Neutral Citation No. [2004] IEHC 415

THE HIGH COURT

Record No. 2003 980 J.R.

BETWEEN

ADVANCED TOTES LIMITED

APPLICANT

AND
BORD NA GCON

RESPONDENT

AND
AUTOTOTE WORLDWIDE SERVICES LIMITED

NOTICE PARTY

Judgment of Mr. Justice Murphy dated the 20th day of December, 2004.

1. Outline of application
The applicant ("ATL") and the notice party ("Autotote") were tenderers for the provision of totalisator services to Bord na gCon, the Irish Greyhound Board, the respondent herein ("the Board"), pursuant to an invitation to tender which the applicant had received on 11th April, 2003. The tender was published in the Official Journal on 15th May, 2003 with an extended deadline to 30th May. The procedure was governed by European law regarding public procurement.

There were four tenderers.

The applicant tendered within that time and made an oral presentation on 24th July. In mid-August queries were raised as to what was not included in the applicant's proposal.

Between 4th and 10th September, 2003 the applicant's Managing Director, Mr. Paul Simpson said that he was informed off the record by Mr. Martin Doolan, that a decision had been made, and approved by Mr. Michael Foley, the acting Chief Executive of Bord na gCon, to recommend to the board of directors that the contract be awarded to ATL.

Mr. Doolan, together with Mr. Foley and Ms. Griffin, was one of the members of the committee of the respondent charged with making a recommendation.

Mr. Doolan, in his evidence on affidavit and in cross-examination, was adamant that he understood that that was the opinion of Mr. Michael Foley. The third member of that committee, Ms. Patricia Griffin, had not expressed any opinion.

Indeed she, Mr. Foley and Mr. Doolan had been of the opinion that Amtote, the third tenderer, was the best technically but could not be recommended by reason of price. It appears to be common case that the committee wished to renegotiate with Amtote and sought legal advice as to whether this was possible under the procurement directives and the regulations made implementing those directives. It was advised that equal opportunity be given to each of the four tenderers.

At its presentation to the committee on 29th July, 2003 the applicant had indicated that its price in relation to off course bets was reviewable. Later, on 2nd September, 2003 Mr. Simpson the applicant's managing director, said that he had indicated to Mr. Doolan that if the applicant's price "was an issue for the ITSP host it could be reviewed". By e-mail of 3rd September Mr. Doolan required Mr. Simpson to confirm and assure the ability of the tote system to interface with other, mainly North American tote providers. Mr. Simpson gave certain commitments and sought assurances and said: "once agreed we will stick by our commitment".

The notice party, Autotote Worldwide Services Ltd. (Autotote), by letter dated 4th September to Mr. Foley (who had not been present at Autotote's presentation) indicated that it was prepared to "review in detail our pricing proposal with a view to increasing if necessary its competitiveness".

A few days later Mr. Foley, on his return, was made aware of that letter and telephoned Mr. James Gilmore, Autotote's managing director, who had written the letter on behalf of the notice party.

The respondent invited a re-tender on price with a deadline of 19th September, 2003. ATL's re-tender was at the same price of 1.5% of turnover. The notice party, Autotote, also came in with a price of 1.5% of turnover but also agreed to supply the communications hub in its facility at Ballymahon for the relevant greyhound tracks.

On 25th September the applicant was informed that Autotote, the notice party, had been successful.

Judicial review proceedings to quash the decision on the grounds, *inter alia*, of the Public Procurement Directive and regulations (see 4 below) were issued and served on 22nd December, 2003. The matter was heard from 19th to 27th October, 2004.

2. Judicial Review Proceedings
By notice of motion returnable for 26th January, 2004 the applicant sought declarations that the respondent board failed to comply with the requirements of European Union law on public procurement, in particular, Council Directive relating to the co-ordination of procedures for the award of public service contracts (92/50/EEC as amended) and of the European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Service Contracts) (No. 2) Regulations, 1994 (SI No. 309 of 1994), as amended, and the European Communities (Award of Public Service Contracts) Regulations, 1998 (SI No. 378 of 1998), as amended and a declaration that the contract the subject matter of the proceedings was void.

The applicant also sought an order of *certiorari* quashing the decision of the Board to award the contract to Autotote. A claim for damages was not proceeded with at this stage. The contract was described in relation to six greyhound stadia, one of which – Galway – had already been awarded to the applicant on a purchase basis before 29th July, 2003. The invitation to re-tender dated 11th September, 2003 afforded each of the tendering parties an opportunity to re-tender their pricing proposals (having rejected the pricing proposals of the original tenders) and inform them that Galway's no longer formed part of the tender. The total value of the tender (including a figure of €300,000 for Galway) was €2.65 million.

It was pleaded that there had been an infringement of the regulations and directives, *inter alia*, as follows:

"(i) The Board contacted tenderers in advance of the publication of the contract notice in the official journal.

(ii) The Board failed to formulate the award criteria in an appropriate way.

(iii) The Board failed to list the award criteria in descending order of importance.

(iv) The Board divided the contract into lots, despite the statement it provided in the contract notice in the official journal that the contract would not be so divided.

(v) The Board adopted the negotiated procedure in reaching its decision to award the contract.

(vi) The Board changed the nature of the project the subject matter of the contract during negotiations with tenderers.

(vii) The circumstances in which the Board permitted a re-tender in price constituted a breach of, inter alia, the principle of equal treatment of tenderers and the principle of transparency.

(viii) The Board failed to publish a notice in the official journal of the European Union of the re-tender on the issue of price.

(ix) The Board awarded the contract after a negotiated procedure without prior publication of the requisite contract notice in the official journal of the European Union.

(x) The Board failed to award the contract exclusively by means of the open procedure.

(xi) The Board failed to ensure that all the tenderers knew in advance the criteria on which its decision to award the contract would be based.

(xii) The Board informed Autotote of ATL's (the applicant's) tender price.

(xiii) In making its decision to reject ATL's (the applicant's) tender and to award the contract to Autotote, the Board had regard to criteria which were not included in the contract notice or the invitation to tender documentation.

(xiv) The Board rejected ATL's (the applicant's) tender on the basis of criteria which the Board did not apply to Autotote.

(xv) The Board failed to interpret the award criteria in the same way throughout the entire procedure.

(xvi) The Board failed to apply the award criteria objectively and uniformly to all tenderers.

(xvii) The Board failed to comply with the principle of equal treatment of tenderers.

(xix) The Board failed to comply with the principle of transparency."

The grounds upon which relief was sought were the aforementioned acts and omissions which are more fully set out in the grounding affidavit of Paul Simpson of 19th December, 2003.

3. Invitation to tender
The relevant portion of the invitation to tender is as follows:

3.1

4.4. Proposals should be forward looking and the technology specified should be easily adaptable to enable the Board to develop its existing markets and expand into new markets. Specifically any system proposed should be capable of the following:

I. Enabling a track to act as a host or a guest.

II. Interfacing with the totes of other providers.

III. Data from the system should be able to electronically interface with the Board's tote database.

IV. Tracking clear details to enable the Board to offer a loyalty reward scheme.

V. Logging all meeting activity.

VI. Providing a management information system (MIS) to monitor real time activity.

VII. Providing detailed analysis reports for each meeting.

VIII. Offering a full complement of betting pools including exotics and jackpots. A list of pools coverage should be provided.

