Neutral Citation No: [2009] NICh 8 | *Ref:* **MOR7606**

Judgment: approved by the Court for handing down | *Delivered:* **28/08/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

DEANE PUBLIC WORKS LTD

Plaintiff;

And

NORTHERN IRELAND WATER LTD

Defendant.

_____

MORGAN LCJ

[1] The plaintiff is a civil engineering company whose registered office is in Irvinestown, County Fermanagh. Its activities include the carrying out of works in connection with water industry infrastructure and treatment works. It operates in Northern Ireland and the border counties of the Republic of Ireland.

[2] The defendant is a company whose predecessor in title was the Water Service, an executive agency within the Northern Ireland Department for Regional Development (DRD). The defendant was established as a government-owned company with DRD holding the entire shareholding. It is the sole public water and sewerage undertaker for Northern Ireland. The defendant is a utility for the purposes of the Utilities Contracts Regulations 2006 which implement in particular Directive 2004/17/EC coordinating the

procurement procedures of entities operating in the water, energy, transport and postal services sectors.

[3] This claim arises as a result of a procurement exercise conducted by the defendant for the provision of a new ring sewer on the western extent of Omagh. The contract is the Brookmount Street -- Hunters Crescent Sewer Replacement Works Contract (Brookmount Contract) which had a value of £2.5 million. The significance of that figure lies in the fact that the threshold for the value of contracts to which the relevant Directive or Regulations apply is in excess of £3.5 million and, therefore, none of the legal obligations which arise from those provisions apply in this case.

[4] At the commencement of the hearing the parties provided a statement of agreed facts which I now set out in full to explain much of the relevant background to this case.

> "1. On 20 July 2007 the Defendant published on its website notice of an invitation to tender for inclusion on a restricted list as a prequalification for tendering for the Brookmount Road- Hunter Crescent Sewer Replacement Project. On 25 July 2007 the Defendant published notice of the invitation to tender in the Belfast Telegraph, the Irish News and the Newsletter. The Plaintiff subsequently requested and was sent the pre-qualification questionnaire ("PQQ").
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> 2. At subsection B9 of the PQQ, entitled "Experience", it stated:
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> > "Please provide details of projects which best demonstrate your ability to undertake the scope of works outlined in (section B3) 'description of the proposed works'. These projects must have been completed within the last 5 years or currently be substantially complete. The Lead Contractor is required to give a summary of three projects"
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> 3. On 27 August 2007 a telephone conversation took place between Manus O'Kane of the Plaintiff and Nigel Tracey of Jacobs UK (representing the Defendant). Manus O'Kane identified himself only as being a "representative" of the Plaintiff. During this conversation Mr O'Kane enquired as to whether a contract outside of the specified 5 year period that

was particularly relevant to this type of work could be submitted for evaluation. Nigel Tracey stated that projects which had been completed outwith the 5 year qualifying period would be awarded zero points. No definition of the meaning of "the last 5 years" or "completed or substantially completed" was requested or provided during this telephone conversation.

4. On 29 August the Plaintiff submitted its completed PQQ. One of the projects referred to in the answer to section B9 (Experience) was as follows:

> "Project 2
>
> (1) Project Name: Enniskillen Sewer Improvements, Phase I
> (6) Form of Contract: NEC – Option D: target cost
> (7) Dates for Contract Commencement and Completion:
> November 2001 to April 2002"

5. Paragraph 11 of section B1 (Instructions to Applicants) of the PQQ stated "By completing and returning their questionnaire, including the declaration, Applicants are confirming that all information given in their completed questionnaire is true and accurate".

6. Section Z1 (Applicant Declaration) of the PQQ contained a declaration to be made by the applicant in the following terms:-

> "The details and information contained within this restricted list application relating to the BROOKMOUNT ROAD - HUNTERS CRESCENT SEWER REPLACEMENT Project are true and accurate and best endeavours have been used not to mislead the assessors".

The Plaintiff signed this declaration.

7. By letter dated 6 November 2007 the Defendant informed the Plaintiff that it had been

unsuccessful in its application for inclusion on the restricted list.

8. The Plaintiff sought a debrief by letter dated 7 November. On 8 November, in the course of a telephone call made by Nigel Tracey on behalf of the Defendant to the Plaintiff, the Plaintiff was offered a date and time for a formal debrief and was informed that it had scored highly in all sections of the PQQ save for section B9. The Plaintiff was told that it had received no marks for Project 2 since it was deemed to fall outside the 5 year period.

