

THE HIGH COURT

2017 No. 150 MCA

IN THE MATTER OF THE REVIEW OF THE AWARD OF A PUBLIC CONTRACT PURSUANT TO THE EUROPEAN COMMUNITIES
(PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 AND

ORDER 84A OF THE RULES OF THE SUPERIOR COURTS (AS AMENDED)

Between:

WORD PERFECT TRANSLATION SERVICES LIMITED

Applicant

– and –

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 4th May, 2018.

I

Background

1. On 12th October, 2015, the Office of Government Procurement (OGP) published a request for tenders to establish a multi-supplier framework agreement for the provision of interpretation services (excluding Irish) (the 'Framework'). The Framework included eight lots. Lot 4 was for the provision of interpretation services to the Immigration Service and the Legal Aid Board. The Framework agreement was established on 25th January, 2016. Three suppliers were appointed to Lot 4, including Word Perfect Translation Services Ltd and Forbidden City Ltd, trading as translation.ie.
2. Following the cancellation of a mini-competition on foot of a supplementary request for tenders to Framework members under Lot 4, the OGP issued a revised supplementary request for tender (SRFT) for Lot 4 for the provision of services to the Immigration Service (including the Irish Naturalisation and Immigration Service, the Office of the Refugee Applications Commissioner, the Refugee Appeals Tribunal, the Reception and Integration Agency) and the Legal Aid Board (all of which comprise 'the service users').
3. The SRFT originally set a closing date for the receipt of tenders of 6th January, 2017. Ultimately, resulting from clarifications sought by Word Perfect, amendments were made to the award criteria and to the chart setting out the scoring bands for the competition. As a consequence, the deadline for the receipt of tenders was extended to 17th January, 2017.
4. The qualitative award criteria focused on service delivery, contract management and management information reporting. The importance of the highest standards of service delivery for the service users was exemplified by the strong weighting for quality over cost (75/25 respectively).
5. By way of letter dated 18th April, 2017 (the 'Reasons Letter'), the Minister for Public Expenditure and Reform notified Word Perfect of his decision to award the contract the subject-matter of the within proceedings to translation.ie. The notice also notified Word Perfect, on a voluntary basis, that the contract with translation.ie would not be concluded for 14 days from the day after the date of the notice. It is the decision aforesaid that is the subject-matter of the within proceedings.
6. The Minister issued an interlocutory motion on 28th June, 2017, seeking an order pursuant to Regulation 8A of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010, as amended, permitting the contract in issue to be concluded.
7. The interlocutory motion was heard by the High Court on 4th and 5th December, 2017, and was determined in favour of the Minister; an order was then made lifting the automatic suspension. This decision of the High Court was appealed to the Court of Appeal, which appeal was heard on 2nd February, 2018. By judgment of 14th February, 2018, the Court of Appeal allowed the appeal but required as a condition of its decision an undertaking on behalf of Word Perfect that it would prosecute the within proceedings with urgency and without any further delay. Word Perfect gave this undertaking and a notably early hearing-date of 11th April, 2018, was assigned to the substantive proceedings.
8. Meanwhile, by way of letter dated 22nd December, 2017, Word Perfect raised a request for voluntary discovery seeking five categories of discovery. Following correspondence between the parties, agreement was reached to make discovery in respect of Categories 1, 2 and 5 in amended form. Word Perfect then issued a motion in respect of Categories 3 and 4. This was intended to be heard by the High Court on 28th February, 2018. However, the hearing did not go ahead due to the closure of the courts on account of snow. Instead, the discovery hearing took place on 13th March, 2018. A particular issue arose at this point as to the discoverability of the successful bidder's tender and confidentiality.
9. Judgment on the discovery motion issued on 16th March, 2018. Word Perfect then appealed that judgment to the Court of Appeal insofar as it related to the discoverability of the translation.ie tender. This appeal was heard on 28th March, 2018. In a judgment delivered on the same date, the Court of Appeal (i) declined the discoverability of that aspect of translation.ie's tender relating to the service delivery plan, (ii) ordered discovery of that part of the translation.ie's tender relating to quality assurance, and (iii) adjourned to the trial judge the issue of whether that part of translation.ie's tender relating to the telephoning resourcing award sub-criterion should be discovered.
10. The especial centrality of the pleadings to procurement cases has been confirmed in numerous cases, most notably in the decision of the Court of Appeal in its judgment of 28th March in the within proceedings (*Word Perfect Translation Services Ltd v. The Minister for Public Expenditure and Reform (No 2)* [2018] IECA 87), para. 14. Perhaps unsurprisingly, given the remarkable speed with which the within proceedings have been progressed by the courts and counsel since the Court of Appeal delivered its judgment of 14th February, the submissions by counsel for Word Perfect have generally been considerably more constrained in focus than the amended statement of grounds that is before the court. As a result, there is a certain want of clarity as to which aspects of the amended statement of grounds the court is being asked to rule upon. Most helpfully, however, a speaking-note was handed up to the court at hearing by counsel for Word Perfect and that provides a useful point of reference by which to organise the within judgment.

II

Error in Evaluation of Service Delivery Plan?

(i) Paragraphs 38-43 of the Amended Statement of Grounds.

11. Paragraphs 38-43 of the Amended Statement of Grounds state as follows:

"38. The Respondent evaluated the Applicant's tender on the basis that it 'did not include any proposal in respect of the methods employed to ensure that interpreters will retain their skills in the language and remain up to date with their practice and fluency to a sufficient standard to ensure effective delivery of the Service in all 4 language groups'. This is manifestly incorrect. The Applicant's tender dealt with this specific point in the following parts of its tender:

☐ Page 5 (first paragraph)

☐ Page 25 (first sentence under the heading '(d) Maintenance and development of interpreters'); and,

☐ Page 38 (section (6), headed 'Training').

39. The Respondent therefore evaluated the Applicant's tender while failing to consider relevant material contained within the tender. In the premises, the Respondent committed a manifest error of assessment and/or failed to take relevant considerations into account and/or breached the general principles of EU law including the principles of transparency, equal treatment and objectivity.

40. The Respondent awarded full marks to the Preferred Bidder under this criterion. The purported reason supplied for the characteristics and relative advantages of the Preferred Bidder's tender over that of the Applicant under this criterion was stated to be the Applicant's tender 'did not include any proposal in respect of the methods employed to ensure that interpreters will retain their skills in the language and remain up to date with their practice and fluency to a sufficient standard to ensure effective delivery of the Service in all 4 language groups.' In contrast, it was said that the Preferred Bidder's proposal 'contained clear information on methods employed to ensure Interpreters retained their skills.'

41. The Respondent awarded full marks to the Preferred Bidder not on any perceived substantive advantage in the Preferred Bidder's tender but on the purported basis that the response was explained in clearer terms. In the premises, the Respondent committed a manifest error of assessment and/or took irrelevant considerations into account and/or applied factors that were not included within the award criterion.