IX. Complying fully with totalisator regulations operated by the Irish Greyhound Board.

X. Offering hand-held and stand-alone self-service units.

XI. Offering individual betting terminals for selected customers.

XII. Facilitating credit betting.

XIII. Offering a web interface to a betting platform. . . .

4.8. Proposals must include for full hardware, software and communication backup.

4.9. The Board expects any proposed system to be robust and functional at all times. Agreed contracts will contain penalty clauses to cover for any loss or partial loss of meetings and any consequential loss incurred."

Section 5 of the tender document indicated that tenderers should tender on the basis of:

(a) outright purchase by the Bord of the hardware and the software support, telephone/modem support and maintenance agreement to include software upgrades and the cost of all paper, tickets and jackpot cards.

(b) A margin agreement whereby all hardware is provided and fully maintained with regular software upgrades in return for a fixed percentage of the handle. This is to include the cost of all paper, tickets and jackpot cards.

3.2 Evaluation and award criteria
The evaluation of tenders and award criteria was expressed to be as follows:

"20.1 Qualifications criteria. Proposals will be evaluated initially by reference to the following qualification criteria:

(a) completeness of proposal documentation; and

(b) stated ability of the tenderer to meet all the minimum requirements specified in this document;

20.2 Award criteria.

Tenders, which fulfil the above mandatory criteria, will be evaluated on the basis of the most economically advantageous tender which fully complies with the requirements set out in the tender documentation.

Bord na gCon does not bind itself to accept the lowest priced tender, or any tender or all of any tender. The award of any tender will be subject to contract."

4. Correspondence
4.1 Autotote's letter dated 4th September from James Gilmore, its Managing Director, to Mr. Foley, CEO of the Board, stated:

"Re: Our bid for tote contract

Dear Michael,

I am obviously concerned we have not received any feedback on our bid since our verbal presentation in Limerick a few weeks ago. I have tried to reach Martin [Doolan] a number of times unsuccessfully over the last couple of weeks. This is a contract which we view with great importance and it is one we do not want to lose. We believe Autotote can do everything you need and more to continue the Greyhound Board's outstanding success in recent years. I have also made it clear to Martin that we are very willing to review in detail our pricing proposal with you with a view to increasing if necessary its competitiveness.

With this in mind we would very much welcome an early opportunity to sit down with you and your evaluation team to openly discuss where our bid currently stands in the tender process. As I am sure you can appreciate we have put a lot of effort into our detailed proposal, and I was concerned that you were unable to attend out last meeting (July 31st) and we therefore did not get the opportunity to emphasise some key points to you directly.

You can call me any time at --- . I would appreciate if you could contact me."

4.2 On September 11, 2003 Mr. Doolan, on behalf of the Board, had written the following letter of rejection to all of the tenderers:

"I refer to your submission for the provision of totalisor services to the Irish Greyhound Board.

Having evaluated each of the tenders a decision has been made to reject the pricing proposal of each tenderer. We are therefore affording each of the tendering parties the opportunity to re-tender their pricing proposals, if they so choose. We would only require re-submissions on the margin proposal i.e. percentage of handle being charged.

Re-submitted pricing proposals should be sent in sealed envelopes, marked for my attention, and addressed to the Irish Greyhound Board … by Friday 19th September, 2003, to arrive not later than 4 p.m. (1600 hrs.) on that day. The tenders will be opened shortly thereafter.

A final decision will be made in accordance with the criteria set out in the tender documentation. Apart from the variations contained in this letter, all other terms and conditions of the original invitation to tender remain unchanged.

Please note that Galway no longer forms part of the tender."

4.3 Applicant's re-tender
The applicant re-tendered in the following terms:

18th September 2003

"Dear Martin,

Re: Re-submission of totalisator services tender:

The exclusion of Galway and the inclusion of stand-alone servers at the Dublin stadia has had a small effect on the margin agreement but I am pleased to say it remains extremely competitive at 1.6% of turnover.

Whilst the tote installation in Galway is now completed and running on the current system we can still offer to return it to a margin agreement and upgrade to Chameleon. With Galway included and despite the addition of stand-alone servers the tender can return to our originally proposed 1.5%.

We believe Chameleon is the system to take the IGB forward both domestically and globally. ITSP compliance is assured. UK satellite services have already started and with a proven working relationship minimum delays are insured. In fact having successfully installed two totes for the Board in the last three months, we also believe we are the least risk option in the remaining time available.

Yours sincerely,

Paul Simpson

Managing Director"

4.4
The Board, following an appraisal by Mr. Doolan, decided to accept the tender of the notice party. On 26th September, 2003 a letter of intent, subject to contract/contract denied was sent by Mr. Foley, as acting Chief Executive of the board, to Mr. Gilmore of Autotote, the notice party, was subject to obtaining warranties in relation to delivering an operational system for Dundalk before 27th November, 2003 and it appears from others with effect from December 31st, 2003. The letter was subject to obtaining warranties from Autotote in relation to delivering an operational system by those dates with six requirements as follows:

1. The delivered system will be fully capable of offering all bet types offered by IGB (the board) and comply fully with our totalisator regulations.

2. The system will be fully ITSP compliant and capable of co-mingling pools from other tote providers into IGB host pools.

3. Autotote will deliver a robust hand-held platform capable of operating on GPRS with a radio frequency back up if requested by the board.

4. The allocation of all stadia will be dependent on the effective implementation of Autotote System of Dundalk.

5. The board will require specific warranties and penalty clauses for system operation failures which result in loss to the board.

6. The contract will be subject to the co-mingling charges/margins set out in your correspondence of 25th September.

4.5
By undated fax received by Bord na gCon on 1st October, 2003 Mr. Simpson expressed his disappointment and said that he had been advised that the procedure for the totaliser services tenders was in breach of the EU procurement rules. Having set out the procedures adopted by the Board he continued:

"We have been advised that the tender procedure followed by the Board is in breach of the EU public procurement rules and in particular that it is in breach of the fundamental principles of transparency and equality of treatment of tenderers. These principles require that all tenderers know the rules of the tendering process in advance and that the rules are applied to all tenderers and potential tenderers in an equal manner.

I have been advised that the fundamental principles of transparency and equal treatment of tenders have been breached in relation to at least the following:

1. the Board contacted the various tenderers prior to publishing the contract notice, under an open procedure, in the Official Journal of the European Communities;

2 contrary to the contract notice, the Board sought the submission of a revised price from tenderers. I understand that in exceptional circumstances, it is possible to use a negotiated procedure if the initial tenders received are inadequate. It is difficult to see how the initial tenders received could have been inadequate. We did not substantially revise our initial tender, yet we came second in the competition and you have indicated that we would be awarded the contract if the Board failed to agree terms with Autotote. We believe that if the Board does not take into consideration the submission of a revised price from tenderers we should be awarded the contract.

3. contrary to the contract notice, you indicated by telephone that the Board appears to have taken into consideration criteria other than those stated in the contract documents. You indicated by telephone that one of the considerations in awarding the contract to Autotote was that it would have terminals in betting shops and that Autotote currently runs the betting system for horse racing in Ireland. We believe that if the Board does not take into consideration criteria other than those stated in the contract documents, we should be awarded the contract.