9. Further discussions and correspondence ensued in which the parties repeated their cases. On 14 November Nigel Tracey, on behalf of the Defendant, wrote to the Plaintiff setting out the main reason for which the Plaintiff's PQQ submission had been unsuccessful. Mr. Tracey also explained in that letter that even on the Plaintiff's interpretation of the qualifying period (based on calendar years) the Certificate of Completion of the Whole Works" for the Enniskillen project was dated 15 August 2001 and had been issued to the Plaintiff on 28 September 2001, the project would not have qualified. A copy of the certificate was attached with that letter.

10. It is not in dispute that had Project 2 been taken into the reckoning, the Plaintiff would have been successful in its application to be placed on the restricted list.

11. At the debrief meeting held on 20 November 2007 the Plaintiff submitted that the dates given for that Project 2 were incorrect.

12. As far as the Enniskillen project is concerned:

(i) The project was awarded to the Plaintiff on 22 November2000.
(ii) The Plaintiff commenced work on site on 08 January 2001.
(iii) At a progress meeting held on 08 August 2001 the Plaintiff stated that 22 August 2001 was still achievable for final completion.

(iv) At a post Project appraisal meeting held on 25 September 2001 the start date of the maintenance period was stated to be 15 August 2001.

(v) On 28 September 2001 a letter was sent by John Black of Babtie to Keith Nixon of the Defendant enclosing the Certificate of Completion of the Whole of the Works which was dated 15 August 2001.

(vi) On 29 October 2001 a payment of £86,263.74 was made by the Defendant to the Plaintiff on foot of payment certificate number 8. This payment included the release of 50% of the retention amounting to £5,981.62. The cumulative total paid to the Defendant on this date was £435,610.26, amounting to 95.3% of the total project value.

(vii) On 09 January 2002 a payment of £9,852.65 was made by the Defendant to the Plaintiff on foot of payment certificate number 9. The cumulative total paid to the Plaintiff on this date was £445,462.91, amounting to 97.5% of the total project value.

(viii) Works of reinstatement to land and fences belonging to Fermanagh District Council were carried out and completed to the satisfaction of Fermanagh Borough Council by 17 June 2002;

(ix) Works to Sligo Road were carried out and complete to the satisfaction of the Roads Service by 19 October 2002;

(x) The Project Manager wrote on 29 September 2003 seeking agreement as to the final account;

(xi) The Plaintiff accepted this valuation on 2 October 2003.

(xii) On 10 October 2003 a final payment of £11,623.18 was made by the Defendant to the Plaintiff on foot of the agreed valuation. This payment included the release of the remaining 50% of the retention which amounted to £5,981.62. The payment made on this date represented 2.5% of the total project value.

13. During the course of the assessment process, the Defendant sought clarification from two other applicants:

(i) In relation to the failure to provide a health and safety policy which was duly rectified; and

(ii) In relation to a response to section B9 where the applicant had provided values of £0 for the "cost attributed to the applicant" in respect of the projects submitted, which was duly rectified.

Both these applicants were successful in their application for inclusion on the restricted list.

The Plaintiff was not offered any opportunity to submit further information nor was any step taken to clarify any matter with it.

14. As far as the other two projects identified by the Plaintiff as reference projects in section B9 are concerned:

(i) In relation to Portglenone (project 1), the Plaintiff identified the completion date as May 2003. Completion was in fact certified complete in 2004.

(ii) The Plaintiff relied on the same project (Portglenone) as a reference project in its PQQ for Limavady waste water treatment works. In the Limavady PQQ under the heading "cost attributed to the applicant", it gave a different figure (LI .2m) than that which it gave in the Brookmount submission (L2.4).

15. The Defendant has recently issued PQQ's for a restricted list for a contract known as Bushmills/Portballintrae WwTW (ref. KC 299). In these, the section B12 Project Experience contains the following definition:

> "Projects must have been completed within the last 5 years <u>from the date of this submission</u> or are substantially complete"

[5] Despite the considerable efforts of the parties to resolve the factual issues between them it was necessary to call Mr O'Kane and Mr Nixon who were involved in the preparation of the PQQ for

submission on behalf of the plaintiff and Mr Tracy, Mr Black and Mr Murray who were civil engineers retained by Jacobs UK Ltd, the project managers retained by the defendant to manage the award of the contract.

