Neutral Citation: [2013] IEHC 414

THE HIGH COURT

Record Number: 2012 No. 232 JR

IN THE MATTER OF COUNCIL DIRECTIVE 18/2004/EC AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES' CONTRACTS) REGULATIONS, 2006 (S.I. 329/2006) AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES CONTRACTS REVIEW PROCEDURES) REGULATIONS, 2010 (S.I. 130/2010) AND IN THE MATTER OF ORDER 84A OF THE RULES OF THE SUPERIOR COURTS, AS AMENDED

BETWEEN:

FRESENIUS MEDICAL CARE (IRELAND) LIMITED

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

AND

BEACON MEDICAL GROUP

NOTICE PARTY

Judgment of Mr Justice Michael Peart delivered on the 16th day of July 2013:

1. The applicant company ("Fresenius") is a leading provider of renal products and renal services not just in this jurisdiction but worldwide.

2. On the 27th May 2011 the respondent ("HSE") published an invitation on the E-tenders website inviting interested parties to submit an expression of interest document in respect of a Contract for the provision of satellite haemodialysis units for Dublin North East and Dublin Mid-Leinster, and sought tenders for the Contract by no later than 23rd June 2011. It appears from the documents that in line with international trends, the National Renal Office has projected an increase in the number of patients requiring dialysis. The HSE wishes to expand its capacity to deal with these projected numbers, as well as to provide services closer to patients' homes, improve in-patient centred care, and expand and support the National Renal Transplant Programme.

3. The expressions of interest sought were in respect of four lots:

(i) Lot 1: Renal Satellite Unit for Dublin North East (along the M1 corridor)

(ii) Lot 2: Renal Satellite Unit for Dublin North East (North of River Liffey)

(iii) Lot 3: Renal Satellite Unit for Dublin Mid Leinster (South of River Liffey, East of River Dodder)

(iv) Lot 4: Renal Satellite Unit for Dublin Mid Leinster (North of River Liffey, West of River Dodder).

4. The document stated that no single tenderer would be awarded all lots. The view of the HSE, as evidenced in the later Tender Response document which formed part of the Invitation to Tender, was that "*the optimum service will require a minimum of two service providers, thereby preventing the development of a monopoly relationship with the HSE, ensuring sustainable service provision and market stability and maximising value for money, quality of service and service support for the HSE*".

5. Five companies submitted expressions of interest within the prescribed time, including Fresenius, which expressed interest in Lots 1, 2 and 4 only. Fresenius was already the incumbent service provider in respect of Lot 2 (Dublin North East – North of River Liffey). All five expressions of interest were evaluated on the 15th July 2011 against, firstly, the Mandatory Exclusion Criteria, and, secondly, against the Qualitative Selection Criteria. All were considered to have passed.

6. The procurement process being adopted by the HSE was a four-stage process – expression of interest, tender proposals, dialogue on proposals, and award.

7. Having informed each of the five bidders that they had been successful in that first phase of the process, HSE moved to the second stage, and by email dated 29th July 2011 furnished to each the Initial Invitation to Tender. The Invitation to Tender informed the bidder that the required services the subject of the tender are Annex II B services and that, accordingly, only Articles 23 and 35(4) of the Consolidated Public Procurement Directive 2004/18/EC for the award of public service contracts, as amended, would apply to the award of any contract arising from this tender process. It also informed bidders that the closing date for proposals was 12 noon on 9th September 2011.

8. Clause 2.1 of the Invitation to Tender stated that tenders which achieved the minimum requirements set out in the qualitative selection criteria would then be evaluated to determine which presented the most economically advantageous tender, and that tenders would be evaluated using the criteria and associated weightings as outlined in the Invitation to Tender document. The document specified main criteria of quality and cost-effectiveness with weightings of 35% and 65% respectively. Sub-criteria within the main criteria of quality were listed as Model of Care, Patient Experience (including location and accessibility), Facility (including equipment and layout), Patient Management Systems and Audit, and finally a Value Add Option.

9. Each bidder submitted its tender proposals by the prescribed closing date. The applicant submitted initial tender proposals in respect of Lots 1, 2 and 4, while the Notice Party, Beacon, submitted initial tender proposals for each of the four lots. On the 21st

September 2011 a sub-group of the Procurement Evaluation Group (PEG) met to discuss certain commercial aspects of the tender, and met again on the 27th September 2011 to discuss those commercial aspects as well as technical elements of the tender. Following these meetings, the PEG set up sub-committees to review two aspects of the tender, namely location and ICT requirements.

10. Thereafter, and prior to the submission of final tenders by the bidders, the third phase of the tender process took place, namely the dialogue phase. This provided an opportunity for the HSE to provide some feedback in relation to the initial tender proposals submitted in order to assist the preparation of the final bid proposals. Members of the HSE visited the sites proposed by each tenderer in respect of each Lot. These visits took place on the 7th October 2011 in relation to Lots 1 and 2, and on the 13th October 2011 in respect of Lots 3 and 4.

11. According to the replying affidavit of Martin Quinlivan of HSE sworn 1st May 2012, HSE representatives held dialogue meetings with representatives of the five bidders on the 18th October 2011, after which HSE issued Supplementary Clarifications on the 20th October 2011 in relation to the specification of a number of sections of the invitation to tender, in order to help bidders better understand the HSE's requirements in those sections,. Thereafter, bidders were requested to submit their responses to these Supplementary Clarifications, as well as any revised cost proposals by close of business on the 26th October 2011. The applicant provided such a response on that date.

12. On the 28th October 2011, and again on the 4th November 2011 further dialogue meetings were held which the applicant attended. These were so that the responses to the Supplementary Clarifications could be discussed. At the latter meeting tenderers were advised by HSE of their current cost ranking based on an initial assessment undertaken by HSE following the responses to the Supplementary Clarifications. According to Mr Quinlivan's affidavit, the applicant was advised that it was ranked third in respect of Lot 1, second in respect of Lot 2, and second also in respect of Lot 4. Tenderers were advised also that further site visits would be conducted on 29th November 2011 and 1st December 2011, the purpose being to assess the suitability of each location under the relevant questions specified as Mandatory Requirements and Weighted Criteria in the Final Invitation to Tender. The assessment in this regard was to be by reference to the responses in the final bids submitted, the observations of the sub-committee, and the responses given by the bidders to relevant questions.

13. On the 7th November 2011 HSE issued all bidders with a Final Invitation to Tender. This was substituted by a revised version on the 9th November 2011 as there had been some clerical errors in the document issued on the 5th November 2011. The Evaluation criteria remained unaltered from those which had been contained in the original invitation to tender published on the 25th July 2011. The closing date for receipt of final tenders was the 25th November 2011. On the 24th November 2011 the applicant submitted its final tender. On the 29th November 2011 and 1st December 2011 HSE again visited the sites proposed by the applicant in respect of its proposals for its North Dublin and Dublin Mid-Leinster units.

14. Between the 9th November 2011 and 25th November 2011 (closing date) the HSE received a number of further requests for clarification from bidders and these were responded to individually. The final composite HSE response to all requests for clarifications received was issued to all bidders on the 22nd November 2011, thus ensuring that all bidders were aware of all requests for clarification made by bidders, and all responses provided.

15. The process of evaluation and assessment of bids is described by Mr Quinlivan at paragraphs 71 – 76 of his said affidavit.

16. Each of the bidders was notified by letter dated 24th February 2012 of the outcome of the competition, and by letter dated 29th February 2012 the full scores were provided. The applicant was highest ranked in respect of Lot 2. However, the Notice Party (Beacon) was ranked first in respect of Lots, 1, 3 and 4. The applicant learned later that in fact Beacon had been ranked first in respect of all Lots but as no one bidder could be awarded all Lots, the applicant was awarded Lot 2 by default, as the next ranked bidder for that Lot.

17. There was a debriefing meeting on the 7th March 2012 at which the applicant explained concerns it had as to the manner in which the respondent had scored its bid. In particular the applicant is concerned about how its bid for Lot 1 was scored. According to the grounding affidavit of David Coyle, the applicant's bid for Lot 1 was "*interlinked with combination bids with other Lots and cumulative bids with 3 Lots, and all were disqualified due to the Patient Experience sub category disqualification in Lot 1 Fresenius City North Single Lot Only*", and goes on to say that the applicant's disqualification in respect of Lot 1 "*scuppered the applicant's entire invitation to tender bid*".