We have also been advised that there may have been a breach of competition law.

Without prejudice to the legal position of Advanced Totes Limited, we request an urgent meeting as soon as possible to discuss this matter."

4.6
By letter dated 7th October 2003 in reply to the undated fax Mr. Foley wrote to Mr. Simpson as follows:

"As you are aware Martin Doolan had responsibility for effecting this process. He sought significant advice from the Board's legal adviser and I am happy that the procedure he employed was both correct and equitable. Both Martin and I reject a number of your assertions outlined in your letter. While I did indicate that your tender was the second preferred tender, I am clear that no assertion was made regarding your ranking relative to the preferred tender. I note that your correspondence does not refer to the Board's other considerations which were advised specifically to you. In particular -

(1) The fact that your system has not been fully tested for ITSP compliancy.

(2) That your proposal involved the Board hosting and managing the IT infrastructure.

(3) That you did not have operating self-serving terminals.

(4) The fact that you had no loyalty card system in operation.

(5) The fact that your hand helds did not have a GPRS Strategy.

We also specifically advised you that you would create additional management resource issues for the Board.

I should put on record that the saving to the Board in the Autotote proposal is significantly in excess of €300,000 over the life of the contract. Your assertion that this was mainly attributable to staff savings is without foundation and incorrect.

I specifically noted your request to amend your offer to host the IT infrastructure at the same costings to the Board as your second bid proposal. I advised you in the presence of Martin Doolan that the Board had completed its assessment procedure and to allow any individual party make a further submission without giving all parties an equal opportunity to do would be a breach of fair procedure. I advised you that the Board made its decision. The Board were entitled to take into consideration any of these considerations which it deemed to be relevant in determining what is most economically advantageous to the Board.

I note your significant disappointment with your unsuccessful application. I am sure you will appreciate that you were one of three parties who expressed disappointment on not receiving the status of preferred bidder. I suggest that given your approach to this matter to date that all future correspondence should be in writing only.

I have forwarded your request for a meeting to Martin Doolan and suggested that he should agree to same only in the presence of the Board's legal adviser. Both I, and in particular Martin Doolan, are disappointed that you have reacted with a threat of legal recourse. Martin Doolan has appraised me of the procedures and I am happy that they were fair and equitable to all parties and effected in accordance with legal advice."

5. Grounding Affidavit: Tender and Retender
Mr. Simpson referred, in particular, to section 4 of the invitation to tender documentation sent to him on 11th April, 2003, a month before publication in the Official Journal which provided that in submitting proposals, tenderers should take into account, inter alia, the matters referred to at 2 above.

Mr. Simpson said that at the start of July, 2003 Mr. Doolan had telephoned him saying that ATL, the applicant, should proceed to order equipment for the Galway track to be paid for by the Board. On the day of the presentation in relation to the present tender, on 29th July, 2003 Mr. Doolan informed him verbally that the applicant had been awarded the contract to provide totalisator services on the Galway track with the first delivery to be made on 4th August. Mr. Doolan informed him that if the applicant was successful on the remainder of the tender Galway would become part of the overall margin agreement and ATL could simply credit the margin agreement account with the money paid for Galway. Further contact was made and he confirmed to the Board that stand-alone servers shown in the purchase option of the ATL tender were included in the margin agreement; confirming the support and staff features of the margin agreement and in relation to frame relay upgrade costs. He averred that some time in early August, 2003 Mr. Doolan had informed him that, in order to save time, he would like to eliminate two of the four companies from the latter part of the tendering process, including Autotote but that he had received advice that they should be kept in. On or about 30th August he said that Mr. Foley had informed him that the tender was down to Amtote and the applicant.

Mr. Simpson then averred in paragraph 34, 39 and 40 of his affidavit as follows:

"34. On 2nd September, 2003, I informed Mr. Doolan that ATL's 1.5% margin agreement also included any bets going through the ITSP host and reassured him of ATL's commitment to ITSP. I also indicated that, if the figure of 1.5% was an issue for the ITSP host, it could be reviewed. On the same day, I spoke with Mr. Foley and assured him of our commitment to and compliance with ITSP."

Mr. Simpson referred to being told of the decision in the following terms:

"39. Between 4th September and 10th September, 2003, Mr. Doolan informed me 'off the record' by telephone that a decision had been made, and approved by Mr. Foley, to award the contract to ATL. He stated that he and Mr. Foley were going to meet Mr. Paschal Taggart, the Chairman of the Board, to inform him of the decision before announcing it. I

believe that this meeting was scheduled to take place at the Lifford track (where a track meet was scheduled) later that week but that, ultimately, it did not take place.

40. Shortly after the events described in paragraph 39 above (probably a day or two later), Mr. Doolan informed me that Mr. Foley had received a telephone call from Autotote and that Mr. Foley had asked him to organise a re-tender on price. I told Mr. Doolan that I was understandably upset and asked him how this could happen. Mr. Doolan stated that he did not know what had been said in the conversation between Mr. Foley and Autotote."

Mr. Simpson then refers to the rejection letter of 11th September, 2003 which afforded each of the tendering parties the opportunity to re-tender.

Although he said he was very concerned about the procedures which the Board was adopting he decided that ATL would submit a revised price in view of the limited timeframe and the risk of being excluded from the tendering process if ATL failed to do so (paragraph 44 of his affidavit). He said that by letter dated 18th September, 2003, the applicant submitted revised pricing for the contract. This pricing was essentially the same as their previous tender (1.5% with Galway included and 1.6% without Galway).

Mr Simpson says on 25th September Mr. Doolan and Mr. Foley contacted him by telephone. Mr. Foley stated that the Board had not been happy with the first tenders and did not feel they were economically advantageous. He said that he was glad the Board had done a second tender as Autotote had come down substantially in price. He said that Mr. Foley had told him that the others had not moved much and that there was not much difference between the applicant's offer and that of Autotote – approximately €300,000 over the five years of the contract. He had told him that Autotote had ITPS and were members of the US forum which, Mr. Simpson said, was not part of the criteria in the invitation to tender. Mr. Foley had also stated that Autotote was putting terminals into betting shops which factor was not part of the criteria set out in the invitation to tender. He said that Mr. Foley acknowledged that the applicant's hand-helds were preferred but that Autotote had assured him they could deliver. Mr. Foley also indicated that Autotote was able to provide its own hub and could manage the hosting element in-house. He was taken aback since Mr. Doolan had previously informed him that the Board was keen to move the technical requirement from the track staff to a Limerick hub operated in-house by the Board and that therefore the applicant had taken this into account in submitting the tender.

Shortly afterwards he said he spoke to Mr. Doolan.

6. Mr. Doolan's evidence
It is appropriate at this stage to deal with Mr. Doolan's account as deposed to in his affidavit dated 29th January, 2004 in response to Mr. Simpson's affidavit which had been sworn one month earlier.

Mr. Doolan said that the committee, having considered the tenders, moved towards favouring two of the tendering parties more than others, and actually to considering one tendering party as the preferred bidder. In evidence in cross-examination he identified this bidder as Amtote but could not recommend its tender. The committee, at the conclusion of the meeting of 14th August, 2003 thought that in the circumstances it would be best to negotiate the price with the then preferred bidder. It was uncertain how best to proceed and took legal advice to the effect that all of the parties would have to be treated equally. He referred to this advice.