[6] On any view the arrangements for the conduct of this procurement exercise were highly formal. The defendant was advised at all times by a specialist project manager and a highly detailed Prequalification Questionnaire was devised. The defendant's website indicated that procurement was based on "Departmental Accounting Procedures and on National Legislation, EC Directives and International GATT requirements". The relevant procedures are to be found in Government Accounting Northern Ireland which refers to 12 guiding principles governing the administration of public procurement. These include transparency, openness and clarity in policy and delivery, fair dealing, treating suppliers fairly and without unfair discrimination and consistency, suppliers should all other things being equal be able to expect the same general procurement policy across the public sector in Northern Ireland. In addition to the publications referred to in paragraph 1 of the statement of agreed facts notice of an invitation to tender was also published in Contrax Ireland which is a construction trade magazine which circulates in both Northern Ireland and the Republic of Ireland.

[7] As appears from the statement of agreed facts one of the significant issues in this case is the treatment by the project managers retained by the defendants of project 2 which was submitted by the plaintiff in section B9 (Experience) of the PQQ. Paragraph 5 of the statement of agreed facts notes that the plaintiff was advised that the completion and return of the questionnaire including the declaration was confirmation that all information given in the completed questionnaire was true and accurate. The declaration in the PQQ was signed by Mr Nixon. The evidence indicates that it was him who chose the project. The dates he gave for contract commencement and completion were November 2001 to April 2002. That is a five-month period. It is now clear that this answer was erroneous. Mr Nixon suggests in his evidence that having consulted the file work was in fact carried out as late as October 2002. The inference I draw from that evidence is that either Mr Nixon had failed completely to examine the file before allocating dates to the project or alternatively that he had only carried out a cursory inspection of the file. In fact it appears that the contract for this project was awarded to the plaintiff on 22 November 2000. The plaintiff commenced work on site on 8 January 2001 and the evidence indicates that the sewer was handed over to Water Service in mid August 2001 some seven months later. At that stage the plaintiff removed from the site all of its machinery and

infrastructure and the maintenance period commenced. Reinstatement to land and fences apparently was carried out on 17 June 2002 although on the evidence it is clear that these were very minor works. There was an issue about subsidence raised by Roads Service as a result of which works to Sligo Road were carried out by the plaintiff on 19 October 2002. The plaintiff maintains that these works were carried out on foot of the original contract. In fact Mr Nixon accepted that the plaintiffs were separately paid for these works and that they did not arise as a result of any obligation owed by the plaintiff as a result of entering into the contract for Project 2.

[8] Mr Tracy was the senior engineer in charge of the assessment of the PQQs. He explained that the five-year period referred to in paragraph 2 of the statement of agreed facts was to be calculated back from the date of return of the PQQ. He said that he confirmed with the defendant that this was the correct interpretation. He considered that the position was quite clear. Mr Tracy had some recollection of marking this particular project. He remembered the conversation he had with Mr O'Kane two days previously and was surprised as a result of that to see a project submitted that was too old. Mr Black was the plaintiff's referee on that Project 2 and Mr Tracy consulted him to establish whether there was any possibility that work had continued beyond the dates referred to in the PQQ. Mr Black indicated to him that in fact he believed the project was even older and in those circumstances Mr Tracy made no further inquiries. Mr Tracy noted that two other applicants had put in projects which were out of date and he thought that the plaintiffs had simply made a mistake about their dates or hoped that the rules would be bent.

[9] Two bidders who were placed ahead of the plaintiff were approached regarding errors in their PQQ submissions. In section B9 bidders were asked to identify the total value of the project selected and the cost attributable to the applicant. Bidder 3 entered a figure of zero in relation to cost attributable to the applicant. If correct that would have suggested that bidder 3 had done no work on the project. Mr Tracy contacted the referees in relation to this bidder and established that the bidder had in fact done work on the projects and had clearly misunderstood the question. It seems highly likely that the bidder interpreted the question as an enquiry about cost and expense in addition to the project cost. In those circumstances he contacted the bidder and allowed them to enter the correct figure. The bid was then marked on that basis.

[10] Each bidder was marked on the content of its health and safety policy. Bidder five did not submit its health and safety policy with the PQQ. It was apparent from the remainder of the application that the

bidder did in fact have such policy. Mr Tracy contacted the bidder and permitted the bidder to submit the health and safety policy which was then marked. The health and safety policy was provided within a short number of minutes and the evidence indicates that the policy was always in place and the late submission did not advantage the bidder beyond having considered that which it already had.