42. Further, the decision to award the Preferred Bidder full marks amounts to a breach of the general principles of European Union law, including the principles of transparency, equal treatment and objectivity. The Respondent has also failed to provide reasons and/or adequate reasons for its decision to award the Preferred Bidder full marks and this amounts to a further breach of the general principles of European Union law, including the principle of transparency.

43. Without prejudice to the foregoing, on the basis of the purported reasons provided by the Respondent for the scoring of the Service Delivery Plan criterion, the 'skills retention' item was the only item where the Preferred Bidder's tender was considered to be more responsive and/or more advantageous than that of the Applicant. Any such purported difference could not have justified the disparity of marks awarded to the Preferred Bidder and to the Applicant respectively. In the premises, the Respondent committed manifest error in the evaluation of this criterion and/or breached the general principles of European Union law, including the principles of equal treatment and proportionality."

(ii) Supplementary Request for Tender.

12. Central to this aspect of matters is page 18 of the SRFT (quoted hereafter; pages 10-12 and Appendix 3, page 28 are also of relevance but too long to quote in the within judgment):

"4.1 Service Delivery Plan (250 Marks Available)

Tenderers must demonstrate their ability to ensure provision of consistently high quality service delivery, on a 24/7/365 basis, specific to the requirements of Immigration Services and the Legal Aid Board.

The Service Delivery Plan must include (but not be limited to) the following:

☐ Tenderers must explain how it is proposed to ensure this optimum reliability of service and must demonstrate how it is proposed to meet very urgent requests for service.

☐ Tenderers must explain how it will give immediate assurance to clients that bookings have been received, confirmed and activated. Tenderers must outline in their response the details of the booking process it will use to ensure that an immediate confirmation of a booking will be sent to the client and how it will confirm that a booking has been activated.

☐ Tenderers must also submit a flow chart set out on one A4 page demonstrating the process proposed to ensure 100% service delivery (from logging of the initial booking to the interpreter turning up on site). [NOTE: THIS FLOWCHART WILL NOT BE COUNTED TOWARDS THE MAXIMUM WORD COUNT SET OUT BELOW FOR THIS AWARD CRITERIA].

☐ Tenderers must set out the methods employed to ensure that Interpreters will retain their skills in the language and remain up to date with their practice and fluency to a sufficient standard to ensure effective delivery of the Service in all 4 language groups.

Responses will be evaluated on the quality, comprehensiveness and suitability of the proposed Service Delivery Plan to the requirements of the Framework Clients.

Tenderers are free to include any other value added aspects of how the above processes will operate having regard to the Framework Clients needs but Tenderers must bear in mind the maximum word count available to their response.

[Click here and insert response (Maximum 2,000 words)]"

[Emphasis in original].

13. A few points of especial note arise from the just-quoted text. First, the skills retention methodology was one of four aspects which had to be addressed by the service delivery plan. Second, responses fell to be evaluated on *"the quality, comprehensiveness and suitability of the proposed Service Delivery Plan to the requirements of the Framework Clients"*, as set out previously in the SRFT. Third, it follows that what fell to be done was a qualitative assessment involving knowledge of the said requirements. Fourth, the word-count was 2,000 words, with the flow-chart to be excluded.

14. In passing, the court notes that there was some complaint made by Word Perfect, which breached the word-count requirements, as to the way in which the word-count requirement was applied by the evaluators. In a sense, that the evaluators should be criticised in this regard is proof of the maxim that 'no good deed goes unpunished'. After all, the evaluators could have excluded a tender that did not conform to the tendering requirements. Instead they accepted the various tenders but only read them to the 2,000th word (if reached) and disregarded any text thereafter (if any), an approach which is exceedingly fair. The methodology applied by the evaluators in deciding which text counted towards the 2,000 words was stipulated by the evaluation panel at the outset and consistently applied. When (consistently) applied, translation.ie was found to be fully compliant with the word-count requirements, whereas Word Perfect was not (and thus its tender was not read beyond the 2,000th word). Thus Word Perfect's complaint in this regard must fail.

(iii) *Reasons Letter.*

15. Under the heading *"Award Criterion 4.1 Service Delivery Plan (250 marks)"*, the following is advised in the Reasons Letter:

"Please note that as the word count was exceeded in this criterion by 37%, only the first 2,000 words were taken into account. As you are aware the SRFT makes it clear that 'Tenders must take note of the maximum word counts where specified in the Award Criteria set out in the SRFT. Tenderers are advised that 'any part of their Tender beyond the word counts, where specified, WILL NOT be accepted'.

Translation.ie (250 marks)

An excellent response covering all the requirements set out in the SRFT, demonstrating a clear understanding of the business requirements of clients and providing convincing and comprehensive evidence of ability to provide robust and flexible provision of a sustainable, consistently high quality, reliable service on a 24/7/365 basis. The proposal contained clear information on methods employed to ensure interpreters retained their skills.

Your Tender (197.5 marks)

A very good response in relation to reliability of service and the proposal to meet urgent requests, providing a detailed outline as to how bookings will be received, confirmed and activated on a 24/7/365 basis. However, your response did not include any proposal in respect of the methods employed to ensure that interpreters will retain their skills in the language and remain up to date with their practice and fluency to a sufficient standard to ensure effective delivery of the Service in all 4 language groups.

"[Emphasis in original].

(iv) *Non-Excluded Parts of Word Perfect Tender Relied Upon.*

16. Word Perfect relies on three non-excluded parts of its tender in contending that it did address the skills retention dimension of the SRFT, viz. (1) p.5, para 1, (2) p.25 and (3) p.38, section 6 of its tender document. Because of the commercial sensitivity of the tender documentation, the court has not included the substance of the Word Perfect tender in the within judgment. It would simply note as follows by reference to the just-referenced text. With regard to (1), this text does not set out the methods to ensure that interpreters will retain their skills; rather it outlines how interpreters will be retained as employees; that is a completely different matter. With regard to (2), all that is stated of relevance in this regard is that interpreters undergo CPD training. There is not, to borrow from the text of the SRFT, any setting out of the *"methods employed to ensure that interpreters will retain their skills in the language and remain up to date with their practice and fluency to a sufficient standard to ensure effective delivery of the Service in all 4 language groups."* With regard to (3), this comprises text concerning training generally. Again, to borrow from the text of the SRFT, there is no setting out of the *"methods employed to ensure that interpreters will retain their skills in the language and remain up to date with their practice and fluency to a sufficient standard to ensure effective delivery of the Service in all 4 language groups."*

(v) *Paragraph 41 of the Amended Statement of Grounds.*

17. It will be recalled that para.41 of the amended statement of grounds states as follows:

"The Respondent awarded full marks to the Preferred Bidder not on any perceived substantive advantage in the Preferred Bidder's tender but on the purported basis that the response was explained in clearer terms. In the premises, the Respondent committed a manifest error of assessment and/or took irrelevant considerations into account and/or applied factors that were not included within the award criterion."