18. In order to understand the applicant's complaints it is necessary to explain certain matters in relation to the Main Criteria for Award as set forth in the invitation to tender at clause 2.1 thereof. The criteria were divided into two main sections, namely Quality and Cost Effectiveness. 35% of marks were allocated to Quality, and the remaining 65% were allocated to Cost Effectiveness. Under the Quality section there were 5 sub-categories, and it was necessary for the bidder to achieve a minimum of 70% of available marks for each sub-category (except the Value Added Option), before the bid would considered at all under the Cost Effectiveness. In other words, a bid would be disqualified from further consideration if it failed to achieve a minimum of 70% in each of four sub-categories under the Quality Section. Those sub-categories were: (i) Model of Care; (ii) Patient Experience (including location and accessibility); (iii) Facility (including equipment and layout); and (iv) Patient Management Systems and Audit).

19. The applicant scored only 53.9% under the Patient Experience sub-category. It was therefore disqualified as it had failed to reach the required 70% in one of the four mandatory sub-categories. The applicant had put forward three location options in respect of its bid for Lot 1, one of which was the City North, Gormanston site. It is that site location on which the applicant's bid foundered in relation to Patient Experience, and it is the way in which that bid was scored by the respondent, and the knock-on effect in relation to its other bids (which are said to have been combination/cumulative bids), about which the applicant principally complains.

20. The applicant has submitted that given the importance of achieving at least 70% in four sub-categories, it was essential that the marking of the bids by the HSE would be carried out in a manner than ensured equal treatment of all tenderers, and that only those criteria which were specified in the invitation to tender (including as may have been varied later by supplemental clarifications) would be applied, and further that criteria that had not been so specified would not be applied. It believes that on this basis the evaluation of the applicant's bid in relation to the City North site was not properly and objectively marked, and was marked by reference to criteria which had not been made known in the invitation to tender or in any supplemental clarifications, and that it was therefore weighted against the applicant and unfairly vis-a vis the winning bid. It is submitted that the general principles of transparency and equal treatment of tenderer have been breached by HSE.

21. Before getting to the specifics of the applicant's complaints, it is important to mention some preliminary issues which have been raised by the respondent. The respondent has submitted that the applicant in its affidavits, and in its submissions to the Court, both

oral and written, has impermissibly expanded its grounds of complaint beyond those for which leave was granted by this Court. Jerry Healy SC for the respondent has referred to a number of such grounds, and has referred to the judgment of Denham J. (as she then was) in *A.P. v. D.P.P.* [2011] 1 IR 729 which makes clear that save where grounds have later been amended with leave of the court, an applicant seeking reliefs by way of judicial review is confined to the reliefs and to the grounds for those reliefs which the applicant has set forth in the Statement of Grounds, and for which leave has been granted. As stated in O. 84 RSC the applicant is further required to state precisely its grounds of complaint and not to do so in a vague and imprecise manner, and must further identify what matters and facts are relied upon in respect of the grounds asserted. It is important that these rules be observed as otherwise a respondent runs the risk of not knowing what case it has to meet until all affidavits and submissions are filed. The Statement of Grounds equates to a Statement of Claim in a Plenary action. The Statement of Opposition equates to the Defence in such proceedings. Whatever form the proceedings take, the pleadings are important as they both define and confine the issues to be determined in the case. A party cannot be permitted to deviate or expand upon those issues by stealth. I shall come to the applicant's Statement of Grounds in due course, when it will be necessary to consider the extent to which some of the grounds which they have argued on this application exceed those for which leave was granted.

22. Another preliminary issue raised by the respondent is in relation to the applicable time-limits for the bringing of a public procurement challenge. Mr Healy has referred to the judgment of Denham J. (as she then was) in *Dekra Eireann Teo. v. Minister for Environment* [2003] 2 IR. 270 (Keane CJ, McGuinness J. and Hardiman J. agreeing), and also to that of Fennelly J. in the same case. Dekra was a public procurement case, but one brought at a time when the applicable time for commencing proceedings was expressed somewhat loosely as having to be made "*at the earliest opportunity after the date when grounds for challenge first arise and in any event, within three months from such date unless the Court considers there is a good reason for extending such period*".

23. This wording was found by the European Court of Justice in *Commission v. Ireland* [2009] ECR 1-225 to give rise to uncertainty both as to which decision must be challenged through legal proceedings and as to how periods are to be determined. Thereafter the terms of Order 84A RSC were amended so that, as provided by Regulation 7(2) of the European Communities (Public Authorities' Contracts)(Review Procedures) Regulations 2010, "*an application … shall be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application*".

24. In so far as the applicant is seeking to expand its case and raise new grounds, Mr Healy has submitted that quite apart from the fact that it is impermissible to do so since no leave has been granted in that regard, the applicant is in any event out of time for doing so, given the strictness of the thirty day time limit in these types of cases. He makes the point also that this time limit is applicable not only to the ultimate decision of the awarding authority to award the contract to the successful bidder, but also to any intermediate decision made along the way during the course of the tendering process. I shall return to the issue of time when addressing the applicant's particular complaints in more detail.

25. Another matter, already mentioned briefly, is the significance to be attached to the fact that the contract the subject of the tender process is a contract to which Annex IIB of the Directive applies. The applicant submits that notwithstanding the fact that the Public Contracts Directive states in Article 21 that only Articles 23 and 35(4) of the Directive apply to such contracts, the tender process is nonetheless subject to the general principles of equal treatment and transparency under the primary EU law. The applicant and respondent differ as to the extent that this is so.

26. The respondent also submits that as the applicant has not made any claim in his Statement of Grounds that it has been harmed, or is even at risk of being harmed, by an infringement of either of those two particular Articles, or indeed of either of Articles 23 or 41 of the Public Contracts Regulations which transposed the Contracts Directive into Irish law, the applicant is not entitled to any relief pursuant to the Remedies Directive and/or Order 84A RSC, and further that in so far as the applicant complains of breaches of other Articles of the Public Contracts Directive i.e. Article 36 (2), the complaints are misconceived. Article 23 of the Directive (and Regulation 23 of the Regulations) concern "Technical Specifications", and Article 35(4) of the Directive (and Regulation 41 of the Regulations) concern the notification of the result of the tender process within a given timeframe upon the award of a public contract. Neither is the subject of complaint in the applicant's Statement of Grounds.

27. Patrick A. Butler SC for the applicant has accepted that the applicant does not rely on a breach of the Directive and/or the Regulations as such, and that the applicant relies on a breach of general principles of equal treatment and transparency in relation to the scoring of its tender, and its knock-on effect whereby the applicant failed to achieve the required 70% mark in each of the four sub-categories in the Quality section of the bid for which 35% of the marks were available, and was thereby excluded from being considered at all under the Cost Effectiveness section for which the remaining 65% were to be allocated.

28. In relation to the general principle of equal treatment he has referred to the judgment of the European Court of Justice in *Commission v. Denmark* [1993] ECR 1-3353 where the Court stated:

> *"Although the public works directive makes no expressed mention of the principle of equal treatment of tenderers the duty to observe that principle lies at the very heart of the directive."*

The Court went on at para. 37 of its judgment:

> *"In this regard, it must be stated first of all that observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers."*

Accordingly the Court held that it is a violation of the principle for the awarding authority to accept a tender which does not comply with the fundamental conditions laid down by that authority.

29. In relation to the general principles of both equal treatment and also transparency, Mr Butler has referred to the judgment of the ECJ in *Commission v. Belgium* [1996] ECR 1-2043 where it stated:

> *"The procedure for comparing tenderers therefore had to comply at every stage with both the principle of equal treatment of tenders and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders."*

30. All parties have referred to the ECJ's judgment in *SIAC Construction Limited v. Mayo County Council* [2001] ECR 1-7725. Mr Butler for the applicant has referred to the Court's statement that the purpose of coordinating procedures for the award of public contracts at community level is in order to eliminate barriers to the freedom to provide services and goods, and therefore to protect the interest of traders established in a member state who wish to offer goods and services to contracting authorities in another member state,

and for that reason equal treatment "*lies at the very heart of the directive 71/305 as amended*". He submits that while a different directive is referred to, the principle is the same for present purposes.