He said that he believed that what was said by Mr. Simpson in respect of the telephone conversation which Mr. Simpson had said had taken place between 4th and 10th September that Mr. Doolan had informed him "off the record" by telephone that a decision had been made, and approved by Mr. Foley, to award the contract to ATL, the applicant herein. He had also said that he and Mr. Foley were going to meet the Chairman of the Board to inform him of the decision before announcing it. Mr. Doolan averred that:

> "I believe that what is said by Mr. Simpson in those paragraphs is substantially correct, including the fact that it was and 'off the record' conversation. … Your deponent understood, wrongly in the event, that the applicant had become the party to whom the committee would recommend the contract be awarded … The Committee decided to approach all four tendering parties on the price question. The action of the committee, therefore, was to adhere to the legal advice given."

Mr. Doolan said that he recognised that, considering the legal advice received and that there had not been a full meeting of the committee to make a decision, informing the applicant that it won the contract was ill advised and wrong. He also said that it was significant that no reliance had been made on what he had said to Mr. Simpson. After the issue of the letter of 11th September, 2003, referred to above, Mr. Simpson accepted that the applicant would have to make a fresh tender on pricing as would the three other tendering parties.

Mr. Doolan referred to the letter of 4th September, 2003 from Mr. Gilmore of Autotote to the Board indicating that Autotote was willing to review their price and he also referred to the telephone conversation between Mr. Gilmore and Mr. Foley. Mr. Doolan had no reason to think or believe that Mr. Foley had passed on to Autotote any information about Mr. Simpson's bid and he did not convey such an impression to Mr. Simpson. Following on the telephone conversation he said that Mr. Foley instructed him to contact the Board's solicitors about arranging a re-tender and price in line with their earlier legal advices.

He thought it appropriate to point out to the court the circumstances where he was speaking so frequently with Mr. Simpson. The reason was that his company maintained the tote service at all the tracks of the Board within the State except those the subject of the tender and had been doing business directly with the Board since 1996.

He had said to Mr. Simpson that he thought the 1.5% margin was very expensive, especially for international and other bets coming in through the system from race tracks other than the stadia the subject of the tender. He said that he said this in the knowledge that other tendering parties were quoting rates for these external bets at between one third and one fifth of the rate being quoted by the applicant. Mr. Doolan said that, despite being given the chance to adjust the figure, Mr. Simpson maintained the figure of 1.5% on all bets going through the ITSP host.

Mr. Doolan then referred to the notes of a telephone conversation on 25th September, 2003 from Mr. Foley and himself to Mr. Simpson. The note read as follows:

> "1. Advise him his tender not the cheapest €300k+ more expensive.
>
> 2. With Chameleon (the applicant's proposed system) – we would have to host ourselves – added burden. Asked if he could offer to host a UK – advised we were gone beyond that.
>
> 3. Argued that his hardware was the best, M. Foley stated that the hardware basically functions the same irrespective of

the provider.

4. Advised Paul (Simpson) he was best for hand-held technology.

5. Better development potential off-course with the provider (Autotote).

6. Great scope for development with HRI [Horse Racing Ireland] with the provider."

7. Disclosure of applicant's tender price to Autotote.

7.1 Mr. Doolan referred to the allegations made by Mr. Simpson where Mr. Simpson had said that Mr. Doolan had told him that Autotote changed its quotation from a complicated quotation to one that somehow exactly matched his flat-rate 1.5% that he believed that a member of the Board (probably Mr. Foley) revealed ATL's tender price to Autotote (para. 50 of Mr. Simpson's affidavit). Mr. Doolan said he had no reason to think or believe that Mr. Foley had passed on to Autotote any information about the applicant's bid and did not convey such an impression to Mr. Simpson. There were only three members of the awards committee and he could safely say that he did not reveal any information of any kind to Autotote or to anyone else. When the allegation was actually made he responded immediately denying the allegation.

7.2. Both Ms. Griffin and Mr. Foley in their affidavits and in cross-examination denied revealing ATL's tender price to Autotote.

Ms. Griffin stated, at para. 16 of her affidavit as follows:

> "I am absolutely certain that at no time and in no way, either directly or indirectly, was I responsible for any release or revealing of any information regarding the tendering price of any one of the parties to any other. Nor did I discuss the tender price with any person outside the committee. I specifically did not say anything about the applicant's tender price to Autotote nor for that matter any other aspect of the applicant's tender. I reject fully the allegation by Mr. Simpson, and affirm that he had no basis for making an implied allegation against me as a member of the committee. I think it outrageous to suggest that a member of the committee behaved like this where Mr. Simpson had no factual ground of evidence."

7.3 Mr. Foley gave evidence on affidavit filed on 30th January, 2004 and in cross-examination. He averred that the committee – Ms. Griffin, Mr. Doolan himself – considered the relative merits of the four tenders received at their meeting of 14th August, 2003. The initial view of the committee was that Amtote best met the requirements of the respondent. The committee was not satisfied, however, that their tender reflected the most economically advantageous proposal and best option for the respondent. The comparative price schedule comparing the four tenders which had been prepared by Mr. Doolan underlined the need for a calculation adjustment on two of the tenders so that a fair comparison could be made. One of these was the applicant's tender which had to be adjusted upwards to include costs which the respondent would necessarily incur if the applicant's tender were accepted. The committee envisaged dealing with Amtote on the basis of a preferred bidder status to negotiate price with it. He referred to the averments of Mr. Doolan regarding the legal advice that such a course of action was not permissible due to the relevant procurement regulation.

On 4th September, 2003 he received a letter from Mr. Gilmore of Autotote.

On noting his concerns he telephoned and advised him that the committee had been disappointed at the bid prices and that Mr. Doolan would be requesting revised bid prices from all of the tendering parties in due course. Mr. Gilmore outlined the benefits of his company system and its compliance with the requirement of the respondent.

In relation to Mr. Simpson's allegation Mr. Foley averred as follows:

> "At no time, either directly or indirectly, did I give to [Mr. Gilmore] any information relative to the applicant's tender, or to any other tender. Mr. Simpson has drawn an unwarranted conclusion for which he has no basis in fact and I refute the allegation totally."

7.4 In his affidavit, Mr. Gilmore's referred to his communication of 4th September and subsequent conversation with Mr. Foley and said:

> 6. "I say and believe that this allegation is unfounded and I reject same. In my capacity as Managing Director, I was the person from (Autotote) principally involved in the tender process. I say and believe that at no time prior to the re-submission on tender price was I (nor, to my best knowledge and belief any other person representing (Autotote)) informed of the tender price of any other bidder by any official of Bord na gCon. For the avoidance of any doubt, I expressly reject the allegation that a member of Bord na gCon (whether Michael Foley or otherwise) revealed the applicant company's tender price to myself or, to the best of my knowledge and belief, any other person acting on behalf of (Autotote). 7. Michael Foley did inform me by telephone in or about early September, 2003 that Bord na gCon would be writing to all bidders and affording the opportunity to re-tender on pricing proposals. I say and believe that subsequent to this telephone conversation, (Autotote) received a formal letter in this regard in or about 11th September, 2003. On receipt of this letter, myself and my senior management colleagues, who were working on the commercial side of the tender, re-examined critically the two main areas in our original pricing submission. These were, firstly, all the capital and ongoing operating costs; and secondly, margins and returns on investment. Essentially, on the capital and ongoing operating costs side, I and my colleagues systematically reviewed again, line by line, all our costs with the aim to reduce them where we judged that we could in order to improve the competitiveness of our costs base and thus our tender."