18. As can be seen from the segment of the Reasons Letter quoted above, there is no statement therein (nor, for the avoidance of doubt, is it stated elsewhere in the Reasons Letter) that the preferred bidder's response *"was explained in clearer terms"*. What it states is that Word Perfect's *"response did not include any proposal in respect of the methods employed to ensure that interpreters will retain their skills in the language and remain up to date with their practice and fluency to a sufficient standard to ensure effective delivery of the Service in all 4 language groups,"* as required by the SRFT.

(vi) *Paragraph 43 of the Statement of Grounds.*

19. It will be recalled that para.43 of the statement of grounds states as follows:

"Without prejudice to the foregoing, on the basis of the purported reasons provided by the Respondent for the scoring of the Service Delivery Plan criterion, the 'skills retention' item was the only item where the Preferred Bidder's tender was considered to be more responsive and/or more advantageous than that of the Applicant. Any such purported difference could not have justified the disparity of marks awarded to the Preferred Bidder and to the Applicant respectively. In the premises, the Respondent committed manifest error in the evaluation of this criterion and/or breached the general principles of European Union law, including the principles of equal treatment and proportionality."

20. Under the "Methodology for Calculating Scores when evaluating Award Criteria" identified in the SRFT (p.17), the following explanatory table appears:"

Weighting	Meaning
80-100%	Excellent response that fully meets or exceeds requirements, and provides comprehensive and convincing assurance that the Tenderer will deliver to an excellent standard.
60-79%	A very good response that demonstrates real understanding of the requirements and convincing assurance that the Tenderer will deliver to a very good or high standard.
40-59%	A satisfactory response which demonstrates a reasonable understanding of requirements and gives reasonable assurance of delivery to an adequate standard but does not provide sufficiently convincing assurance to award a higher mark.
20-39%	A response where reservations exist. Lacks full credibility/convincing detail, and does not provide confidence to the Contracting authority that the required services will be successfully delivered.
1-19%	A response where serious reservations exist. This may be because, for example, insufficient detail is provided, or the response has fundamental flaws, or is seriously inadequate or seriously lacks credibility with a high risk of non-delivery.
0%	No response or partial response only and poor evidence provided in support of it: failure to meet the requirements.

21. It is perhaps worth recalling in this regard that the Reasons Letter states, *inter alia*, as follows, under the heading:

"Translation.ie (250 marks) [100%]

An excellent response covering all the requirements set out in the SRFT, demonstrating a clear understanding of the business requirements of clients and providing convincing and comprehensive evidence of ability to provide robust and flexible provision of a sustainable, consistently high quality, reliable service on a 24/7/365 basis. The proposal contained clear information on methods employed to ensure interpreters retained their skills.

Your Tender (197.5 marks) [79%]

A very good response in relation to reliability of service and the proposal to meet urgent requests, providing a detailed outline as to how bookings will be received, confirmed and activated on a 24/7/365 basis. However, your response did not include any proposal in respect of the methods employed to ensure that interpreters will retain their skills in the language and remain up to date with their practice and fluency to a sufficient standard to ensure effective delivery of the Service in all 4 language groups."

22. Given these observations, it seems to the court that the marks granted were perfectly justified. In truth, it struggles to see how the contrary can be contended.

III

Want of Transparency in Increase of translation.ie Mark?

23. Paragraphs 45-46 of the amended statement of grounds state as follows:

"45. The Respondent initially allocated a mark of 225 to the Preferred Bidder following the first evaluation and then increased this to the maximum mark of 250 at the second evaluation meeting. Having scored the Preferred Bidder at 225, the Respondent noted at the first evaluation that the Preferred Bidder had not set out any clear statement of the methodology by which the Preferred Bidder would ensure that interpreters' language skills would be retained, also noting that the Preferred Bidder merely encouraged such skills retention. The Respondent noted that this issue would have to be clarified with the Preferred Bidder were it to be considered for a score higher than 225.

46. The Applicant does not know if the Respondent sought and obtained the clarification (but no such clarification has been discovered). If it did so, it permitted the Preferred Bidder to amend its tender in breach of the principle of equal treatment and transparency and/or permitted a material change to the tender. If it did not do so, it nonetheless increased the score of the Preferred Bidder to the maximum 250 marks without any rational or legitimate basis and has not explained why it increased the mark. In those premises, the award of the 250 mark is a manifest error of assessment and/or a breach of the general principles of European Union law, in particular the principles of equal treatment and transparency."

24. A number of points fall to be made in this regard. First, from the very beginning translation.ie was awarded a holding mark of 90%, placing it in the 'Excellent' band'; a move to 100% was a move within the same band. Second, manifest error is a ground of objection targeted ultimately at an impugned decision, not at the notes of the meetings which precede the making of such decision. Third, a note made at a meeting of evaluators is simply a brief record of points or ideas written down; it is not a comprehensive dissertation on all points arising or a barrier to future discussion, or something that cannot be deviated from. Fourth, the evaluator notes exhibited before the court in the within proceedings simply record the to-be-expected interplay (or 'to-ing and fro-ing') between evaluators as they move towards a decision; there is nothing untoward in same. Fifth, the evaluators were entitled to proceed without seeking the referenced clarification. Or, to put matters otherwise, they were entitled ultimately to conclude in their own right and by themselves,

whether or not they had initial concerns in this regard, that translation.ie's tender gave them the level of assurance required to award full marks. It is clear from their notes that they did this following comprehensive discussion and examination and re-examination of the tender. They were also entitled in the context of the overall tenor of translation.ie's tender to award full marks despite the use of a particular verb in the tender.

IV

Quality Assurance Plan

(i) Paragraphs 71 to 79 of the Amended Statement of Grounds.

25. Paragraphs 71-79 of the Statement of Grounds state as follows, under the heading "Quality Assurance Plan Award Sub-Criteria":

"71. Under this award sub-criterion, the Preferred Bidder was awarded 170 marks out of the 200 marks available (an aggregated score of 85%). The Applicant was awarded full marks.

72. However, the Respondent has not explained why the Preferred Bidder obtained 170 marks. The Applicant is concerned that the Preferred Bidder should have been awarded less marks under this sub-criterion. The Applicant requires full reasons as to why the Preferred Bidder was awarded 170 marks which reasons have not been provided. The Applicant reserves the right to add further particulars once reasons have not been provided. The Applicant reserves the right to add further particulars once reasons have been provided, whether by way of discovery or otherwise.

73. It is apparent from the documents discovered by the Respondent on 28 March 2018 that the allocation of 170 marks to the Preferred Bidder was a manifest error and further that the allocation of this mark was done in breach of the general principles of European Union law, in particular the principles of transparency and equal treatment.