31. In SIAC the principles of equal treatment and of transparency were considered in the context of the provisions of a directive, and in particular in the context of the requirement under the directive in question to clearly formulate and set out the award criteria in the tender documentation. So, what is stated in SIAC must be considered with that distinction in mind since in the present case the alleged breach of the principles is in the context of general EU law principles of equal treatment and transparency rather than as they are given voice in the Directives. In relation to the latter, the distinction between a contract to which the provisions of the directive apply i.e. Annex IIA contracts, and contracts within Annex IIB to which only Articles 23 and 35(4) apply is relavant.

32. Nevertheless, Mr Butler for the applicant refers to a passage from SIAC where the Court stated:

> *"However, in order for the use of such a criterion to be compatible with the requirement that tenders be treated equally, it is first of all necessary, as indeed Article 29 (2) of the directive 71/305, as amended provides, that that criterion be mentioned in the contract document or contract notice. Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified. 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 and normally diligent tenderers to interpret them in the same way. This obligation of transparency also means that the adjudicating authority must interpret the award criterion 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 ……".*

In so far as the respondent and Notice Party argue that the contracts in question are subject only to Articles 23 and 35(4) of the Directive and nothing more, Mr Butler has referred to the judgment of McMahon J. in *Release Speech Therapy Ltd v. HSE* [2011] IEHC 57 where he, referring to the ECJ's judgment in *Commission v. Ireland* (C-226/09), confirmed that the general principles of transparency and equality apply to such contracts.

33. However, as both the respondent and Notice Party emphasise, *Commission v. Ireland* is important, particularly since the contract at issue was an Annex IIB contract unlike that at issue in SIAC. While Mr Butler is correct in stating that it confirmed the application of general principles of transparency and equality of treatment of tenderers to an Annex IIA context, it is essential to understand the distinction in their application to the two different categories of contract. If there be no difference in application of the principles, the distinction between an Annex IIA contract and an Annex IIB contract becomes meaningless, or at least opaque. To put it simply, the fact that the principle of equal treatment under general Treaty principles is reflected in the Directive in respect of contracts coming within the categories of contract in Annex IIA by a requirement for the publication of award criteria, cannot be then interpreted as meaning that in order to comply with the principle of equal treatment under the Treaty, such award criteria must be published also in respect of contracts not within Annex IIA. The judgment of McMahon J. in *Release Speech Therapy Ltd v. HSE* bears this out, and it is clear that he makes this distinction in that case.

34. In *Commission v. Ireland*, the ECJ stated at paras.29 of its judgment:

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

In that case the applicant had complained, inter alia, that the Treaty principle of equal treatment had been infringed by weightings being attributed to the award criteria only after the closing date for the submission of tenders. Addressing that point, the Court stated first of all that the fact that the tender for an Annex IIA contract had been published in the Official Journal as permitted under Article 36 of the Directive for an Annex IIA contract, did not of itself mean that the Member State was under an obligation to award that Annex IIB contract in accordance with the provisions of the Directive. The Court went on:

> *"In order for it to be accepted that the first complaint is well-founded, it would be necessary for the specific rule governing the prior weighting of the award criteria for a contract falling within the ambit of Annex IIA to the Directive to be regarded as constituting a direct consequence of the fact that the contracting authorities are required to comply with the principle of equal treatment and the consequent obligation of transparency.*
>
> *It is true that, according to the Court's case-law relating to public contracts awarded in accordance with all the provisions of the various public procurement directives which preceded the adoption of the Directive, the purpose of the requirement to inform tenderers in advance of the award criteria and, where possible, of their relative weighting, is to ensure that the principles of equal treatment and transparency are complied with (see, inter alia, Case C-470/99 Universale-Bau and Others [2002] ECR 1-11617, paragraph 98, and Case C-331/04 ATI EAC and Viaggi di Maio and Others [2005] ECR 1-10109, paragraphs 22 to 24).*
>
> *However, while the requirement to state the relative weighting for each of the award criteria at the stage of publication of the contract notice, as now provided for under Article 53(2) of the Directive, meets the requirement of ensuring compliance with the principle of equal treatment and the consequent obligation of transparency, it cannot legitimately be argued that the scope of that principle and that obligation extends, in the absence of a specific provision to that effect in the Directive, to requiring that, in the context of contracts not subject to a provision such as Article 53 of the Directive, the relative weighting of criteria used by the contracting authority is to be determined in advance and notified to potential tenderers when the are invited to submit their bids. Indeed, as the Court indicated by the use of the phrase 'where possible' in the case-law referred to in the paragraph 42 above, the reference to the weighting of the award criteria in the case of a contract that is not subject to a provision such as Article 53(2) of the Directive does not constitute an obligation for the contracting authority.*
>
> *It follows that Ireland, which had granted potential tenderers access to appropriate information concerning the contract at issue prior to the closing date for the submission of tenders, did not infringe the principle of equal treatment or the consequent obligation of transparency by attributing weightings to the award criteria without granting the tenderers access to those weightings before the closing date for the submission of tenders."*

35. In similar vein is the judgment of the Court of Justice in *Case C-95/10 Strong Seguranca SA v. Municipio de Sintra*, when

addressing the question whether the principles of equal treatment and transparency are breached where an obligation laid down by the Directive in respect of an Annex IIA contract is not imposed in respect of an Annex IIB contract. The particular obligation at issue is unimportant to state, but in finding that there was no such breach of the Treaty principles the Court stated:

> *"It should be noted that such a broad approach to the applicability of the principle of equal treatment could lead to the application to the service contracts referred to in Annex IIB to Directive 2004/18 of other essential provisions of that directive, for example, as the national court observes, provisions which establish the qualitative criteria for the selection of candidates (Articles 45 to 52) as well as the contract award criteria (Articles 53 to 55). That would involve the risk of rendering entirely ineffective the distinction drawn by Directive 2004/18 between the services of Annexes IIA and IIB, as well as the application of that directive on two levels, under the terns used by the case-law of the Court."*

36. It will be recalled that the applicant calls in aid the judgment of the ECJ in SIAC in support of its submissions in relation to obligation for equal treatment and the concomitant principle of transparency. I have already referred to the fact that SIAC was an Annex IIA contract case, and must be seen in that context. Declan McGrath SC for the Notice Party has in his written submissions referred to the judgment of the ECJ in *Telaustria Verlags GmbH v. Telekom Austria* [2000] ECR 1-10745 which also draws a distinction between the principle of transparency as applied in the Directive, and the more general principle of transparency under the Treaty. The Court has stated at paras. 60-63 of its judgment:

> *"In that regard it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principles of non-discrimination on the ground of nationality, in particular.*
>
> *As the Court held in Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31, that principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.*
>
> *That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.*
>
> *It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect."*

37. Finally, on this aspect, I will refer to a passage from *Arrowsmith, The Law of Public and Utilities Procurement*, 2nd ed, 2005, page 194, to which Mr McGrath also referred in his written submissions. The learned author states:

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

38. The passages to which I have referred demonstrate the difference of approach in relation to the application of general principles of equal treatment and transparency for Annex IIB contracts. When considering the applicant's complaints about the alleged unequal treatment and lack of transparency in relation to the scoring of the applicant's bid and the criteria used, it will be necessary to observe this clearly described distinction between those principles as they are reflected and given voice in the Directive for the purpose of Annex IIA contracts, and the more restricted application of the general principles, and how they are applied to contracts coming within Annex IIB as in this case.