Mr. Gilmore then referred to his keenness to secure the new business, his operations in 25 horse racing tracks in Ireland and the significant local based technical and manufacturing support infrastructure with highly experienced staff and two tote central computer hub systems all of which had more than adequate capacity and could be easily adapted to run all of Bord na gCon's tracks and which would be advantageous to both industries if future cross-betting activity between horse and greyhound racing were considered. He said that they had employed a relatively complicated pricing proposal in the initial tender and on re-examination revised the bid to a simple price formula of 1.5% margin of overall handle.

He said and believed that the insinuation of Mr. Simpson that the invitation to re-tender arose directly as a result of a conversation between representatives of Bord na gCon and his company was groundless. He had approached Mr. Foley because Mr. Foley had been

unable to attend his company's presentation to Bord na gCon on 31st July, 2003. He repeated that during that conversation no specific price information was revealed.

8. Award Criteria
Mr. Simpson in his affidavits and in cross-examination alleged that the Board breached the requirements of public procurement law and, in particular, the principle of equal treatment of tenderers. The Board failed to specify one of the criteria on the basis of which it ultimately rejected the applicant's bid and awarded the contract to Autotote. This related to the hosting requirement which was not specifically dealt with in the invitation to tender and form the basis of the award criteria. Mr. Simpson says that two of the tenderers, including his company, were told that they had not met the Board's requirement. Mr. Foley had said that section 4.3 of the invitation to tender document was a clear reference to hub requirement and that no preference was indicated as to whether it should be external or internal because the respondent wanted to see the range of proposals on this point. Paragraph 4.3 stated as follows:

> "3. As part of this tender the Board is open to proposals and suggestions on how its existing tote infrastructure over the seventeen stadia may be streamlined."

The requirements, at 4 included, *inter alia*,

> "(i) Enabling a track to act as a host or a guest.
>
> (ii) Interfacing with the totes of other providers.
>
> (iii) Data from the system should be able to electronically interface with the Board's tote database.

9. The applicant's submissions
9.1 Mr. Hogan S.C., on behalf of ATL, referred to the legislative framework and in particular to Council Directive of 18th June, 1992 relating to the co-ordination of procedures for the award of public service contracts (92/50/EEC), as amended (the "Services Directive"), to the European Communities (Award of Public Service Contracts) Regulations, 1998, to Council Directive of 21st December, 1989 on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC) (the "Remedies Directive") and to the European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Service Contracts) (No. 2) Regulations, 1994.

He referred to *Gebroeders Beenjes Commission v. Denmark* to related cases including *Finlandia* and to *SIAC Construction Limited v. Mayo County Council and Dekra Éireann*.

9.2 In relation to its dealings with the respondent the applicant submitted that decision had been made and communicated to it,

> - it was likely that the price of the applicant was disclosed to the successful party,
>
> - the decision to re-tender on price arose because of the contact between the Managing Director of the notice party, Autotote and the Board.

In relation to the award criteria the applicant submitted that:

> - the Board failed to publish a notice in the official journal of the European Union of the re-tender on the issue of price,
>
> - the manner in which the Board formulated, and amended and applied the award criteria was inappropriate, the Board failed to list the award criteria in descending order of importance and change the nature of the project the subject matter of the contract during negotiation with tenderers, it failed to ensure that all the tenderers knew in advance of the criteria in which the decision to award the contract would be based
>
> - in making its decision to reject the applicant's tender the Board had regard to criteria which were not included in the contract notice or in the invitation to tender document,
>
> - the Board rejected the applicant's tender on the basis of criteria which were not applied to Autotote and failed to apply the award criteria objectively and uniformally to all the tenderers,
>
> - the Board failed to comply with principle of equal treatment and of transparency,
>
> - it failed to adopt the open procedure and adopted a negotiated procedure in circumstances where it was not permitted to so do,
>
> - it also divided the contract into two lots, Galway and the remainder, contrary to the statement in the contract notice in the official journal, by giving the first lot to the applicant.

9.3 In Mr. Hogan's submissions there were three indisputable conclusions from the facts which would justify quashing the decision of the Board.

The first was that the decision to re-tender arose from the letter and telephone conversation between Mr. Gilmore of the notice party and Mr. Foley of the Board. On Mr. Foley's own evidence that contact resulted in the rejection of previous tenders and a re-tendering on price.

Notwithstanding that it was an open tender there was negotiation with regard to price where only Autotote, the notice party, reduced its headline rate.

The Board's decision following re-tendering should not be allowed to stand where the applicant stood still and Autotote reduced its price.

There was no requirement in the letter of 7th September, 2003 to re-tender with single figures.

The re-tender circumstances due to Mr. Gilmore's contacting the Board should not have allowed tenderers to improve their bids. The best position of the Board on the evidence of Mr. Foley was that the contact with Mr. Gilmore was one of three factors. There should not be a re-tender resulting from inappropriate communication post tender. Even if the applicant itself had re-tendered it could still raise such an objection.

There was a conflict between Mr. Doolan and Mr. Foley with regard to whether or not there had been a decision. That conflict had not been resolved. Mr. Doolan was clear that the decision was made and that there was a change after Mr. Gilmore's contact. There was no change in Mr. Dolan's evidence when he was recalled and it was put to him what Mr. Foley had said.

All three committee members filed separate affidavits in January 2004. The agreement to recommend referred to by Mr. Doolan was not denied by Mr. Foley on affidavit. While pleadings didn't raise the issue of this agreement all the affidavits replied to this pleading point. Mr. Foley did not say that Mr. Doolan was wrong and did not refer to his arranging to meet the Chairman of the Board.

The second undisputable conclusion was the different criteria applied to Autotote and ATL with regard to their respective operating systems. The applicant, ATL, had Version 18 where as Autotote had Version 16.

The third fact submitted was that the series of criteria actually employed by the Board were not those set out in the tender documents. The criteria in the letter of rejection of the 7th October did not correspond with paragraph 4 of the tender.

The Board had a preference for an external communications hub according to the evidence of Mr. Foley. This was not an award criterion and it was not a matter just of price. Such preference should have been stated in the award criteria in the invitation to tender.

The internal hub was not as costly as was claimed and, it was repeated, was not specified in the tender document. The Finlandia case said it should be specified. When pressed Mr. Foley accepted that the Board had preference for an external hub. This was a criterion which, on the basis of the preference in the Finlandia case for green buses that should have been specified in the tender.

Mr. Simpson could have adapted his tender if he had known of a preference, *inter alia*, for an external hub

The GPRS ability was not a factor mentioned in the tender documents, anyway ATL had the best hand-held technology as acknowledged by the Board's letter of rejection. Betting shops were extraneous to the tender.

9.4 The applicant's submission was made in time so the only issue is that of promptness. Both *SIAC and Dekra Eireann* referred to the necessity of having a special factor which would deprive an applicant of the assumption of promptness once the matter was within time. Accordingly such argument should fall *in limine*.