74. In relation to the Contract Volume Report, the Preferred Bidder was initially scored 58.5 marks out of 90. This was then raised to 76.5 marks. It was a stated requirement that the 'report must include a narrative summarising the information provided, including how they will ensure that these MI Reports will be provided to Framework Clients in a timely manner'.

75. As noted by the Respondent in Category 1 discovery documents 23, 28, 30, 76 and 77 following the first and second evaluations of tenders, the Preferred Bidder failed to develop this narrative requirement. Yet, between the first and second evaluations, the Preferred Bidder's score was increased from 58.5 marks to 76.5 marks. No adequate explanation was provided for this change in the evaluation.

76. In the premises, the allocation of the score of 76.5 marks and the change of score from 58.5 to 76.5 marks, constituted a manifest error of assessment. Further, the allocation of this mark was done in breach of the general principles of European Union law, including in particular the principles of transparency and equal treatment.

77. In relation to the Complaints Management Report, the Preferred Bidder was initially scored 88 marks out of 110. This was then raised to 93.5 marks. Again, it was a minimum requirement that the report had to include a 'narrative summarising the information provided, including how they will ensure that these MI Reports will be provided to Framework Clients in a timely manner.

78. As noted by the Respondent in Category 1 discovery documents 23, 28, 30, 76 and 77 following the first and second evaluations of tenders the Preferred Bidder failed to develop this narrative requirement. Yet, between the first and second evaluations, the Preferred Bidder's score was increased from 88 marks to 93.5 marks. No adequate explanation was provided for this change in the evaluation.

79. In the premises, the allocation of the score of 93.5 marks and the change of score from 88 to 93.5 marks, constituted a manifest error of assessment. Further, the allocation of this mark was done in breach of the general principles of European Union law, including in particular the principles of transparency and equal treatment."

(ii) No Explanation given for translation.ie's 170 Marks.

a. Overview.

26. It is contended by Word Perfect that the Minister is under a duty to provide reasons for why translation.ie got the lower mark for the Quality Assurance Plan dimension of its tender. It is claimed by Word Perfect in this regard that without such reasons Word Perfect does not know whether it has grounds to challenge that mark (in a process where every mark given to any party counts) and thus the contract award decision.

b. The Reasons Letter.

27. When it comes to the Quality Assurance Plan dimension of the tenders, the Reasons Letter observes as follows:

"Award Criterion 4.3 – Quality Assurance Plan

☐ **Report 1: Contract Volume and Value (90 Marks)**

☐ **Report 2: Complaints Management (110 Marks)**

Report 1: Contract Volume and Value

Translation.ie (76.5 marks)

As your Tender scored higher than the successful bidder, there are no relative advantages.

Your Tender (90 marks)

An excellent response with excellent use of visualisation tools. A very comprehensive easy to understand narrative

summary is also provided. Fully meets requirements.

Report 2: Complaints Management

Translation.ie (93.5 marks)

As your Tender scored higher than the successful [bidder], there are no relative advantages.

Your Tender (110 marks)

An excellent response with excellent use of visualisation tools. A very comprehensive easy to understand narrative summary is also provided. Fully meets requirements."

c. Some Points Arising.

28. Perhaps six points might usefully be made as regards this particular contention of Word Perfect:

(1) as can be seen from the above-quoted text, the Reasons Letter provides scores for both tenderers and a description of the characteristics of the winning tender.

(2) regulation 6 of the Regulations of 2010 provides, *inter alia*, as follows under the general heading "Notices to unsuccessful tenderers and candidates":

"(1) ...[A] notice to an unsuccessful tenderer...shall be as set out in this Regulation.

(2) Such a notice–

(c) for each unsuccessful tenderer...shall include –

(i) in the case of an unsuccessful candidate, a summary of the reasons for the rejection of his or her application,

(ii) in the case of an unsuccessful tenderer, a summary of the reasons for the rejection of his or her tender.

(3) In the case of a tenderer who has submitted an admissible tender (that is, a tender that qualifies for evaluation under the rules of the relevant tender process) the summary required...shall comprise –

(a) the characteristics and relative **advantages** of the tender selected..."

[Emphasis added]

(There was previously like provision in reg.49(3) of the European Communities (Award of Public Authorities' Contracts) Regulations 2006, since revoked by reg.15(2) of the Regulations of 2010. The court confines its attentions to the Regulations of 2010).

Notably, (i) the Regulations of 2010 do not require the disclosure of the content of the selected tender, but rather its "characteristics and relative advantages", and (ii) there is no mention of disadvantages in the just-quoted text. It is true that there have been at least two United Kingdom cases, viz. *Partenaire Ltd v. Department of Finance and Personnel* [2007] NIQB 100 (an application for extension of an interim injunction which stayed a procurement process conducted by a contracting authority) and *Lightways (Contractors) Ltd v. North Ayrshire Council*, [2008] SLT 690 (an application for interim suspension of a decision by a local contracting authority to accept a particular tender) – neither of which cases was opened before the court but both of which are referenced in Arrowsmith, S., *The Law of Public and Utilities Procurement*, Vol I (3rd ed), 1358, which was opened before the court – which between them suggest that it is arguable that general European Union law obligations of objectivity, transparency and non-discrimination (all of which are accepted by this Court to be of application) should ensure that such reasons as are given include such information about a successful bid or bids as would permit a well-informed and diligent tenderer to understand the relative advantages and disadvantages of the respective bids. But (i) as Charleton J. observes in *Oltech (Systems) Ltd v. Olivetti UK Ltd* [2012] IEHC 512, para.8 – writing in a very different context, though his observations would appear to have a general resonance – "experience demonstrates that there is little that cannot be argued", and (ii) even Professor Arrowsmith appears to shrink from stating that the arguable is the actual, confining herself to the following submission, at 1358:

"[I]t is submitted that...a tenderer should be able to understand the assessment of the relative advantages and disadvantages of the respective bids for it to establish whether it has been fairly treated."

As it happens, the court does not consider that it need arrive at a concluded view in this regard because what Word Perfect wants is to go very much further than knowing the advantages and disadvantages: it wants to know if the translation.ie marks were justified *at all*. Two points might be made in this regard. First, that is a very different proposition, for which one does not find support in the express text of the Regulations of 2010 and which would appear to take the application of the above-mentioned European Union law obligations to a place far beyond what any of *Partenaire*, *Lightways* or indeed Professor Arrowsmith, contemplates. (Nor is there case-law of the Court of Justice which states that such a position is mandated by European Union law). Second, for the contracting authority to identify concrete points of relative disadvantage between the two bids would not explain to Word Perfect why translation.ie got the marks it did, it would only explain why it got lower marks, an exercise which (a) seems pointless and (b) would involve the contracting authority addressing the substance of the translation.ie bid for no good reason.