Standard of Review -- Manifest Error – Margin of Appreciation:

39. The next part of the legal landscape against which the applicant's complaints must be considered is the standard of the Court's review. When conducting a judicial review, this Court does not conduct a merits-based review. The Court is not concerned with whether, if it was making the decision, it would come to a different result. The Court is not concerned with whether it considers the scores given by the awarding authority are unduly high or unduly low in any particular section or under any particular heading. The Court will allow an expert body, such as in this case the Procurement Evaluation Group (PEG), a margin of appreciation or discretion as to the mark which it considers appropriate, and will defer to that body in this respect. That body has a degree of discretion permitted to it since its members have been tasked as an expert body by HSE to assess the bids received. It has significant experience in such matters and must be allowed to do its job without undue and unnecessary interference by the Courts. The Courts must not lightly interfere in the tender process, including the result. What the Court must do when the decision is under review is adjudicate upon the process by which the tender process was conducted, including by ensuring that what rules were set in the tender documentation are clear, that those rules are applied equally and objectively to all tenderers, and that only tenders which are completed and submitted in compliance with these rules are accepted and evaluated. In so far as clarifications are sought and/or provided during the tender process, the Court will have to ensure that all tenderers were kept fully informed of any such clarifications, so that any one tenderer does not receive additional advice or information to the prejudice of any other tenderer thereby gaining some advantage. In that regard, the rules must be clear so that any review of compliance can also be effective. These matters ensure that appropriate levels of transparency and equality of treatment are built into the tender process. Naturally, as stated by Fennelly J. in his judgment in the Supreme Court in SIAC, the obligation to render effective the public procurement principles means that where there has been an established failure to respect the principles of equality, transparency or objectivity, there can be no question of permitting the discretion or margin of appreciation to overlook it. In such clearly established circumstances the Court must act and quash the decision.

40. That margin of appreciation discussed, and the desirability that a Court should not lightly interfere with the decision of an expert body charged with the evaluation of bids in a particular sector, explains and is consistent with the principle by now well-established in the case-law that the Court will not do so except where a manifest error has occurred in the process – in other words a very clear error, an error obvious to the eye, and one which prompts the Court to ask itself could this possibly be correct, and, upon close examination, answer that question in the negative. Different judges have put the same relatively simple concept in different ways in an attempt to bring more clarity to what is meant by manifest error. Fennelly J. in SIAC felt that the case-law showed that Courts are

prepared to annul a decision "*at least in certain contexts, when they think that an error has been clearly made*". He went on to state that he did not think however "*that the test of manifest error is to be equated with the test adopted by the learned trial judge, namely that, in order to qualify for quashing a decision must 'plainly and unambiguously fly in the face of fundamental reason and common sense*", and he referred to the fact that in the SIAC case the Advocate General had felt that the test "*should be rather less extreme*", so as to avoid the possibility that the remedy available here by way of judicial review in such matters may not be sufficiently effective to ensure protection of the interests of disappointed tenderers for the purposes of the Remedies Directive.

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

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

The applicant's complaints:

Tender Question 5.2.4:
42. The expression of interest document already referred to stated the following in relation to the location of any proposed unit: "*The precise location identified/proposed for each of the units above must consider road access for travelling patients, taxi and ambulance access, existing facilities and should be consistent with population densities*."

In the Final Tender document itself, Question 5.2.4 stated:

> *"The lot 1 satellite unit in Dublin North East should ideally be located*
>
> *(a) along the M1 corridor*
>
> *(b) within a 10 mile radius of Drogheda Town Centre*
>
> *(c) within the proximity of a large population centre*
>
> *(d) the unit must have the capacity to treat up to 80 outpatient haemodialysis patients."*

The applicant submitted three possible locations in relation to Lot 1. But it is the City North site with which complaint is made in these proceedings. The applicant in its tender relating to the City North location stated in answer to question 5.2.4:

> *"The first option comprises the conversion of units 4, 5 and 6 of Block 3 at City North Business Park, Gormanston.*
>
> *The existing property is a new build development of high quality and the proposal is to convert 3 units into one ground floor space in which the dialysis unit will be accommodated. Access to the Business Park is directly off Junction 7 of the M1 and therefore the unit would have excellent links to the main road network providing ideal road access for patients, staff and deliveries."*

This site location had been visited by HSE prior to the bid being scored. The applicant was awarded 26.4 marks out of a possible 132 marks, giving it a score of 2 out of 10 in respect of City North. It should be noted that in respect of each of its other two proposed locations (Southgate Shopping Centre and Marleys Lane) the applicant received a score of 10 out of 10. But it is the mark for the City North location which is the subject of its complaint in these proceedings. The applicant believes that the correct score based on its response ought to be 7.5 marks out of 10, on the basis that it complied fully with three out of the four criteria set forth in question 5.2.4.

42. The respondent in its notification letter to the applicant dated 29th February 2012 informed the applicant of the marks awarded and provided an abbreviated commentary in relation to the basis for the marks allocated. In relation to the City North location under this question the respondent commented: "*Rural location – not near large population centre*". Given that the City North location is along the M1 corridor, is within a 10 mile radius of Drogheda and could cater for 80 patients a day, the applicant feels that the score achieved should reflect the fact that three of the four categories were fulfilled in respect of the City North site – and hence it should have received a score of 7.5 out of 10 rather than 2 out of 10.

43. In addition, however, the applicant complains that in any event it should have received credit for the fact that in fact City North is "*within the proximity of a large population centre*", being the fourth criterion, because it is close to the town of Stamullen which it contends comes within the definition of a large population centre since it has a population of c.4500 inhabitants. It is submitted that the respondent has made a manifest error firstly in not awarding 7.5 marks out of a possible 10 on the basis of the three correct answers, and that the respondent has similarly erred by not awarding a further 2.5 marks to the applicant on the basis of proximity of City North to Stamullen. In other words the applicant contends that it was a manifest error not to have awarded the applicant 10 marks out of 10 on Question 5.2.4. The winning bid achieved 10 out of 10 on this question.

44. Martin Quinlivan, a General Manager of the HSE has responded to the applicant's complaints. In a very extensive affidavit sworn on the 1st May 2012, he has described the tender process undertaken. He explains for example that in the Tender Response Document tenderers were informed that on the basis of 1-10, HSE would assess the information provided, and would attribute scoring as follows: Excellent (9-10); Very Good (7-8); Good (5-6); Fair (3-4); Poor – lowest score (1-2); No response (0). This information also informed tenderers that "*Failure to provide sufficient information may result in your tender not being considered*".

45. He goes on to refer to the clarifications provided to the applicant during the process. He refers also to the site visit to the City North premises proposed by the applicant in respect of Lot 1 which took place on the 7th October 2011. Three members of a sub-committee of the PEG attended, namely Professor Conlon, Catriona McDonald, and Sharon Dwyer, all of whom have sworn affidavits. The Minutes of that site visit have been exhibited. Mr Quinlivan expresses surprise that in its grounding affidavit the applicant has not referred to the fact that at this site visit, and at a further dialogue meeting on the 18th October 2011, the applicant was specifically informed of the HSE concerns about the City North premises being proposed, and also notes that Mr Doyle in his affidavit does not state why in the light of these expressed concerns the applicant nevertheless decided to include that premises. Professor Conlon has stated in his affidavit that at that meeting on the 7th October 2011 he informed David Coyle (Fresenius) of HSE's concerns as to the

suitability of the City North premises being proposed, and goes on to state that he specifically informed him that it was "*industrial, remote, not well located and likely to be prone to an unsuitable level of HGV activity*". He says also that this view was reiterated to the applicant at the further dialogue meeting on the 18th October 2011. Fiona McNamara who is a Business Manager with HSE has sworn an affidavit on the 30th April 2012 wherein she has agreed that this reiteration was given by Prof Conlon. In fact she has exhibited her contemporaneous notes of that meeting. Those notes indicate clearly that Prof. Conlon expressed his concern that the City North premises was a remote location. A look at those notes indicates that the issue of location in relation to City North came up on two further occasions on the 18th October 2011, as there is a note which refers to the industrial nature of that location and that Prof. Conlon highlighted "*that the City North unit was on an industrial complex and his concerns in his regard*". A third reference appears later in the notes when again the industrial nature of the location is noted and that "*[Prof. Conlon] … identified concerns in respect of an industrial setting*". Yet another reference to this occurs in the notes when it is noted that Mr Coyle enquired if any of the locations listed by the applicant was unacceptable, to which Prof. Mellotte appears to have stated that the applicant's Airton Road site was not particularly well located, and that there were issues in relation to another site known as the Lake Side site. But it is noted also that Prof. Conlon again stated that City North site was "*not well located*". Prof. Mellotte has sworn an affidavit confirming this.