[11] Where a party initiates a process of competitive tendering and tenders are submitted, a contract may come into existence between the party and the tenderers that governs the manner in which the competition will be conducted. In Blackpool and Fylde Aero Club Ltd v Blackpool BC [1990] 1 WLR 1195 a group of six tenderers were invited to tender for the concession to operate pleasure flights from the local airport. The invitation to tender specified a deadline and indicated that no late tenders would be accepted. The plaintiffs submitted a tender prior to the deadline but the defendant did not empty their post box as a result of which it was not considered. The court held that a contract should be implied which required the defendant to open and consider the plaintiff's tender in conjunction with all other tenders. In that case weight was given to the fact that the group of tenderers were identified by the defendant, that the defendant was a local authority and that the tender procedure was clear, orderly and familiar.

[12] There has been consideration of the circumstances in which a contract should be implied both in this jurisdiction and in England in relation to procurement contracts. Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House Of Commons (1999) 67 Con LR 1 and Lion Apparel Systems Ltd v Firebuy Ltd [2007] EWHC 2179 (Ch) both support the proposition that where the procurement contracts are governed by the relevant Directive and Regulations the legal obligations between the parties should be confined to those arising from those provisions. In Natural World Products Ltd v ARC 21[2007] NIQB 19 Deeny J concluded that even where the Regulations apply a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly. It is not necessary for me to express a view on that difference of opinion and I will not do so in this judgment.

[13] The tender process in this case was on behalf of a single public utility undertaker. It was a highly formal process in which the defendant was advised at all times by a professional project manager. Although it did not reach the threshold for the operation of the Regulations it involved a considerable sum of money. It related to a project which was approximately 20 miles from the land border with the Republic of Ireland. The project was advertised in both Northern

Ireland and the Republic of Ireland and there was at least one response from the Republic of Ireland. This was, therefore, a project with cross-border interest. That gave rise to Treaty obligations particularly in relation to 43EC and 48EC which deal with freedom of establishment and freedom to provide services. All of those factors strongly support the view that a contractual relationship came into existence between the defendant and those who responded by way of submission of a PQQ to its invitation to tender and I am satisfied that such a relationship came into existence in this case.

[14] The next question is to determine the nature of the contractual obligations to which this relationship gives rise. Since the terms of the contract are not express it is necessary to establish what duties are to be implied from the relationship. There are two broad approaches to the determination of whether an obligation should be implied into a contract. In relation to particular contracts an obligation can be implied where it can be demonstrated that the imposition of the obligation is necessary in order to give business efficacy to the relationship (see The Moorcock (1889) 14 PD 634). A term is not simply to be implied because it is reasonable. Applying that test the defendant contends that the plaintiff cannot demonstrate that it is necessary to imply any term in relation to fairness, equal treatment or transparency. At most the defendant contends that the obligation should be restricted to the Blackpool Aero obligation to consider the tender.

[15] There is, however, a second line of authority flowing from cases such as Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555 in which the court will impute to the parties a certain intention by virtue of the nature of the relationship into which they enter. This line of authority was then specifically addressed by the House of Lords in Liverpool City Council v Irwin [1977] AC 239. In that case the parties were the Council which was the landlord of a high rise block of apartments and its tenant and the issue was the nature of the obligation that should be imposed upon the landlord to take reasonable care to keep in repair and lit essential means of access and rubbish chutes. The distinction between the two approaches to implied terms was captured by Lord Cross -

> "When it implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type - sale of goods, master and servant, landlord and tenant and so on - some provision is to be implied unless the parties have expressly excluded it. In deciding whether or not to lay down such a prima facie rule the court will

> naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert. Sometimes, however, there is no question of laying down any prima facie rule applicable to all cases of a defined type but what the court is being in effect asked to do is to rectify a particular - often a very detailed - contract by inserting in it a term which the parties have not expressed. Here it is not enough for the court to say that the suggested term is a reasonable one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the term is necessary to give - as it is put - "business efficacy" to the contract and that if its absence had been pointed out at the time both parties - assuming them to have been reasonable men - would have agreed without hesitation to its insertion."

The majority, Lord Cross, Lord Edmund Davies and Lord Fraser, concluded having regard to the nature of the relationship of landlord and tenant in this high rise block owned by a public authority that the obligations contended for were legal incidents of the relationship. They reached that view on wider considerations of reasonableness and policy. Lord Wilberforce approached the issue on the basis of the necessity test but recognised the elasticity of that test which he described as shades in a continuous spectrum.