(3) regulation 6(7) of the Regulations of 2010, as amended, provides, *inter alia*, as follows, under the heading "Notices to unsuccessful tenderers and candidates":

"[A] contracting authority may decide to withhold any information referred to in paragraph (2)(c) regarding [inter alia] the award of a contract...if the release of such information... (c) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or (d) might prejudice fair competition between economic operators."

It is further made clear that a positive duty arises in this regard from the judgment of

(i) Hogan J., for the Court of Appeal, in the within proceedings, on 28th March last ([2018] IECA 87), when he observes, at para. 17, that:

"Confidentiality and the legitimate protection of business secrets are indispensable features of a tender process because this calls upon potential business rivals to advance their best case in the tender, often revealing their business plans, methods and pricing strategies in the process. There is, of course, an important public policy in promoting a competitive tendering process",

and

(ii) the judgment of the Court of Justice in Case C-450/06 *Varec S.A. v. Belgium*, as referenced by Hogan J. in his judgment of 28th March, in which the Court of Justice observes, *inter alia*, as follows:

"34 The principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States (see, to that effect, Case C 26/03 Stadt Halle and RPL Lochau [2005] ECR I 1, paragraph 44).

35 In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.

36 Furthermore, both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them.

37 Accordingly, Article 15(2) of Directive 93/36 [coordinating procedures for the award of public supply contracts (no longer in force)] provides that the contracting authorities are obliged to respect fully the confidential nature of any information furnished by the suppliers.

38 In the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender, and of publishing a notice of the award of a contract, Articles 7(1) and 9(3) of Directive 93/36 give the contracting authorities the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.

39 Admittedly, those provisions relate to the conduct of the contracting authorities. It must nevertheless be acknowledged that their effectiveness would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners.

40 In such circumstances, the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets.

41 In such an appeal, the respondent would be the contracting authority and the economic operator whose interests are at risk of being damaged would not necessarily be a party to the dispute or joined to the case to defend those interests. Accordingly, it is all the more important to provide for mechanisms which will adequately safeguard the interests of such economic operators.

42 In a review, the body responsible for the review procedure assumes the obligations laid down by Directive 93/36 with regard to the contracting authority's respect for the confidentiality of information. The 'effective review' requirement provided for in Article 1(1) of Directive 89/665 [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], read in conjunction with Articles 7(1), 9(3) and 15(2) of Directive 93/36, therefore imposes on that body an obligation to take the measures necessary to guarantee the effectiveness of those provisions, and thereby to ensure that fair competition is maintained and that the legitimate interests of the economic operators concerned are protected.

43 It follows that, in a review procedure in relation to the award of public contracts, the body responsible for that review procedure must be able to decide that the information in the file relating to such an award should not be communicated to the parties or their lawyers, if that is necessary in order to ensure the protection of fair competition or of the legitimate interests of the economic operators that is required by Community law."

So a positive duty arises for a contracting authority as regards confidentiality, this has consequences for what may be included in a confidentiality letter, and contracting authorities are expressly granted a discretion as to what they may include in same by the Regulations of 2010. For this Court to conclude that a contracting authority is required to provide reasons in a Reasons Letter justifying translation.ie's mark would upset the balance that has hitherto been struck in

legislation and case-law between giving the basis of a decision and respecting the interests of confidentiality and competition.

(4) as Humphreys J. notes in *RPS Consulting Engineers Ltd v. Kildare County Council* [2016] IEHC 113, para.89(f), following a review of European Union legislation and case-law:

"In order to set out the characteristics and relative advantages of the successful tender, the contracting authority must at least mention the matters which should have been included in the applicant's tender or the matters contained in the successful tenders. The statement of reasons must therefore be sufficiently detailed to explain how the preferred tender was advantageous by reference to particular matters, respects, examples or facts supporting a general assertion of relative advantage."

It seems, *inter alia*, from the just-quoted text that what is required of a contracting authority in the context to which Humphreys J. refers is a high-level comparative exercise that identifies concrete points of relative advantage (which relative advantage, the court again notes, is relative to the losing tenderer, not the award criterion).

(5) the Court of Justice does not require that information be provided justifying an individual tenderer's scores, as opposed to relative information justifying the scores between tenderers. Thus in Case C-235/11 P *Europaiki Dynamiki v. European Commission*, the Court, in its Order, observes at para.50 that "[T]he Commission cannot be required to communicate to an unsuccessful tenderer, in addition to the reasons for rejecting its tender, a detailed summary of how each detail of its tender was taken into account when the tender was evaluated" (an observation that would seem to apply with especial rigour when it comes to the detail under a losing sub-criterion), and at para. 51 that "[I]t should be noted that, in the context of notification of the characteristics and relative merits of the successful tender, the contracting authority cannot be required to undertake a detailed comparative analysis of the successful tender and of the unsuccessful tender".

(6) in Case C-629/11 P *Europaiki Dynamiki v. European Commission*, para.22, the Court of Justice observes that a "contracting authority is not under an obligation to provide an unsuccessful tenderer, upon written request from it, with a full copy of the evaluation report". For this Court to conclude that a contracting authority is required to provide reasons in a Reasons Letter justifying translation.ie's mark would run directly counter to this observation.

(iii) Increased Marks for Missing Narratives?

29. Section 4.3 of the SRFT, provides as follows, under the heading "Quality Assurance Plan (Marks available: 200)":

"The Immigration Services and the Legal Aid Board require an effectively and efficiently managed interpretation service. Management Information Reporting is critical to this function.

Tenderers must explain in their Tender how they will provide high quality, well presented and accurate Management Information Reports ('MI Reports').

In addition, given the criticality of MI Reports, Tenderers have been provided with Monthly Management Information set out in the Excel spreadsheet at Appendix 2 ('Notional Information'). The notional information provided is for March 2015. The notional Quarter referred to is Quarter 1, 2016 – January, February, March. Please note the following: In the column 'Total cost per Quarter', the notional Quarter referred to is Quarter 1, 2016.

Tenderers are required to use the Notional Information in Appendix 2 and apply it to the Notional Source Data set out in the next Appendix, i.e. in appendix 2A, when preparing the three sample bespoke reports.

Tenderers must include as Appendices to their Tender the following bespoke sample reports, based on one calendar month.

☐ *Report 1: Contract Volume and Value (CV Report) (60 Marks) [90 marks]*

☐ *Report 2: Quality Assurance (QA Report) (70 marks)*

☐ *Report 3: Complaints Management (CM Report) (70 marks) [110 marks]*

[Report 2 was dropped as a requirement; hence the deletions and re-calibration of the marks].