46. In spite of these reservations expressed at the above meetings and as minuted, the applicant persisted with the City North location for the purpose of Lot 1 in its Final tender proposal.

47. In its letter of notification issued to the applicant on the 29th February 2012, HSE informed the applicant of the marks awarded, including in relation to City North, and in an abbreviated commentary stated in relation to Question 5.2.4: "*Rural area, not near large population centre*".

48. It will be recalled that the applicant contends that the tender documentation never stated that a criterion was that the location ought not to be "rural", and submit that by assessing the applicant's tender by reference to whether it was or was not "rural" is to introduce a new criterion, and that by doing so HSE has breached the general principles of equal treatment and transparency. The HSE on the other hand contends that the appearance of the word "rural" in a commentary in relation to the assessment is not to be equated to a new criterion, but is simply descriptive of, and another way of indicating, the sort of unsuitability of the City North site which the applicants had been well informed about during the dialogue phase which preceded its Final tender proposal. HSE submits that it cannot have come as any surprise that the City North site was marked low, as this had clearly been flagged during that process. It will be recalled that one of the complaints made by the applicant is that it should have received marks for the fact that City North is proximate to a large population centre because that site is within the proximity of a large population area, being a short distance from Stamullen. HSE makes the point that Stamullen itself is in a rural area, and also that the applicant never made any reference in its tender to Stamullen being the town which, for the purpose of its proposal, was the large population area. HSE however goes on to say that even if Stamullen had been mentioned in the tender bid, the fact is that Stamullen is some 5.3 kilometres from City North, and that the City North site is some 13 kilometres from Drogheda Town Centre. HSE states that at all times it had told the applicant that it considered the City North site to be remote and not well located. It makes the point also that following that meeting of the 18th October 2011 and the submission of the Final tender bid on 24th November 2011 no fewer than 8 clarifications were sought by the applicant, and that at no stage did it seek a clarification as to what was meant by "*within the proximity of a large population centre*".

49. I should of course add that in a second affidavit Mr Coyle takes issue with the averments made by the HSE deponents as to what was stated at the meetings of the 7th and 18th October 2011. It is not necessary to set forth the areas of dispute. Suffice to say that Mr Conlon's recollection differs in relation to what exactly was said.

50. The applicant makes another point but one which is nowhere mentioned in the Statement of Grounds. Nevertheless, the point is made in support of its submissions in relation to Question 5.2.4, so I will consider it and reach a conclusion even though as a separate ground it cannot be permitted on a stand-alone basis. The point is that because the applicant was awarded full marks in respect of Question 5.2.6 the applicant must be regarded as having fully complied with the requirement that the City North location be "*within the proximity of a large population centre*". Question 5.2.6 stated, inter alia, that the location of units proposed "should be consistent with population densities". The applicant submits that if it was deemed worthy of full marks for that question in relation to City North it is inconsistent, and a manifest error, for it to have scored so low in Question 5.2.4 on the basis of its distance from a large population centre. However, HSE has responded by saying that the reference to population density in Question 5.2.6 is a reference to the density of dialysis patients, rather than the general population, and it states that this was clear from the Expression of Interest document which issued in May 2011, as well as from the Initial Invitation to Tender which issued at the end of July 2011, and the Final Invitation to Tender in November 2011. The respondent has dealt with this point well in its written legal submissions, and I am completely satisfied that the mark awarded to the applicant under Question 5.2.6 does not in any way speak to the mark awarded in Question 5.2.4, and does not render the latter a manifest error. Question 5.2.6 is addressing a different matter altogether.

51. In my view, HSE is not guilty of any manifest error in the manner in which it scored the applicant's bid in relation to Question 5.2.4. The applicant says that it complied fully with three out of four criteria and that it should have scored at least 7.5 marks out of 10. That in my view does not follow as directly as it is contended. For example, in relation to the requirement that the site be "within a 10 mile radius of Drogheda Town Centre", it seems to me that a number of bidders putting forward a number of different sites may fulfil that requirement specified, but it does not follow that by ticking that box, so to speak, a site which is perhaps 9 miles from Drogheda Town Centre must receive the same mark as a site which is, say, only 1 mile away. It seems to me that the HSE must be permitted to regard one site as more favourable than another even if all comply in a strict sense with the requirement. It is within the margin of appreciation to be allowed to the HSE when assessing the bids received, and scoring a weighted question. That cannot amount to a manifest error, and in may view cannot amount to a breach of the principles of equal treatment and transparency as claimed.

52. Secondly, with regard to the complaint that HSE did not have regard to the proximity of City North to the town of Stamullen, I would have to say that it is up to the bidder to provide in its tender the factors which it wishes to be taken into account in the marking of its bid. The applicant made no mention whatsoever in its bid to Stamullen. The Final tender document made it clear that sufficient information had to be provided. It cannot be part of the general principles of transparency and equal treatment that where a tenderer fails to make reference to a matter of that kind, the HSE must nevertheless must search around a map of the relevant area just in case there is a large centre of population proximate to the site proposed to which the applicant may have omitted to make reference. That is unreasonable, and cannot lead to a manifest error in the marking.

53. I have considered all the submissions made on behalf of the applicant in relation to Question 5.2.4, and the facts relied upon in relation thereto. I am satisfied that there is nothing which constitutes a manifest error in relation to this question. The process leading to the Final tender proposal was comprehensive, and inclusive, and in my view ensured that the principles of transparency and equal treatment were observed. Those principles have not been breached either in relation to how the applicant's bid was scored.

Clarifications sought were provided. Dialogue meetings took place at which relevant issues were raised by HSE, and clarifications provided also.

54. It is important to stress the fact that this is an Annex IIB contract, and as such none of the Articles of the Directive apply except Articles 23 and 35 (4) as explained already. As the authorities already make clear, the mere fact that the principles of transparency and equal treatment are to be met in a certain manner in relation to Annex IIA contracts by compliance with certain other provisions contained in the Directive, does not mean that for the purpose of satisfying those principles in relation to Annex IIB contracts the same procedures must be adopted.

55. The applicant has submitted another basis for manifest error in the marking of the applicant's City North location bid, namely by reference to its marking of Question 5.2.7. This question specified:

> *"Each of the units should, ideally, be located in an area that is*
>
> *(a) normally accessed by general public i.e. not in an industrial area close to noisy production units;*
>
> *(b) not close to units currently or potentially receiving goods by HGV."*

The applicant scored 5 out of 10 on this question, and it submits that it ought to have scored at least 8 out of 10 since in its response to the question the applicant stated that the location of the unit was accessed by the general public given its proximity to the City North Hotel. In its response to this question the applicant had stated that "*all four units are in areas that are accessed by the general public, are a mix of light industrial areas with offices and are not close to buildings receiving HGV goods……".*

56. The abbreviated commentary contained in the HSE Notification letter dated 29th February 2012 stated in relation to this response: "*Not normally accessed by general public and potential HGV use*". The applicant submits that persons frequenting or visiting the City North Hotel are members of the general public and that therefore that aspect of the question is fully satisfied. The HSE on the other hand say that the applicant knew that HSE had expressed adverse views as to the suitability of the City North location as referred to already above. It makes the point also that the City North Hotel is about 550 metres from the site proposed by the applicant for the dialysis unit at City North, and that any access to the City North complex generally is focussed on the hotel and not the area where the unit is proposed. HSE makes the point also that there are high bay logistic units in the immediate vicinity of the applicant's proposed unit, and that these have the potential to generate HGV traffic. But the applicant, while accepting that there may be HGV activity close by, submits that none of the logistics units are noisy to the extent that a manufacturing-type industrial unit could be. The applicant in its affidavits made the point that there was an inevitability that some HGV activity would arise in any event because of the fact that a renal unit itself at this location would require the delivery of goods that would be required for the unit itself. However, the HSE say that this would be sporadic in nature only, and can be organised by the unit in question to be delivered at times when least disruption and disturbance to patients and staff can be assured. The point is made by HSE in its response to this point that it was not the activity from deliveries to the renal unit that was the point of this particular requirement, but rather noise from HGV traffic associated with adjacent industrial units.

