT campus is a central part of a wider Government-supported urban regeneration scheme being developed by the Grangegorman Development Agency and extending to the construction of health facilities, an 'Educate Together' primary school and substantial community-related resources.
>
> (4) the imperative of allowing badly needed public projects to proceed. (*Lowry Brothers Ltd v. Northern Ireland Water Ltd* [2013] NIQB 23 (QBD (NI)).

Some of the factors touched upon above are of relevance in this context also. In addition, the court notes that the DIT project will: (a) contribute to a regeneration of Dublin's north inner city and enhance the capital's ability to attract inward foreign direct investment; (b) deliver significant facilities for Dublin City (and the north inner city, in particular); and (c) consolidate the provision of education services by DIT, which is presently spread across 39 separate cites around Dublin City.

- (5) the importance of preserving public funds and having regard to market conditions.(*Exel Europe Ltd v. University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC).

As is usual in large building projects, delay engenders all manner of cost: the more the Grangegorman project runs according to its planned schedule, the more efficiently it can apparently be expected to run. The court notes in this regard the contention of BAM that (a) the judicial review application does not prevent the post-tender process from continuing to the point of contract; and (b) the only obstacle to the process continuing is Eriugena's apparent refusal to expend further funds on due diligence pending the conclusion of BAM's judicial review.This, with respect, does not seem a correct characterisation of the present 'state of play' as regards the tender. Rather, it appears to the court from the evidence before it that the principal, perhaps the only,practical obstacle remaining to the completion of the tendering process, is the securing of debt-funding from the European Investment Bank and private funding institutions. However, it is not practicable to advance further these remaining steps of the tendering process, which involve a very substantial financial and labour commitment on the part of Eriugena and its funders, in circumstances where there remains extant a prohibition on the conclusion of a contract in respect of which debt funding is sought.

24. As against all this, there is an abiding need for the integrity of this and all procurement processes. However, it appears to the court that when it comes to the 'integrity' of the process, what is ultimately at issue is the quality of being honest. There is no suggestion that there has been any dishonesty on the State's side in the within proceedings. Nor, even if BAM were ultimately successful in such contentions as it now makes, does the court consider that the man on the DART or the woman on the LUAS would sit back and marvel at the dishonesty of the process arising; he or she would simply perceive a mistake to have been made (if it has been made), an occurrence that is not uncommon in human processes, and not something which, in the alleged form it takes in this instance, falls totaint the overall'integrity' of the process at issue in these proceedings, if proved.

PART 6: THREE QUESTIONS ANSWERED.

25. Returning to the three questions identified in Part 4:

(1) *Is the applicant the relevant 'contracting authority' (within the meaning of reg.2(1) of the Principal Regulations)?*

Each of the respondents is such a contracting authority.

(2) *If there was no reg.8(2)(a) prohibition on contract conclusion, would it be appropriate to grant an injunction restraining the contracting authority from entering into the contract? (If the answer, to (2) is 'yes', that is an end of matters. If the answer to (2) is 'no', the court must determine whether it is satisfied in any event to make an order permitting the contracting authority to conclude the contract).*

The answer to the question posed is 'no'. This is because the balance of convenience, for the reasons stated above, would rest in favour of the State authorities and thus against granting an injunction. As to whether the court is satisfied in all the circumstances to make an order permitting the contracting authority to conclude the contract, the court is so satisfied. In reaching this last conclusion the court has had especial regard to the 'integrity' of the procurement process at issue.

(3) *Does the court consider it just to specify in any such order as it may make under reg.8A that the order shall operate subject to there being satisfied one, or more than one, condition that it determines to be appropriate?*

The court considers it just that the order permitting the respondents to conclude the contract should become operative only upon one or other of the respondents giving that form of undertaking as to damages as is so often ordered when injunctive relief is sought and granted.

PART 7: CONCLUSION.

26. Having regard to all of the foregoing, the court will order the lifting of the suspension that at this time impedes the respondents from concluding with Eriugena the contract that is in dispute in the within proceedings. The court will also require as a pre-condition to that order becoming operative that one or other of the respondents provide the form of undertaking referred to immediately above.