[16] There is now considerable support for the view that where one is dealing with the implication of terms in contracts of a particular nature a wider approach can be appropriate. In those circumstances Dyson LJ in Crossley v Faithful and Gould Holdings Ltd [2004] 4 All ER 447 suggested:

> "It seems to me that, rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations."

[17] This contract is a highly formal procurement contract conducted on behalf of a state-owned company by professional project managers. It is not subject to regulation by the Directive or any statutory provision. Although the procurement does not reach the threshold for the Directive the contract to be awarded is for a very substantial sum of

money. The project lies within 20 miles of the land border with the Republic of Ireland. The project has been advertised in the Republic of Ireland and Northern Ireland and there has been at least one application from the Republic of Ireland. Having regard to the size of the project and its location this is a project with an obvious cross-border interest. In those circumstances the Treaty imposes obligations of non-discrimination on grounds of nationality particularly in relation to establishment and freedom to provide services. The defendant has acknowledged all of these obligations in its published material on the internet. In those circumstances I consider that this is a procurement contract of a certain type in which it is appropriate to imply obligations of non-discrimination and equal treatment. Although it is common case that the advertising of the project was sufficient to address any issue of discrimination on grounds of nationality by reason of notification I consider that the Treaty obligations also apply to the assessment and evaluation of the bids and in the circumstances set out above I consider as a matter of domestic law that those obligations should be implied into the tendering contract.

[18] Although this conclusion is consistent with the decision of Deeny J in Natural World Products it is not inconsistent with the decision of Morgan J in Lion Apparel Systems. In the latter case the critical distinction is that the Directive and Regulations provided a formal legal relationship which in the judge's view fully governed the legal obligations to which each of them was subject. I also consider that this conclusion is consistent with the conclusion reached by Judge Lloyd QC in Harmon where at paragraph 216 of his judgment he concluded that there was an obligation to treat the tenderers who responded to the invitation equally and fairly where the competition, for the reasons explained, was being conducted outside the machinery of the 1991 Regulations.

[19] I now turn to the meaning of the terms set out at paragraph 2 of the statement of agreed facts above. I will deal first with the term "within the last five years". In my view these are straightforward words which identify a period commencing with the submission of the PQQ and carry back from that date for a period of five years exactly. Accordingly I consider that any project which was completed prior to 29 August 2002 falls foul of this provision. In its initial submission the plaintiff contended that the relevant period ran from 2002 to 2006 inclusive. When it was pointed out in argument that such an interpretation would mean that no project which was completed in 2007 but which was not substantially complete by the end of 2006 could be considered the plaintiff then altered its submission to contend that the period ran from 1 January 2002 until 29 August 2007. Plainly this is a period in excess of five years and it does not seem to me that

there is any ambiguity suggesting that such a period is contemplated by this provision.

[20] In support of its position the plaintiff referred to two other portions of the document where there was a reference to the past three years. The first related to a request to provide information about staff numbers for the past three years from 2004 to 2007. The point about this request was that it was followed by a table which provided comments for managers, supervisors and support personnel and under the heading “number" then provided for information in respect of the years 2004, 2005 and 2006. This in my view is a straightforward example of the meaning of the term being derived from the surrounding circumstances of the request. This request is in a separate section of the document dealing with resources. It seeks information in relation to numbers "for" the last three years rather than "within" the last three years. I do not consider that this example assists the plaintiff. Similarly the PQQ raises questions in relation to profit, turnover and assets "over the last three years" but then provides a table relating to the calendar years 2004, 2005 and 2006. Again the meaning is to be derived from the context and it is plain that in this case the meaning relates to the relevant financial years. Neither of these examples in my view raises any doubt about the meaning of the terms set out at paragraph 2 of the statement of agreed facts above and I do not consider that the plaintiff has demonstrated any ambiguity arising from the use of the term "within the last five years".

[21] The second issue between the parties relates to the meaning of the term "completed" within the same section. The defendant's case on this point is that works are completed when the contractor has finished its work on the site and handed the project back to the client. At that stage under the NEC form contract a certificate of substantial completion is issued. It is common case that the objective of this requirement in the PQQ is to demonstrate recent relevant work experience on the part of each applicant. Depending on the form of contract, after the handing back of the project to the client there may be continuing obligations on the part of the contractor to remedy defects. In some cases the contractor may have to return but in others he may not need to do so. The form of the PQQ requires each applicant to indicate the form of contract under which each of the submitted projects was carried out. It then requested dates for contract commencement and completion. I have had the benefit of expert opinions from Mr Baldwin and Mr Hegan on the interpretation of this term. Although I recognise the expertise of each of these individuals I do not consider that the meaning of this term in the context in which it is used is much assisted by expert evidence in relation to the meaning of completion within the particular contractual environment.