10. The respondent's submissions
10.1 Mr. Frank Clarke SC, on behalf of Bord na gCon, submitted that there were agreed principles to be applied to the facts. He was not pressing the issue of promptness.

The statement to ground the application for judicial review identified the issues for trial as being the infringement of the regulations and directives.

What was in direct contention was paragraph H: (xii)

> "the Board informed Autotote of ATL's tender price."

Mr. Clarke agreed that if this were so it was fatal to the Board's decision. It was a question of fact for the determination of the court.

There were several technical objections made regarding contacts between tender and the failure to re-advertise as pleaded in (vii):

> "the circumstances in which the Board permitted a re-tender on price constituted a breach of, inter alia, the principle of equal treatment of tenderers and the principle of transparency."

It was submitted that no application had been made to amend that paragraph to broaden the case. What was absent from the particulars given in relation to this heading was any reference to a pleading that the Board had made a decision which was subsequently rescinded. The pleadings did not refer to a rescission of a contract. This point was not made until the second affidavit of Mr. Simpson sworn 12th March, 2004 over two months later. A notice to cross-examine was served on 30th March, 2004.

It was, accordingly, clear that there would be oral evidence and accordingly no criticism should be made to the lack of replying affidavits on this point.

There is a conflict regarding Mr. Doolan and Mr. Foley's evidence on affidavit and in cross-examination. The pleadings did not raise this difference.

There were three key issues. The first of these was a stark factual question of the leaking of information.

The second was that the re-tender had been influenced by an improper factor.

Thirdly there were issues regarding the tenderer criteria and the compatibility of the tender documents and the letter of the 7th October, 2003 refusing the applicant's tender.

A number of residual questions would also be dealt with.

10.2 In relation to the leaking of information it was submitted that there were strenuous repeated denials and that the onus was on the applicant to prove such leaking on the balance of probabilities. Mr. Simpson had indicated that the applicant was prepared to lower its rates submitted on 2nd September, 2003. Aside from the repeated denials there could be no advantage if it was going to re-tender. Moreover ATL could have also changed in its re-tender.

The range of prices was relatively small between 1.5 and 1.75 even if the Board had hoped, with larger volumes to have had a lower price. Within the range and in terms of round numbers it was statistically not a great coincidence. Moreover the movement from

complex pricing to a simple percentage had resulted from the comment made by Mr. Doolan to Mr. Simpson and the letter seeking a re-tender of the 11th September, 2003.

It was a matter for the court to determine the credibility of witnesses in this regard.

10.3 In relation to the re-tender being influenced by improper factors the following facts needed to be taken into account. All committee members on 14th August, 2003 were unhappy with the price. It was proper that the recollection of each member differed somewhat. Their roles differed and not all were at every presentation. It was clear that they all felt that Amtote was the best other than in respect to price. All members wanted to re-negotiate. The legal advice given was that there should be re-tendering on price by all tenderers.

He posed the question whether the letter from Autotote of 4th September, 2003 (which was seen by Mr. Foley on 8th or 9th September) and the subsequent telephone call from Mr. Foley of Bord na gCon to Mr. Gilmore of Autotote were improper.

The re-tendering of a lower price could not have affected third parties who had not originally tendered. According to Mr. Doolan it was the letter to Mr. Foley in subsequent conversation that triggered the re-tender. Mr. Foley, on the other hand, says that two other factors were taken into account, that is to say the preference for Amtote and the desire to re-negotiate with it and Mr. Simpson's offer to reconsider price.

Mr. Hogan had objected to Mr. Foley's version of events not having been put to Mr. Doolan. The court had allowed Mr. Doolan to be recalled in this matter which resolved this objection.

Mr. Clarke submitted that Mr. Simpson could not object where he himself had agreed that if a figure of 1.5% were an issue for the ITSP host it could be reviewed. The fact that he did not do so in his re-tender was not relevant. He was pressed by Mr. Doolan to consider a reduction but did not do so. Mr. Gilmore's reduction was uninvited. At the presentation, which was not attended by Mr. Foley, Mr. Gilmore had been told by Mr. Doolan that his expression of price was over complicated. It was submitted that the decision to re-tender was formed by many circumstances and the process was, accordingly, not tainted.

10.4 The statement of grounds at paragraph 14 referred to the test of "well informed and normally diligent persons interpreting the award criteria". The applicant's case was based on the assumption that the external hub was an award criterion. It was submitted that the analogy with the provision of professional services with or without a premises, secretarial and communication services was appropriate. In the present case the in-house hub was costed at €60,000 per annum which, assuming a turnover of €450,000, converted a 1.5% into 1.8% margin. The applicant's assumption that the Board preferred an external hub derived from pre-tender communications in the course of business between Mr. Simpson and Mr. Doolan. In so regarding these communications Mr. Simpson had taken into account factors outside the award criteria of the tender.

The Board was entitled to rely on its own expert view. Mr. Doolan had calculated what was most economically advantageous. This procedure had been upheld in SIAC v. Mayo County Council referred to above. Mr. Hogan, in his submissions, had relied on Mr. Foley's evidence that the external hub was preferred. This, in the respondent Board's submission, was not relevant. It was the cost of hosting the hub which was relevant. Accepting Autotote and the applicant as equals in terms of the margin of 1.5% would not hold when the extra cost of the hub was taken into account. The applicant's tender was less economically advantageous.

On the evidence the headline figure being unequal (taking into account the extra cost of the internal hub) then other matters were neither relevant nor decisive to the decision of the Board. The other factors didn't alter the result nor did they cause harm to the applicant.

The tender criterion of "technology capable of expansion and easily adaptable to expand into new markets" related to tested technologies.

The court could only award damages to a person harmed by an infringement of the directives or the regulations implementing them. The proceedings before the court were *inter partes* and not *in rem*.

The applicant had said that the factors outlined in the letter of 7th October, 2003 from Bord na gCon to the applicant were not real but were ex post hoc rationalisation and that this was supported by Mr. Doolan's evidence. It was acknowledged that if these were the only factors there would be merit in the applicant's case. However, it was the adjustment in price due to the hub calculations by Mr. Doolan which was decisive. This was not ex post hoc rationalisation but an appropriate adjustment in the price. This was an obvious factor tipping the balance which took into account factors notified to the tenderers.

On 24th September, 2003 all factors in the letter of 7th October, 2003 were, in fact, discussed by all the members of the committee.

The Board's view was that ATL could be taken on trust regarding the 5.18 version which was in operation in other countries by ATL. There was a clear statement of the test of the system being easily adaptable. This was a legitimate factor.

10.5 A number of residual factors were also dealt with in the submissions by way of comment on the statement grounding the application.

Pre-tender contact resulted from appropriate dealings between the parties in relation to other contracts.

Failure to formulate the award criteria and to list the award criteria in descending order as required by Article 36(2) of the Directive was not the subject of a complaint at the time. Moreover the criteria, like apples and oranges, were not susceptible to financial ranking.

The applicant was not disadvantaged but rather advantaged by the removal of Galway from the notice.

There was not a re-negotiation but a re-tender and there was no requirement to have a notice in the journal for a re-tender.

On the basis of the SIAC decision the applicant is precluded from making points at a later stage. There is a difference between a judicial review by the applicant and a judicial review by the European Union which could raise wider issues. Moreover, the applicant had delayed in its judicial review proceedings.