57. I have to say I can see no merit whatsoever in the points being made in relation to Question 5.2.7. The meetings which took place with bidders as already described as well as site visits conducted by HSE made it perfectly clear that the City North site was not being favourably looked upon by HSE. The applicant knew this. They knew that it was regarded as industrial in nature, quite apart from it being regarded as remote. Indeed, as Mr Quinlivan notes in his first affidavit, the applicant in its supplementary clarifications received by HSE on 26th October 2011 in response to Supplementary Clarification issued by HSE on the 20th October 2011, acknowledged that the proposed unit was "*subject to existing or potential HGV traffic nearby*", albeit that the comment went on to state that all were located away from such potential traffic so as to ensure no detriment to privacy and overall running of the unit. The latter may well be so, but it surely cannot be said that the HSE was not entitled to view that feature negatively, and to score the question accordingly. The Supplementary Clarification dated 20th October 2011 from HSE had stated that while the criteria in Question 5.2.7 were not mandatory "*the tender evaluation will favour proposals that meet the following criteria:*

> *"1.1 In an area that is normally accessed by general public i.e. not in an industrial area close to noisy production units, not close to units currently or potentially receiving goods by HGV".*

58. I can see no basis whatsoever for a finding that by scoring the question as it did, HSE has committed a manifest error, or has been guilty of breaching equal treatment and transparency principles. There is no basis for saying the decision is clearly wrong. It is not a case where it is clear that some mistake has been made. I do not believe that there has been any real or reasonable basis for the applicant to contend that it has in some way been taken short or by surprise by HSE by some lack of transparency as to the criteria applicable or the view that the HSE had of the applicant's proposed City North proposal.

59. I should say that I have reached that conclusion having considered all the affidavit evidence adduced and the written and oral legal submissions, without feeling the need to set forth all that in exhaustive detail. The HSE made their criteria very clear in this regard, and it was entitled to take the view that it did in relation to the applicant's answering of this question. The view it took is well within the discretion permitted in relation to its assessment.

Tender Question 5.2.8:

60. The applicant also contends in these proceedings that the HSE is guilty of manifest error in relation to the scoring of the applicant's response to Question 5.2.8 which stated:

> *"Each of the units should be reasonably accessible to established public transport network".*

The ground of complaint in relation to this question is stated in the applicant's Statement of Grounds as follows:

> *"The respondent scored the applicant incorrectly and/or inaccurately in respect of Lot 1 (Northeast along N1 corridor) and patient experience sub-category with the respondent's scoring failing to adequately or at all assess or give credit to the applicant including inter alia the proximity to Drogheda, Stamullen, the proximity of City North Hotel, the proximity of a seven day public bus service whereby the respondent disqualified the applicant in respect of Lot 1 under this sub-category." (emphasis added)*

61. The applicant's response to this question was: "*All units are convenient to public transport via bus and taxi, and in the case of Southgate and Kendar, main line rail*", for which the applicant scored 1 out of 10, whereas the winning bid from Beacon Medical Group scored 7 out of 10. It will be noted that the applicant's response did not state how far from the nearest bus-stop the proposed unit

was, or what that service consisted of. No detail was provided. In its abbreviated commentary on this question, HSE stated: "*Circa 2 km from nearest public transport and no rail link*".

62. Mr Coyle's grounding affidavit elaborates on this ground of objection. He says that it is factually incorrect that the nearest bus top was 2 km from the City North location, as he says that there is a public bus stop about 360 metres from the entrance of unit (even though this was not identified in the applicant's answer to 5.2.8), and that HSE has failed to score the question on that basis. He goes on to state that the bus service serving that particular bus stop is 'Matthews Coach' which is "*an extensive 7 day service serving Dublin Centre (Parnell St) and Bettystown/Drogheda/ Dundalk*". He states that the City North stop is a scheduled stop clearly identified with a bus stop shelter and indeed clearly marked on the service timetable. He contends that the score awarded is an error as it was marked by reference to the incorrect bus stop and that distances were not measured. Mr Coyle believes that the applicant should at least have been awarded a mark equal to that awarded to Beacon.

63. In response to this point, Mr Quinlivan states that the applicant did not either in its written tender proposal or at the site visit on the 29th November 2011 or any other occasion include any reference to the Matthews Coach service which this particular bus stop services. In so far as the applicant seeks to rely on a bus timetable exhibited by Richard Shipley in his affidavit, Mr Quinlivan states that this timetable was never referred to at the site visit or on any other occasion. He submits that if the applicant wished to rely on this bus stop and bus service in support of its tender, it was obliged to provide that information to HSE for consideration and should have made reference to it in its tender. Mr Coyle on the other hand, in his replying affidavit, states that HSE at no stage of the tender process specified a requirement to see timetables or the frequency of the public transport available to any site.

64. Mr Quinlivan goes on to state that during the site visit to this location he had inquired of the applicant where the nearest bus stop was, and that he was informed by Mr Coyle that it was on the old Drogheda to Dublin road, from which, he says, the sub-committee concluded that the nearest stop being referred to by the applicant was approximately 2 km from the City North unit. According to other evidence exhibited in Mr Coyle's affidavit in the form of a report from Paul Corrigan, Geo Surveyor, that stop is in fact 2.6km from the City North unit. He expresses his view also that the proposed unit is not near any rail link, and that the surrounding area, the lack of pathway and inadequate lighting also contributed to the conclusion that the unit proposed by the applicant at City North is not reasonably accessible to an established public transport network. He further states that even if the applicant had drawn attention to the Matthews Coach bus stop, the HSE could not have awarded the applicant a similar mark to that given to the winning bid having regard to its distance from the unit and the general surrounding area between the stop and the unit. He makes a further point that in any event even if the applicant had been awarded full marks on this question it still would not have achieved an overall mark sufficient to exceed the minimum required of 70%.

65. Mr Coyle in his supplemental affidavit says that the question of the availability of public transport close to a renal unit is not of any great importance, since in his experience, and given the nature of the dialysis treatment being undergone by patients, patients do not arrive and leave units by public transport, but instead are transported by family or friends by car or avail of non-ambulance transport provided by HSE. He points to the fact that such patients are very often elderly and in poor health, and that after a four hour treatment they are inevitably weak and unable to use public transport. He finds it inexplicable why this criteria was added to the specification during the tender process. In relation to this last point, HSE has submitted that the applicant cannot raise any issue as to the validity of the tender process by reference to the inclusion of this criteria since no leave has been granted which covers that ground now raised, and in any event the applicant is out of time for doing so. I agree, and I will disregard that particular matter raised by the applicant.

66. The applicant makes the point also that the fact that HSE's site visit took place after dark as well as the fact that HSE did not take time to fully satisfy itself as to the exact location of the nearest bus stop is indicative of the fact that HSE did not regard this issue of being of any great significance and weight. In all the circumstances, the applicant submits that it has been marked incorrectly and unfairly compared to the winning tender under this question, and that it amounts to a manifest error.

67. In much the same way that the applicant sought to find fault with the scoring of question 5.2.4 because the HSE took no account of the proximity of Stamullen to the City North unit where it had in its tender made no reference to Stamullen as being the large population centre on which it was relying, the applicant again seeks to question the score allocated under Question 5.2.8 on the basis that even though it never identified Matthews Coach as a relevant operator or the bus stop which services Mathews Coach in its tender response, the HSE nevertheless ought to have carried out its own investigations in order to take it into account. It is significant that the applicant never identified this bus stop or this service at any site meeting, and when asked specifically by the sub-committee where the nearest bus stop was, indicated that it was that which was on the "old Drogheda to Dublin Road" which was considered by HSE to be about 2 km away, but is in fact even more, namely 2.6 km away from the unit. I fail to see in such circumstances how the HSE can be considered to have made a manifest error as interpreted in the case law to which I have already referred to in some detail. One must reiterate that the obligation to include all information which a tenderer wishes to be taken into account in the scoring of the tender response is upon the tenderer. It is up to the applicant to makes its own case, and not for the HSE to fill any gaps in the information provided. The tenderer can only be scored on its own responses, otherwise there is potential unfairness towards any other tenderer.