☐ *All three MI Reports must include monthly (reporting month only – i.e. March 2016) AND cumulative year to date (i.e. Quarter 2016) Information.*

☐ *In all cases the MI Reports must clearly distinguish between Telephone Interpretation Services AND On-Site Services.*

☐ *MI Reports must convey information to management in a clear and transparent manner and in a format that allows Framework Clients to understand the information. The detail provided must be sufficient for management to have no need to review source data other than for verification purposes.*

☐ *The sample monthly MI reports must be displayed in an easy to read format using PDF, Open Office or Microsoft Office readers. MI Reports must use relevant visualisation tools, such as charts, graphs, etc. to display pertinent information (as set out in Appendix 2 of this SFRT), graphically, with clear labelling of titles, legends, values, axis, categories, trend lines, scales, data source, grid lines, data points, etc.*

☐ *Each report must include a narrative summarising the information provided, including how they will ensure that these MI Reports will be provided to Framework Clients in a timely manner.*

☐ *The Successful Tenderer will be required to produce the MI Reports in the same format as submitted with their Tender."*

30. So, as can be seen, tenderers were given 'dummy data' and asked to show their mettle by undertaking certain tasks in respect of same. In this regard, Word Perfect scored full marks for what even the court, inexperienced as it is in such matters, can see was a high-quality narrative report. By contrast, translation.ie scored 170 marks for its contribution. One question that arose at hearing was whether translation.ie had in fact provided a narrative. Certainly the narrative it provided was not as good as that of Word Perfect. But that is not the test (and Word Perfect in any event scored higher); the test is whether translation.ie provided a narrative. In this regard, the court asked at hearing 'what is a narrative?' In reply it was referred, *inter alia*, to certain dictionary definitions. Thus, the *Collins Online Dictionary* defines a 'narrative' as "an account, report, or story...". The *Oxford English Reference Dictionary* (2nd ed) describes a 'narrative' as "a spoken or written account of connected events in order of happening". Counsel for the Minister noted that the verb to narrate comes from the Latin 'narrat' which means 'to relate' or 'to tell' and thus what one is looking for in this regard is something that tells a story, an approach which accords with the *Collins* and *Oxford* definitions.

31. Did the documentation provided by translation.ie 'tell a story' and otherwise conform with the requirements of the SRFT? It seems to the court to be undeniably the case that the coloured charts, bars, graphs and miscellaneous data supplied by SRFT in this regard, together with certain written, comparatively limited commentary do 'tell a story', do comprise a narrative and do otherwise conform with the requirements of the SRFT. In this regard, the court notes the following averments of Ms Anne Lannon, a Procurement Portfolio Manager with the OGP, and chairperson of the evaluation panel, in her affidavit evidence (and it cannot but note in passing that the issue of whether what was supplied by translation.ie was a narrative was something squarely within the competence and expertise of the evaluators to decide):

"[I]t is unclear whether the Applicant is seeking to assert...that there was no narrative report contained in the preferred bidder's tender. If this is the case, I can confirm that said tender did include a narrative report. A general narrative was provided in Appendix 2 and a more detailed narrative was provided in the tender under Award Criterion 4.3..."

32. Word Perfect has pointed to certain contradictions in the evaluators' notes on the question of whether the narrative requirement was satisfied. But what difference does it make if there were such contradictions if, as is the case, there is in fact a narrative and the evaluators come to the final conclusion that that narrative exists and meets the SRFT requirements? Moreover, while coming to that conclusion is a matter very much within the remit of the evaluators, it may assist for the court to note that it sees no reason why the evaluators could not in law and by reference to the facts before them properly so conclude. In fact, it seems to the court that had the evaluators not so concluded, translation.ie would have had the very best of bases for contending that the decision of the evaluators in this regard was tainted by manifest error.

V

Management Resources

(i) Paragraphs 48-51 of the Amended Statement of Grounds.

33. Paragraphs 48-51 of the amended statement of grounds state as follows:

"48. Under this award sub-criterion, the Preferred Bidder was awarded the maximum number of marks available, i.e. 75 marks. The applicant was awarded 67.5 marks, i.e. 90% of the available marks. Thus number of marks put the Applicant in the first weighting band, i.e. the band described in the following terms:

'Excellent response that fully meets or exceeds requirements, and provides comprehensive, and convincing assurance that the Tenderer will deliver to an excellent standard.'

49. The purported reasons provided by the Respondent in its letter of 18 April 2017 explaining the difference in marks was said to be that the Applicant's tender 'does not make it clear that the and Deputy [Key Account Manager] will between them be available 24/7/365.' This purported reason is manifestly wrong. Page 31 of the Applicant's tender provided as follows:

*'The above structure gives the Contracting Authority assurance that Word Perfect is able to deliver and oversee the day to day management of any contract(s) awarded under this SRFT to various agencies **on a 24/7/365 basis as each department within our Company under this contract is fully resourced and managed by a nominated contact point, available to Contracting Authority 24/7/365** in order to underpin our commitment to deliver high quality services' (emphasis added).*

50. In the premises, the Respondent committed a manifest error in the evaluation of tenders and/or took irrelevant considerations into account and/or failed to take relevant considerations into account and/or breached the general principles of European Union law including the principles of equal treatment, transparency and objectivity.

51. The Applicant's tender was placed in the first weighting band, a band indicating that its tender not only met the requirements identified in the SRFT but exceeded them. However, in its letter of 18 April 2017, which purported to provide reasons for the decision, the Respondent suggested that the Applicant's tender failed to satisfy a key requirement of the SRFT. Such a contention is incompatible with the score awarded to the Applicant's tender and indicates that the First Respondent engaged in some sort of ex post facto analysis designed to justify an irrational and disproportionate decision to award the tender to a bidder whose tender price exceeded that submitted by the Applicant by 50%. In the further premises, the Respondent committed a manifest error in its assessment of this sub-criterion and also breached, among others, the principles of equal treatment, proportionality and objectivity and took irrelevant considerations into account while failing to take relevant considerations into account. Further, the Respondent failed to allow its own procedures and failed to abide by the marking scheme set out in the SRFT.

"[Emphasis in original].

(ii) The Supplementary Request for Tender.

34. The SRFT stipulates, *inter alia*, under the heading "Management Resources" that "Because of the 24/7/365 nature of the

Services, the Key Personnel must be directly available by phone at all times (for the avoidance of doubt **either the Key Account Manager OR the deputy Key Account Manager** must between them be available to Framework Clients on 24/7/365 basis)." [Emphasis added].

(iii) *The Reasons Letter.*

35. The Reasons Letter states, *inter alia*, as follows, under the heading "Management Resources":

"Your Tender (67.5 marks)

Management resources are clearly outlined and a clear narrative is given on proposed meetings, scheduling and report preparation. However, Award Criteria 4.2, Management Resources, clearly states that 'for the avoidance of doubt, either the Key Account Manager or the Deputy Key Account Manager must between them be available to framework clients on a 24/7/365 basis. Clarification 1269813 dated 22 December 2017, was issued by the Contracting Authority confirming that Tenderers must appoint and confirm both the Key Account Manager and the Deputy Key Account Manager. Your submission does not make it clear that the KAM and Deputy KAM will between them be available 24/7/365.'