11. The relevant European provisions and case law

11.1 The Supreme Court had observed in *SIAC Construction Limited v. Mayo County Council* [2002] 2 I.L.R.M. 401 at 422 that:

> "Since it is clear that the judicial function has to be exercised by reference to the Remedies Directive, its terms are highly relevant."

The European Communities (Review Procedure for the award of Public Supply and Public Works Contracts) Regulations give effect to that Directive, 89/665/EEC of 21 December 1989.

11.2 The Directive
Article 1(1):

> "requires Member States to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively in accordance with the conditions set out in particular in Article 2(7) which requires Member States to ensure that decisions taken by bodies responsible for review procedures can be effectively enforced."

Article 6 provides as follows:

> "6. Where a contract has been concluded subsequent to its award the High Court may, in the exercise of its powers under Article 2(1) of the Council Directive –
>
> (a) declare such contract, or any provision of such contract, to be void, or
>
> (b) declare that the contract may have effect only subject to such variation as the court shall think fit, including any variation required to protect the interest of a party to the contract who was not responsible for the infringement of the law concerned, or
>
> (c) make such other order concerning the validity of the contract or any provision of it as the court shall think fit.
>
> 7. Where a contract has been concluded subsequent to its award, the High Court may award damages to any person harmed by an infringement whether or not it decides to exercise the other powers conferred on it by these regulations."

11.3 In *Gebroeders Beentjes* (case 31/87 [1988] E.C.R. 4635) the European Court of Justice observed that while it is open to the authorities awarding contracts to chose the criteria on which they propose to base their award of the contract, their choice is limited to criteria aimed at identifying the offer which is economically the most advantageous. The court addressed the publicity requirement of the Directive and stated as follows:

> "In order to meet the Directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts."

The court referred to Article 29(1) of the Directive 71/305/EEC. This provided that the authorities awarding contracts must base their decision either on the lowest price only or, when the award is made to the most economically advantageous tender, on various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit. The court observed that although the second alternative leaves it open to the authorities awarding contracts to chose the criteria on which they propose to base their award of the contract, their choice is limited to criteria aimed at identifying the offer which is economically the most advantageous. In that case a condition that the employment of long-term unemployed persons was an additional specific condition must be mentioned in the notice.

11.4 A further case, *Commission v. Denmark* (case C-243/89 [1993] E.C.R. 1-3353) the court held that the defendant had failed to fulfil its obligations under Community law on the grounds that the Danish contracting authority had, inter alia, held negotiations with the selected consortium on the basis of a tender which did not comply with the tender conditions. It was held that the duty to observe the principle of equal treatment of tenderers lay at the very heart of the Directive. The equal treatment of tenderers requires that all the tenderers comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers. In *Concordia Bus Finland Oy Ab v. Helsingin Kauunki* (Case C-513/99), [2002] E.C.R. 1-7213 the European Court of Justice found that Article 36(1)(a) could not be interpreted as meaning that each of the award criteria used by a contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It could not be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority (55)

The court also found that the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in directive 92/50, in particular the rules of advertising. It followed that in accordance with Article 36(2) of that directive, all such criteria should be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance so that operators are in a position to be aware of their existence and scope.

11.5 In *SIAC Construction Limited v. Mayo County Council* (Case C-19/00 [2001] E.C.R. 1-7725 the Court of Justice had to consider the following question which was submitted by the Supreme Court for a preliminary ruling. That question was:

> "In a situation … where the authority shall have specified the 'award criteria (other than price)' as being that the contract would be awarded to 'a competent contractor submitting a tender which is adjusted to be the most advantageous to the (awarding authority) in respect of cost and technical merit' and where the three lowest tenderers shall have been contractors of accepted competence and shall have submitted valid tenders of accepted technical merit, where the tender price of the three lowest tenderers shall not have diverged greatly, is the awarding authority obliged to award the contract to the contractor who shall have tendered the lowest price or is the awarding authority entitled to award the contract to the contractor with the second lowest price on the basis of the professional report of its consulting engineer that the ultimate cost of the contract to the awarding authority is likely to be less if the contract is awarded to the contractor who tendered the second lowest price than it would be if the contract were awarded to the contractor who tendered the lowest price."

Advocate General Jacobs stated that:

> "The main purpose of regulating the award of public contracts in general is to ensure that public funds are spent honestly and efficiently, on the basis of a serious assessment and without any kind of favouritism or quid pro quo whether financial or political. The main purpose of community harmonisation is to ensure in addition abolition of barriers and a level playing field by, *inter alia*, requirements of transparency and objectivity."

The Advocate General further stated that where the tender specifies criteria it is bound by those criteria and may not deviate from them in the course of the procedure. The requirements of transparency, objectivity and equality of opportunity are respected only if all tenderers know in advance on what criteria their tenders will be judged and those criteria are assessed objectively. It was for the national court to determine whether the criteria was applied objectively.

He concluded that the question referred by the Supreme Court should be answered as follows:

> "… An awarding authority is entitled to award the contract to the tenderer whose tender, although not the lowest, is likely in the professional opinion of the authority's consulting engineer to be the lowest and ultimate cost, provided that transparency, objectivity and equal treatment of tenderers are ensured, and in particular that –
>
> > the award criteria was clearly stated on the contract notice or contract documents; and the professional opinion is based in all essential points and objective factors regarded in good professional practice as relevant and appropriate to the assessment made. (paras. 50 to 60 of the Advocate General's opinion."

At the resumption of the appeal the Supreme Court was faced with opposing arguments as to the contents of the tender criteria and the appropriate standard for judicial review. Fennelly J., for the court, in dismissing the appeal, referred to the judgment of the European Court on 18th October, 2001 and noted that:

> "Criteria for an award based on the most economically advantageous tender was not listed exhaustively … It would be incompatible with Directive 71/305 if the award criteria were interpreted so as to confer on the adjudicating authority an unrestricted freedom of choice.
>
> The mere fact that an award criterion relates to a factual element which will be known precisely only after the contract has been awarded cannot be regarded as conferring any such unrestricted freedom on the adjudicating authority.
>
> More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed, normally diligent tenderers to interpret them in the same way.
>
> This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure.
>
> Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known precisely only in the future is in principle capable of guaranteeing compliance with that condition." (paras. 42-44 of the judgment of the Court of Justice and [2002] 2 I.L.R.M. 401 at 412.)

The Supreme Court (Keane C.J., Fennelly, Denham, Murray and Hardiman JJ. concurring) [2002] I.L.R.M. 426, dismissed the appeal and affirmed the order of the High Court.

12. Decision of the court

12.1 The core principles which emerge from the legislation and case law are summarised in *SIAC v. Mayo County Council* and are agreed by the parties. There are specific issues in relation to the instant case which require preliminary consideration.

12.2 The first issue for consideration by the court is whether, in fact, a decision had been made and rescinded by the Board with regard to Autotote. Though this was not pleaded in such terms, it is appropriate, nonetheless, to deal with the matter.

It is clear that the role of the committee consisting of Miss Griffin and Messrs. Foley and Doolan, was not to decide but to recommend, one or to decline to recommend, any of the tenderers. It is very clear indeed that the invitation to tender, and the notice in the Official Journal, referred to the contracting authority as Bord na gCon, the respondent herein. The respondent was the decision-making authority.