68. Given the manner in which this question was answered, and given the account of the dialogue meetings and site visits referred to in the affidavits, I am completely satisfied that there is no manifest error in the manner in which the applicant was scored on this question on the basis of the information and answers provided by it in its final tender.

Tender Questions 10. 4 – Model of Care:
69. This question stated as follows:

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

Sufficient staff must be employed to provide the required quality of patient service to include cover for holidays, sickness and any other absences. The staff must be competent in dealing with medical emergencies.

There must be appropriate skill mix and the staffing level must be acceptable to the referring Consultant Nephrologist/Parent Renal Unit.

It will be an essential element of performance monitoring of this contract that the provider is in compliance with this ratio at all times" [Emphasis in original text]

70. Before proceeding further I want to draw attention to the word "how" in the first line of this question, even though it is not one of the words underlined in the original text. The tenderer is required not simply to agree that it will meet the requirement set forth, but to describe "how" it will do so. The text of this particular question was significantly different in the initial tender document which issued at the first expression of interest stage of the process, and which the applicant submitted by way of response on the 8th September 2011. The original question did not require tenderers to specify "how" it would meet the minimum requirements, but simply set out a number of matters that providers must comply with. I will not set out the original question in detail. But it is significant that even though the requirement to explain "how" the minimum requirements would be met, and even though the question was differently worded to a large extent, the answer given in the tender proposal put forward on the 8th September 2011 is almost verbatim the answer given in the final tender submitted by the applicant, except that it states that the applicant will employ on a fulltime basis a minimum staff compliment of 1 x CNM; 12 x RGNs; 1x HCA; 1 x Secretary, and goes on to state that "these are based on an 80 patient compliment, 2 shift roster. That is the extent to which the applicant dealt with "how" it would meet the minimum requirements.

71. The applicant, nevertheless, did quite well on this question by achieving a mark of 8/10 marks. However, it believes that it should have been awarded 10/10 marks, and in support of that proposition has produced a report from a Dr Mansell in which he sets forth his credentials, and based on his expertise states that from his perusal of the applicant's submission the applicant "more than covered the specifications in the tender" and that they should have been awarded full marks. Although the Statement of Grounds lacks specificity as to the precise grounds on which the applicant urges this particular point, its solicitor's letter to HSE dated 9th March 2011 provides some detail in Schedule 2 attached to the letter where it is stated:

"[The applicant] asserts that the answer to this question fully complies with the specification asked.

The specification requests a tenderer to respond on the number of staff required to run the service being tendered and gives no specification to the numbers of patients to be considered save for the patient numbers mentioned in Section 5.5, that any unit must have the capability of treating up to 80 patients.

Based on this premise [the applicant's] answer provides the full contingency coverage against the specification of annual leave and sickness with the commitment to employ a minimum of 12 FTEs (full time equivalents) in addition to the Clinic Manager.

[The applicant] used the basis of the maximum number of patients specified in Section 5 to ensure that our staff numbers would cover the eventuality of any unit growing, over time, up to 80 patients.

[The applicant] is committed to employing a minimum of 12 full-time equivalents RGNs and a Clinical Manager from the commencement of any successful award of contract.

For ease of reference 80 patients under the tender specification stated, requires a Clinic Manager who does not treat patients and 10 dialysis nurses. [The applicant] committed to employ an additional 2 full time nurses (additional 20%) to assure of contingencies of Annual Leave and Sickness being covered [sic].

[The applicant] asserts this is over and above our current contracts commitments with the HSE in Dublin, Kilkenny and Limerick for similar service contracts.

Therefore [the applicant] asserts that the score should be 10/10 or 354 out of 354 marks."

72. The Statement of Grounds seems to refer to this point of objection (and question 10.7 which I will come to next), in only general terms by pleading at paragraph xiii (g) and (h) thereof:

"g. The respondent failed to adequately score the applicant in respect of the Model of Care sub-category and properly assess the level of staffing being proposed by the applicant.

h. The respondent incorrectly, inaccurately and/or failing to assess the applicant's proposals did not afford the applicant equal treatment".

73. The respondent makes the preliminary point that in so far as the applicant's legal submissions summarise the applicant's argument on this point, it does so in a way which goes beyond the grounds for which leave was sought and granted. Even though I agree to a large extent with that submission, I propose to deal with the issue for the sake of completeness, particularly since I heard argument on the point. But I do not want that to be taken as an indication that parties can go beyond the grounds permitted when leave is granted by enlarging the grounds being put forward by either oral or written submissions.

74. In his replying affidavit, Mr Quinlivan deals with the issue raised by the applicant in relation to question 10.4. He states at para. 133 of his replying affidavit that the PEG when considering what was proposed in relation to staffing levels applied a methodology which he says reflects "*common nursing staff management practices in haemodialysis in Ireland*", and he sets out that methodology in detail. In addition he refers to the fact that the HSE required a high level of comfort from tenderers that this critical aspect of the service delivery would cover "any reasonably predictable contingencies". He goes on to state that the Specification in the Final Invitation to Tender proposed two treatment shifts, six days per week, caring for twenty patients per shift, and that elsewhere in the document the minimum patient ratio of 1:4 was specified. He describes that as a "*non-prescriptive approach affording an opportunity to bidders to offer staffing configurations reflecting different solutions to manpower requirements*".

75. Clearly, and not unreasonably in my view, HSE was expecting that bidders would not just confirm that all staff ratios would be met and state what staff they proposed to engage and have available, but to go on and explain (as required by the question, precisely "how" the proposed compliment of staff would fulfil the requirements. It turns out, as averred to by Mr Quinlivan, that none of the

tenderers provided an actual roster with their tender. A roster would have demonstrated how for example the applicant considered that its proposal for staff would provide sufficient cover to cope with the core hours, and contingencies such as sickness, holidays, study leave.

76. Not having been provided with a proposed roster by the applicant or any other tenderer in order to demonstrate "how" the staff proposed would meet the requirements set forth in the question, the PEG, as explained by Mr Quinlivan, applied the standard practice whereby it would be assessed that each RGN would normally be required to work 3 x 12 hour shifts, which equates to a 36 hour week, with each of the 10 x RGNs being available to provide 1.5 hours per week to cover the out of core hours shift manager role (total 15 hours). But he goes on to state that the requirement for the Shift Manager role is 32 hours, which is 17 hours more than is available through the input of 10 RGNs. His affidavit at para. 136 sets out a calculation arrived at by PEG in accordance with what Mr Quinlivan described as "standard practice", and this informed the PEG that the minimum staffing requirement to meet the specification for the 80 patient unit was 12.917 whole time equivalent (WTE) Registered General Nurses (RGN), whereas the bid by the applicant provided for only 12 WTE RGNs. I note that the winning tender had specified 13 RGNs and was awarded a mark of 10/10.The PEG had concerns in relation to the applicant's response that *"the week to week management of staff rosters to incorporate planned annual leave and unexpected additional leave would be extremely difficult with the resources proposed by [the applicant]".*

77. Mr Quinlivan also makes the point also that the applicant's staffing proposal did not include any provision for the 1 supernumerary Senior Clinical Nurse Manager required, but I will return to that matter when dealing with question 10.7 in due course.

78. Those concerns clearly led the PEG to award less than full marks under this question. The applicant submits that it was never informed that a roster was required to be submitted. It is of the opinion that the methodology applied does not reflect standard or common practice and certainly not the practice applied by the applicant with its staff. In particular, the applicant draws attention to the fact disclosed by Mr Quinlivan that the methodology applied by the PG incorporated a "time out" cover requirement of 22%. Mr Coyle states in his supplemental affidavit that the HSE never at any of its dialogue meetings made it known that such a methodology would be adopted, and never sought any guidance from tenderers in relation to that 22% time out figure. He says that the figure applied by the applicant for "time out" is only 14.8%. Mr Quinlivan states that the 22% figure is widely applied and is one which is underwritten by "the work of Keith Hurst a highly regarded expert in the field". Mr Coyle takes issue with Mr Hurst's credentials by stating in his replying affidavit that Mr Hurst obtained this figure from a study of general hospitals in the United Kingdom and that a renal unit bears little resemblance to a general ward of a public hospital. It is submitted that the failure to inform tenderers in advance that it would be applying this time out percentage and the methodology referred to breaches the applicant's right to transparency.