[Emphasis in original].

(iv) *Conclusion.*

36. Paragraph 31 of Word Perfect's tender (as quoted at para.49 of the amended statement of grounds (quoted above)) states that a "nominated contact point" is available. It neither states nor can be construed as inferring that, to borrow from the wording of the SRFT (as quoted above) "either the Key Account Manager OR the deputy Key Account Manager...[will be] between them be available to Framework Clients on 24/7/365 basis)". So there is no error of any kind on the part of the Minister in this regard. The Minister made clear in the SRFT what was being looked for, this was made doubly clear in the Clarification of 22nd December, 2017, and the Minister made clear in the Reasons Letter what the (crystal clear) failing of Word Perfect was in this regard. There is no wrong of any nature presenting in the Minister's actions in this regard.

VI

Financial Marks Disclosed to Evaluators?

37. Not raised in the statement of grounds (and so not answered in the respondent's affidavit evidence) but raised nonetheless by way of submission at hearing was the contention that the evaluators knew prior to making their decision on the award criteria what the financial marks would be for each tenderer. The Superior Courts have been entirely clear as to the need to confine complaints in procurement proceedings to those set forth in the statement of grounds. See in this regard, e.g., *Fresenius Medical Care (Ireland) Ltd v. Health Service Executive* [2013] IEHC 414, para.21 and *BAM PPP PGGM Infrastructure Cooperative U.A. v. National Treasury Management Agency* [2016] IEHC 546, para.109. As the point aforesaid was not pleaded, it falls to be and is dismissed by the court as not pleaded.

VII

Some Further Points Arising

(i) *Affidavit Evidence.*

38. It was urged on the court that a deficiency presented in the affidavit evidence of the contracting authority in that, apart from the chairperson of the evaluation panel, none of the evaluators have sworn affidavits in the within proceedings. As chairperson of the evaluation panel, Ms Lannon was entitled and qualified to swear the affidavit evidence which she has sworn as to the deliberations of that panel.

(ii) *Notes and Matrices.*

39. Criticism is made that there are no notes by the evaluators and no evidence of a draft evaluation matrix being circulated in advance of the meetings. There is no merit to these criticisms. At the first panel-meeting (on 21st January, 2017) it was noted that the OGP would record the notes on the template, it did so, and all the notes remained with the OGP. As to the preliminary note-forms that the court has seen, these were distributed at the meeting on 21st January and annotated by OGP personnel as the meeting proceeded.

(iii) *Final Conclusions.*

40. Complaint is made that there is no evidence as to how the final conclusions to the marking scheme following the third meeting. In fact, there was no alteration to the marking-scheme following the third meeting. Insofar as any point is being made (if it is being made) in this regard concerning the 'no narrative' aspect of matters, this has been considered at length previously above.

(iv) *Role of OGP Personnel.*

41. It is contended that OGP personnel took an active role in the evaluation process. This is not borne out by the evidence of Ms Lannon who avers, *inter alia*, as follows:

"Composition of the Evaluation Committee

*28. In respect of paragraph 90(a) of the Amended Statement of Grounds, it is surprising that the Applicant has overlooked the information contained at **Category 1, Document 169, Roles and Responsibilities – Evaluation Panel (date 27/1/17)**. This document clearly states that:*

(i) the role of OGP is to chair and facilitate (the facilitation role is referred to twice on this page), and

(ii) that the role of INIS/LAB is decision-making and scoring (the decision-making role is referred to twice on this page).

29. Attention is also drawn to my Affidavit sworn on 17 November 2017 which comprehensively sets out the role of the Chair and the role of the Respondent in the evaluation process.

30. In any event, and for the avoidance of doubt, I would like to confirm that my role as the Chair was to serve and

facilitate the Evaluation Panel in my role and this included note-taking at the evaluation meetings. The fact that the Respondent would record notes on a template is also clearly stated on this page.

31. As the chair I was responsible for acting in an administrative capacity as secretariat to the panel. Unsurprisingly, this role included note-taking, acting as record-keeper and performing administrative functions to ensure that the process was co-ordinated and facilitated and that the panel members were supported in every way throughout the process. The fact that I, as Chair, undertook this role to the utmost of my ability does not by default confer upon me a decision-making role in respect of the evaluation itself.

32. Neither does the applicant have cause for complaint under the umbrella of transparency. The OGP gave a specific commitment to the Applicant regarding the evaluation panel and this has been meticulously upheld, as repeatedly addressed at considerable length in my previous affidavits.

33. As Chair I did not have a decision-making role. I conducted my role in the service and facilitation of the evaluation panel and to ensure best practice and a scrupulously fair process throughout.

34. The contents of paragraph 23 of my previous Affidavit sworn on 17 November 2017 are reiterated: the role of the Respondent was neutral, was discharged in respect of an administrative function and this was made clear to INIS and LAB at the outset, as recorded in **category 1, document 169**. Furthermore the assurances given to the Applicant in the letter dated 13 April were upheld at all times.

35. With regard to paragraph 90(b) of the Amended Statement of Grounds, reference is made to **category 1, document 169**, again which sets out that the Respondent has the role of recording notes on the template.

36. In the course of my role in administrating and facilitating the process as Chair, I served as note-taker for the evaluation panel. These notes were the point of reference for the panel throughout the process and I can confirm that they are not a record of my individual opinion. The notes are a record of the points raised and the opinions voiced by the decision-making (INIS and LAB) members of the panel. This involved me, as the Chair, having recorded the notes, reading the notes back to the panel to check that the record reflected the process and the decisions reached by them. Therefore, it is not surprising that 'Anne's comments' are referred to in **Category 1 documents 23, 26 and 28** in Ms Byrne's notes, as the notes recorded by me are the working record of the evaluation process, agreed by the decision-making members of the panel. I can confirm that this is not a reference to any personal opinions on my part.

37. In respect of paragraph 90(c), Category 1, document 169, date 27/1/17, page 2, 4.3 – Reports is relied upon. It is clear from this note that at the time of the first evaluation meeting the decision-makers had not analysed the reports submitted by the tenderers on a line-by-line basis. Therefore, the panel agreed that the marks awarded would be 'holding only' and that the Respondent (Ms Wiktorowska), would conduct this line-by-line analysis to establish if the reporting requirements were fully met. On confirmation of the status of the three tenderers in this respect, the decision-makers would consider the overall quality of the submissions, taking into account the visualisation tools, narrative and other aspects of the requirements as set out in 4.3 of the SRFT.

38. I can confirm that Ms Wiktorowska conducted this exercise to facilitate the panel, reported to the evaluation panel on 1 March 2017, explained how the exercise was conducted and the outcome. It was then that the evaluation panel decision-makers discussed the submissions and decided on the marks awarded.