Accordingly, any decision made by the committee to recommend could not constitute binding contract either until the provisions of the tender itself or, indeed, under the general provisions of law.

Having said that, Mr. Doolan understood that Mr. Foley had agreed that the applicant should be recommended. Miss Griffin was not aware of any such decision or understanding. Mr. Foley, on the other hand, believed that it was a misinterpretation of the discussions held between himself and Mr. Doolan. The differences in their evidence, which may, indeed, have been a misunderstanding, would not appear to be critical. The common position was that the committee favoured recommending Amtote and wished to renegotiate on price.

The respondent, following advice sought a re-tender. There was no evidence of any decision to recommend much less of a decision to accept the applicant's tender.

No declaration was sought that there was a contract which had been rendered void.

I am satisfied from the affidavit of Mr. Gilmore that the movement from a complicated pricing structure to a simple 1.5% margin arose because of the comments made to Autotote in their presentation to the Board that the price structure was complicated, and to the express requirement in the notice for re-tendering on 7th October, 2003 that the price be expressed in percentage terms.

Mr. Doolan calculated the cost of the hub as having a significant effect on the percentage margin by the addition of 0.3% to the 1.5% making a total of 1.8%. This was an appropriate method of appraisal in accordance with the award criteria as to the economically most advantageous tender.

The range of margins in the industry would seem to be relatively limited. If one were to assume rounded figures then statistically the

coincidence would not be significant. Even if this were not so and, indeed, in a bidding strategy one would expect bids to be below round figures, I am satisfied that whatever coincidence there was did not result from any improper disclosure.

Indeed, as is clear from this case there were many other factors determining the award. The award criteria was not for a lowest price.

12.3 The second issue is whether the specific contact between the respondent and the notice party regarding price was inappropriate that there had been previous was no inappropriate disclosure by any of the members of the committee of the Board to Mr. Gilmore regarding the tender price of the applicant. This is clear from the affidavits of Mr. Foley, Mr. Doolan, Ms. Griffin and Mr. Gilmore.

Mr. Simpson's allegation in this regard in paragraph 50 of his first affidavit is in unsubstantiated and speculative.

While it may have been more prudent to decline any contact during the tender process except for the purpose of clarification there is no evidence that, such contact as there was, was inappropriate.

12.4 The next matter that arises is the appropriateness of the general contact between the applicant and the respondent and between the notice party and the respondent.

There had been some contact between the Board, through Mr. Doolan, and the applicant in relation to previous dealings. So long as subsequent dealings were in respect of clarification of the tender then this would appear to be within the spirit and letter of the regulations implementing the Directives.

Given the degree of contact between the Board and the parties tendering, it seems to me that there can be no criticism of Mr. Gilmore writing to the Board in the first week of September. This was particularly so as Mr. Foley had not been at the presentation and that, at that presentation, some indication was given (though evidence in this is not all that clear) of his price being too complex. Mr. Foley did not read that letter until a few days later as he had been away from his office. I have no doubt, from a commercial point of view, that Mr. Foley was acting in the best interests of the Board in contacting Mr. Foley. However, from a public procurement point of view, it would have been more prudent not to have made any response.

12.5 It seems to this court, however, that any such imprudence or impropriety (if such there was) was resolved by the subsequent invitation to re-tender.

The legal advice given, and taken by the Board, was to re-tender. I have no doubt that following that advice was the more prudent course of action at that stage.

12.6 The Court finds that the only decision taken by the respondent Board was to reject the pricing proposal of each tenderer and to request them to re-submit pricing proposals. All other terms and conditions to tender were to remain unchanged.Moreover, no objection was taken by the applicant who did, in fact, re-tender in the same terms as its original tender. Before re-tendering the applicant had said that its price for off course betting was reviewable. Mr. Simpson accepted that the applicant would make a fresh tender.

In relation to the re-tendering on price, I have no doubt that parties who did tender could not have been prejudiced nor adversely affected by the re-tendering which would be unlikely to involve an increase in price. It is also doubtful whether they would be prejudiced by the omission of Galway which was notified to have been awarded to one of the tenderers.

It does seem to me that some flexibility is permitted so long as there is equality of treatment and transparency. The re-tendering process did seem to me to lack such characteristics.

The respondent relied on the financial assessment of the committee on the basis of complying with the award criteria and being the most economically advantageous. Even if the award criteria did not specify whether the hub should be internal or external it was clear that its location had cost implications. In assessing this element the costings in relation thereto proved decisive. The differences between version 1.8 and 1.6 were not decisive.

While the criteria was expressed to be evaluated on the economically most advantageous, the notice party, on the basis of the financial assessment of the committee, tendered the lowest price.

Article 29(1) of Directive 71/305/EEC provides that when an award is made to the most economically advantageous tenderer it must be on the basis of price completion, running costs, profitability and technical merit. These factors appeared to have been considered by the respondent in arriving at its decision

12.7 The Court also finds that the failure to re-advertise the tender on the basis of price only was not fatal to the process. There was no change in the award criteria. Given that the only difference was in the expression of the respective prices in simple terms the process was more of a clarification (though prices could have changed), than a re-tender. It would appear not to have been a negotiated procedure.

The Court also considered whether the off the record remarks of Mr. Doolan could have given an impression that the applicant did not have to revise its price in re-tendering. This was not argued by the applicant. It was not denied that Mr. Doolan had indicated that the applicant should consider reducing its price. There is no evidence of assumptions made by any of the tenderers as to what others might bid - the so called games theory - which, no doubt, forms part of the decision-making process on tendering. Even if this issue had been raised and some expert evidential basis provided it would fall outside the provisions of the regulations and directions.

12.8 The award criteria was known and not altered for the re-tender. No objection had been raised in relation thereto.

The letter of 7th October 2003 listed five considerations which had been advised to the applicant who argued did not correspond with the invitation to tender of 15th May, 2003. The respondent had argued that all of these were expressed or, at least implied in paragraph 4.4 of the invitation to tender. The Court accepts that, while it is difficult to reconcile the considerations with the criteria, as the tender was for a totaliser service to be provided rather than a specified hardware product, some flexibility in design and implementation was, not alone understandable, but may also have been desirable. The invitation to tender required proposals to be "forward looking" as well as having certain specific capabilities. Any proposed system was to have been "robust and functional at all times".

In this regard, while the location of the hub was not specified and no preference was indicated it is clear that the proposals on streamlining the existing infrastructure would have to be costed and would be assessed and evaluated by the respondent. This seems to have involved an exercise similar to that undertaken by the local authority in *SIAC v. Mayo County Council.*

The criteria of green buses in *Finlandia* was not contained in the published award criteria in that case and, accordingly, this would appear to be apposite.

12.9 It is not clear that all of the strict requirements of the directives have been met. There would appear to be no ranking of criteria in descending order of importance, for example. It does not seem to breach the principle of equal treatment or of transparency.

The contact between the parties before publication in the Official Journal has already been explained.

The application before the court is *inter partes*. It does not seem that any prejudice has been suffered by the applicant by reason of such technical breach of the regulations and directives.

12.10 The court believes that the respondent acted within its discretion in the manner in which it applied the stated criteria. Expert tenderers were in a position to interpret the criteria in the same way.

In the circumstances the court refuses the reliefs sought.