79. I have considered the applicant's affidavits and all the submissions both written and oral on this question. But in my view the HSE cannot be faulted on the basis of a lack of transparency where the applicant answered the question in a way which failed to explain "how" the numbers of staff proposed would fulfil the requirement and specification set forth. The applicant simply stated what staff it proposed without addressing the vital matter of demonstrating how that level of staff would fulfil the requirements. From what is contained in Mr Coyle's affidavits it would have been perfectly feasible for the applicant to have provided that information. It may be that the applicant requires its RGNs to work, say, 39 hours per week rather than the 37 norm applied in the methodology used by the PEG. But this was nowhere explained or demonstrated by the applicant. It is up to each tenderer to put its best foot forward. If it fails to answer a question, or to answer it in a way which the question invites, it cannot complain if it achieves less than a full mark. In the absence of such explanation, it was perfectly reasonable that HSE should apply a methodology which it believed represented common practice in the industry. Indeed, the same methodology was applied equally to each tenderer.

80. It is worth drawing attention again to the fact, already pointed out, that the applicant's answer to question 10.4 in its final form is almost the same as the answer given to that question in its original form at the Expression of Interest stage. Now account seems to have been taken of the change to the wording of the question. In my view, the fact that the HSE point to the absence of a roster which would have demonstrated how it was proposed that the requirement would be fulfilled by the staffing proposed is not to insert a new criteria. The applicant was not required to produce an actual roster, but it was required to answer the question asked i.e. "how it proposed to meet" (emphasis added) the requirement set forth. It could simply have explained its methodology in its answer. Simply because the word "roster" has been used by Mr Quinlivan does not detract from the fact that the question was clear. It required the tenderer "*to outline how they propose to meet a requirement that they must retain a sufficiency of staff to provide an acceptable level of service*". The applicant did not do that. It simply stated what staff it proposed to retain. It was open to the PEG to take a view that the answer provided should attract 8/10 rather than 10/10, without any infringement of transparency, equal treatment or general fairness. I am not satisfied that the applicant has made out a case on this point. I am certainly not persuaded that any manifest error has occurred.

Tender Question 10.7:

81. This is another question under Model of Care. The applicant was awarded a score of 5/10 marks and contends that by its answer it was entitled to be marked 10/10. The question contained 3 elements. Those elements are not numbered, lettered or bulleted in the tender document but I will letter them here for convenience:

> *"(a) Tenderers are required to outline how they propose to meet a requirement that the Senior Clinical Nurse Manager must be supernumerary and be present during core hours;*
>
> *(b) Each clinic should also have a named Deputy Clinical Nurse Manager with an appropriate Post Graduate Renal Course who, in the absence of the Senior Clinical Nurse Manager should be present during core hours;*
>
> *(c) Outside core hours, there must be one designated nurse in charge present in the unit, this may be a staff nurse provided they have a Post Graduate Renal Course and do not carry a full clinical case load." [emphasis in original text]*

82. In its response to this question, the applicant answered:

> *(a) Agreed*
>
> > *It is [the applicant's] policy that during core hours the CNM is supernumerary. It is clearly evident from our answer in 10.4 of our recruitment of the numbers required for patient numbers (sic).*
>
> *(b) Deputy Clinic Manager on duty when Clinic Manager is on leave or absent and is supernumerary.*
>
> *(c) Agreed. [The applicant] will endeavour to recruit as many Qualified Renal Nurses as possible. Our view is to employee (sic) dialysis nurses where possible."*

83. The Statement of Grounds does not make specific reference to this question, but it would appear that the applicant contends that by being marked 5/10 on this question the respondent has failed to adequately or properly score the applicant, and properly assess the level of staffing being proposed, and did not afford the applicant equal treatment with other tenderers. This seems to be the meaning to be gleaned from paragraphs (g) and (h) of paragraph xiii of the Statement of Grounds. One can gain some further insight into the objection from Schedule 2 of the applicant's solicitor's letter to HSE dated 9th March 2012.

84. The applicant's solicitor's said letter put forward the following case in relation to question 10.7 by reference to what is stated in Schedule 2 thereof:

> *"In this question the HSE specification listed 3 requirements. [The applicant] complied fully with all 3 requirements.*
>
> *The clinical manager would need to be supernumerary during core hours and that in his/her absence a named and Post Graduate Renal qualified deputy would step up, manage the unit and have no case load of patient treatment while in this role.*
>
> *Finally, the specification of outside core hours, for reference this is accepted as outside hours of 8-4/9-5, a 3rd nurse from the staff compliment would be required to take responsibility for the unit, having also a post graduate renal qualification but be allowed to treat some patients i.e. less than 4 in the HSE model of care specification 10.4.*
>
> *[The applicant] further explained that not only would we comply with having these 3 specified post graduate qualified nurses as part of the minimum staff but in fact would, where possible, employ more than 3 renal qualified nurses and indeed [the applicant] committed as part of the dialogue process that if we could source a full staff compliment all of whom were Post Graduates then [the applicant] certainly would.*
>
> *[The applicant] asserts that given our compliance with each of the 3 specification points raised the score should be 10/10 or 354 out of 354 marks.*
>
> *Indeed, [the applicant] attended a recent debriefing meeting concerning the tender process whereupon it was conceded by HSE representatives that the scoring matrix for the tender question 10.7 was based on contracted hours rather than head count as per the tender specifications above, which is alarming and directly contravenes the tender specifications and/or the scoring system."*

85. A response to the applicant's letter is dated 12th March 2012 and in relation to question 10.7 states as follows:

> *"In relation to Section 10.7 your client's tender response stated that it would endeavour to recruit as many qualified renal nurses as possible. As referred to in the letter to your client of 29 February 2012 from HSE, this suggests some conditionality in relation to your client's ability to meet the HSE's tender requirements in relation to staffing. HSE is satisfied that the marks awarded reflect its professional judgment of the sufficiency of staff levels proposed having regard to the factors to be taken into account, including the availability of nursing with post graduate renal training. The HSE would reiterate that the evaluation of Model of Care was conducted in accordance with the tender documents. HSE rejects any suggestion that it confirmed or suggested to the contrary at the debrief meeting on the 7 March 2012."*

86. In his first affidavit, Mr Quinlivan reiterates that it was the conditionality of the applicant's answer to question 10.7 that justified a mark of 5/10. In that regard it is worth noticing again the emphasis given by HSE in the tender document to the word "must" in the paragraph of the question which I have marked as (c). Clearly HSE was entitled to place a high importance on this question. It needed to be certain that this requirement would be met at all times. There was no concealment of this emphasis, and therefore no lack of transparency. Mr Quinlivan states that the mark reflects the PEG's professional judgment regarding the sufficiency of staff levels having regard to the factors to be taken into account, including the availability of nurses with post graduate renal training, as stated by Mr Quinlivan in paragraph 153 of his replying affidavit.

87. The basis on which the applicant failed to achieve a score of 10/10 is in my view clearly evident in the above circumstances. The emphasis placed on the word "must" makes the importance of the matter clear, or ought to have, to any competent and diligent bidder. There is no lack of transparency in the manner in which the question is put, or in the way the criteria and its importance has been specified and applied. It follows that there has been no breach of any principle of transparency in this part of the tender process by the respondent. There is no manifest error in the score awarded, given the answer's conditionality in the face of the word "must". The mark is not clearly wrong. The PEG was entitled to apply its own professional judgment and apply a mark according to its view. This ground must also fail.

88. For the reasons stated I am satisfied that there has been no manifest error, and no breach of the general principles of equal treatment and transparency in this tender process, or in the scoring of the applicant's tender and the marks allocated to the questions at issue herein.

89. I therefore dismiss the proceedings.