39. For the avoidance of doubt, Ms Wiktorowska's role was to ensure that the submissions complied with the notional data requirements set out in the SRFT at Appendices 2 and 2A (as amended). This was an administrative function based on data matching and did not have a qualitative element to it; she had no role in assessing the quality of the submission nor in deciding the marks awarded."

[Emphasis in original].

42. In passing, the court notes that Word Perfect has (rightly) conceded that evaluators could delegate the role of note-taking. Any contention, to the extent that such contention is made, that the evaluators were required as a matter of law or good practice to undertake personally the line-by-line analysis of the spreadsheets of 'dummy data' is not accepted by the court.

(v) Opening of tenders.

43. Word Perfect notes that the online audit trail shows the tender documentation to have been opened several times by a named staff member of the OGP. It was, but Ms Lannon has sworn that the said staff member "was not involved whatsoever in the evaluation of the tenders the subject-matter of the within proceedings", an averment which does not appear to have been controverted. So that is the end of this line of complaint, though it is not entirely clear what complaint is being made in this regard in any event.

VIII

Some Points of Law

44. The following points of law, additional to those treated with previously above, might usefully be noted:

(1) as to the requirements to be met in respect of the reasons to be given in notification letters, the court respectfully adopts the reasoning of Humphreys J. in *RPS Consulting Engineers Ltd v. Kildare County Council* [2016] IEHC 113, para. 89. (In passing, the court notes that in RPS, the reasons given to each tenderer were found to be uninformative and near-identical in each instance. In the matter at hand, the Minister furnished Word Perfect with bespoke reasons as to why its tender had been unsuccessful).

(2) in RPS the court did not make an order setting aside the contract award decision. Rather it compelled Kildare County Council to provide a statement of reasons, including the characteristics and relative advantages so as to meet applicable legal requirements. Thus RPS can also be seen to be authority for the proposition that just because some error presents in a procurement process it does not follow that the only and best relief to be granted by a court is necessarily to collapse what has occurred and return everyone involved to 'Square 1' and a commencement anew of a fresh tendering process. That said, for the avoidance of doubt, the court does not see any error to present on the part of the Minister as

regards the conduct of the procurement process that it has been sought to impugn in the within proceedings.

(3) in *Somague Engenharia SA v. Transport Infrastructure Ireland* [2016] IEHC 435, Baker J. notes at para.56, and the court respectfully associates itself with her reasoning in this regard, “*The language of the debrief letter [i.e. the Reasons Letter] is not to be interpreted as requiring the degree of exactitude and care as might be required in a contract or a piece of legislation.*” The Reasons Letter is entirely fit for purpose when one has regard to this standard.

(4) the standard of review applicable to the assessment of bids in procurement cases has most usefully been analysed e.g., in *Fresenius* and *Somague*. According to this line of case-law, and the court respectfully accepts this reasoning as correct, an applicant in proceedings such as that now presenting must demonstrate a clear error on the part of a contracting authority in the evaluation and scoring of a tender; it does not suffice for an applicant simply to contend that a better mark should have been awarded to it. (Notably too, when one has regard to certain of the contentions made in the within proceedings, Baker J., in *Somague*, found no error to present where an evaluator’s preliminary view was varied following discussion).

(5) the court is bound by the renowned observations of Fennelly J. in *SIAC Construction Ltd v. Mayo County Council* [2002] 3 IR 148 concerning manifest error, including the point that there is no question of permitting a margin of discretion in the face of manifest error. As should by now be clear, the court does not consider that there was any error on the part of the Minister in its evaluation and scoring of the tenders that have been the subject of focus in the within proceedings. However, if the court is wrong in this (and it does not consider that it is), it does not consider that any of the errors contended to present amounts to a manifest error: all of the conclusions of the Minister which it has been sought to impugn are supported by material that was before the Minister and were made within the margin of appreciation that falls to be allowed to the Minister when scoring and assessing the bids.

IX

Reliefs Sought

45. The reliefs sought by Word Perfect in the within application comprise the following:

- (1) an order pursuant to reg.8 and /or 9 of the Regulations of 2010 setting aside and/or permanently suspending the decision of the Minister, as reflected in the Reasons Letter, to award the contract the subject-matter of the within proceedings to translation.ie, namely the contract for the provision of interpretation services to the Minister and/or to such other agency or agencies as may be nominated by the Minister in accordance with the terms of the Framework Agreement (the ‘Contract’);
- (2) a declaration that the Minister’s decision to award the Contract to translation.ie was unlawful, *ultra vires*, invalid and/or of no legal effect;
- (3) an order directing the Minister to commence a new process for the award of the Contract and/or a declaration to the effect that the Minister is obliged under law to commence such a new process;
- (4) further, or in the alternative, an order directing the Minister to award the Contract to Word Perfect,
- (5) if necessary, an order pursuant to reg.9(5) of the Regulations of 2010 suspending the operation of the Minister’s decision to award the Contract to translation.ie;
- (6) in the event that the contract has been entered into by the Minister with translation.ie, an order or orders pursuant to reg.9(1)(b) of the Regulations of 2010 declaring the same to be ineffective or, in the alternative, an order or orders pursuant to reg.9(5) of the Regulations of 2010 suspending the operation of such contract(s);
- (7) if necessary, an alternative penalty pursuant to regs. 9 and 13 of the Regulations of 2010, including the termination or shortening of the duration of any Contract concluded with translation.ie;
- (8) if necessary, interlocutory orders pursuant to reg.8(1) and/or 9(2) of the Regulations of 2010 with the aim of correcting any infringement or preventing further damage to Word Perfect’s interests concerned, including measures to ensure the suspension of the implementation and/or operation of the Contract and, if necessary, setting aside the decision of the Minister to award the Contract to translation.ie;
- (9) a declaration that the Minister has not complied with the duty to give reasons and/or with the requirements of reg.6(2) and/or reg.6(3) of the Regulations of 2010;
- (10) a declaration that the Minister has acted contrary to general principles of European Union law and/or contrary to the principles of natural and constitutional justice and/or contrary to fair procedures and/or contrary to the legitimate expectations of Word Perfect;
- (11) a declaration that the decision of the Minister, as reflected in the letter of 18th April, 2017, in marking and applying the award criteria was in manifest error and/or was irrational and/or flew in the face of fundamental reason and common-sense and/or was unlawful by reason of taking into account irrelevant considerations and/or failing to take into account relevant considerations.
- (12) a declaration that the Minister is in breach of the implied and/or collateral contract between the Minister and Word Perfect;
- (13) if necessary and appropriate, an order for *certiorari* quashing the decision of the Minister to award the Contract to translation.ie; and
- (14) damages, interest and certain ancillary reliefs.

X

Conclusion

46. For the various reasons aforesaid, all of the reliefs sought by Word Perfect in the within application are respectfully refused.