[22] The plaintiff puts forward a number of possible interpretations for the term "completed". First the plaintiff says that at the earliest the project is not completed until any work required to be done under the project is finished as a result of which the contractor has no further visits to the site. On this scenario if the project is handed over to the client but the contractor has to return to deal with defects that would extend the completion date. I can see force in this submission where the return of the contractor is required in relation to significant or material works affecting the project. I have more reservations where the return to the site is for the purpose of modest landscaping works such as occurred in June 2002. The plaintiff further contends that the completion of the project should encompass the entirety of the defects period and indeed the provision of the final certificate. I do not consider that the provision set out in paragraph 2 of the statement of agreed facts can be construed so as to include these contractual periods where the contractor is no longer on site.

[23] I have already indicated that the plaintiff's selection of this project does not appear to have been carried out with any careful regard to the period during which the work was ongoing. The period of the project contended for in the submitted PQQ is five months from November 2001 to April 2002. It is plain, therefore, that in submitting this project the plaintiff did not rely upon the contractual period including the defects period. It is further clear from the statement of Mr Nixon that he had calculated the date on which the project was completed having regard to his recollection that CCTV works were carried out at the sewer in April 2002. When the debriefing meeting occurred in November 2007 it is clear that the focus of the plaintiff was demonstrating that work was carried out late in 2002 on foot of this project. In particular the plaintiff relies upon the fact that work was carried out at the request of Roads Service in October 2002 and seeks to fix that date as the completion date for the project. As I have already indicated I am satisfied on the evidence that the work in question was not part of the project works but was a separately negotiated agreement and did not have any effect on the extension of the completion date.

[24] On the evidence I consider that the landscape works of June 2002 did not extend the date of completion of this project within the meaning of the disputed term beyond August 2001. If I am wrong in that I consider that the latest date to which completion extended was June 2002. For the reasons given I consider that this was outside the five-year period stipulated within the PQQ and that the project was rightly excluded from consideration from marking by the defendant. Any clarification by the defendant could not have assisted the plaintiff.

[25] The plaintiff contends that the decision to investigate the attribution of zero cost by bidder three in describing "cost attributable to the applicant" constituted unequal treatment. Looking at this on first principles I do not agree. The defendant contacted the referee and established that the answer was clearly wrong. The answer firmly indicated that the bidder had misunderstood the question. By comparison when the referee was contacted in relation to the plaintiff's bid he indicated that the defect was even greater than that suggested. In those circumstances these cases were different and it was within the proper range of discretion available to the defendant to decide not to pursue the matter further. Similarly in relation to the provision of the health and safety policy by bidder five it was plain that the bidder had such a policy already in place. That is to be contrasted with the information available to the defendant that the plaintiff was relying on an out of time project. The decision by the defendant to approach bidder five to secure the health and safety policy that the defendant knew was there was entirely appropriate and does not in my view assist the plaintiff.

[26] There are two relevant authorities in this area. These are both court of first instance commission decisions. In Adia Interim [1996] 3 CMLR 849 a tenderer complained that the commission had not come back to seek clarification of its tender. The court held that in that case that any clarification would have constituted an infringement of the principle of equal treatment since it might have enabled the applicant to alter substantially its tender price. By contrast in Tideland Signal Ltd Case T-211/02 the court noted in the circumstances of that case that the principle of good administration required the Commission to exercise its power to obtain clarification in circumstances where clarification was clearly both practically possible and necessary. In my view these cases support the conclusion which I had reached at paragraph 25 above.

[27] The plaintiff raised 2 further issues in relation to the manner in which its insurance provision was marked and the manner in which subcontractors were treated. There may well be some substance in each of these items but in fact cumulatively they would not have made any difference to the plaintiff's position. In the circumstances I do not need to deal with them.

[28] For the reasons given I consider that the defendant was entitled to exclude the plaintiff's Project 2 and was further entitled to seek clarification of the bids from bidders three and five. Accordingly the plaintiff's case must fail and I dismiss it.