

Neutral Citation no. [2007] NICH 4

Ref: **WEAH4761.T**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **15/06/07**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION**

BETWEEN:

GERARD MARTIN SCOTT & ORS

Plaintiffs;

and

BELFAST EDUCATION & LIBRARY BOARD

Defendant.

WEATHERUP J

[1] Before the Court is a preliminary issue in these proceedings and two questions are raised. First, do the tender documents give rise to an implied term of fairness and good faith? Secondly, if so, does the implied term of fairness and good faith require the absence of any material ambiguity in the tender documents that would significantly affect a tender?

[2] The proceedings are by way of originating summons between the plaintiffs, as contractors, and Belfast Education & Library Board, as employer. Maurice Flynn & Sons Ltd are rival contractors to the plaintiffs and are notice parties to the proceedings. The plaintiffs sought an interim injunction, in the first place restraining the defendant from proceeding with a tendering process in respect of the award of measured term contracts for general building works in two areas, Belfast East and North and Belfast South and West and secondly, the plaintiffs sought an order restraining the award of any measured term contract for the maintenance work. On 31 October 2006, upon an ex parte application by the plaintiffs, I granted an interim injunction.

[3] The plaintiffs relied on three grounds of complaint. After an inter partes hearing I rejected the first two grounds and acceded to a modification of the third ground. An earlier judgment was delivered on 22 December 2006 setting out the position. The result was that the plaintiff's successful ground related to a day-works issue that had not been pleaded by the plaintiff in the manner in which the issue developed at the hearing. The first step was the amendment of the pleadings in order to reflect the issue of the day-works as it had then emerged. The proceedings were adjourned for the amendments to be drafted and the injunction continued in the interim period. The next step was a further hearing on 28 February 2007 in respect of the amendments. I gave leave to make the amendments and continued the interim injunction. There followed the preparation of the preliminary issue which has now been heard.

[4] In essence the plaintiffs argue for an implied contract between tenderers and prospective employers which it is said has developed at common law and has emerged in parallel with legislation on the domestic and European scene in relation to public service contracts and the public interest in relation to the management of public service contracts. A number of cases have discussed the development of implied contracts during tendering and the plaintiffs rely in particular on an extensive judgment of Judge Humphrey Lloyd QC in the Technology and Construction Court in England and Wales in Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons [1999] All ER (D) 1178 and the decision of the Privy Council in Pratt Contractors Ltd v Transit New Zealand [2003] UKPC 83.

[5] On the other hand the defendant rejects any implied contract arising out of all tendering processes and rejects any basis for an implied contract in the present case and any intention to create legal relations. It is argued that the authorities are fact specific and that the Pratt decision proceeded by way of concession by the defendant that there was an implied contract.

[6] Having considered all of the authorities and without reviewing them for the purposes of this present ruling I would state as follows. First of all, I am satisfied that an implied contract can arise from the submission of a tender. It may arise by inference from the scheme of the tendering process and the presumed intention of the parties. Secondly, I am satisfied that an implied contract may arise from a tendering process for a public works contract, even though the particular contract is below the financial level of the Regulations that apply in relation to public works contracts. The parties to such a public works contract as the present are parties to an elaborate tendering process which is designed to achieve best value for the provision of public services. An implied contract arises in the present case. Thirdly, I am satisfied that the implied terms of such an implied contract extend to the implied term of fairness and good faith.

[7] In relation to the first question, the defendant, quite properly, suggests that it should be formulated in this manner - Do the tender documents give rise to an

implied contract, the terms of which are that the employer will act fairly and in good faith in relation to the tenders submitted? The proposed implied term is that of fairness and good faith. Good faith is not an issue in this case. It is a question of fairness. I am satisfied that the concept of fairness applies in a number of respects:

1. Fairness applies to the nature and application of the specified procedures in a particular contract.
2. Fairness applies to the assessment of the tenders according to the stated criteria.
3. Fairness applies to the evaluation of the tenders in a uniform manner and as intended by the tender documents.

[8] If there is a mistake in a tender submitted by a tenderer it may arise by reason of misinterpretation of the documents by the tenderer. If there is no mistake in the tender documents and it is simply a mistake by the tenderer then it appears to me that no issue of unfairness would arise. However if the mistake of the tenderer is occasioned by the employer, for example, because there is an error in the tender documents, then that may give rise to a position where one or more tenderers has adopted a different approach to the tender to that which must have been intended by the tender documents. This in turn may affect the assessment of the tenders and it may affect the uniformity of evaluation of the tenders as there may be a different impact on different tenderers. Such a mistake occasioned by the employer may affect the fairness of the process.

[9] Apart from a mistake in the tender documents there may be an ambiguity. The present case proceeds on the basis that there is some evidence of a mistake by the employer in the preparation of the tender documents, but whether there is a mistake or not, there is evidence of an undetected ambiguity in the tender documents, that is to say such ambiguity as the Plaintiff relies on was only revealed as such after completion of the tender. An undetected ambiguity that has impacted on the approach of the tenderers may affect the assessment of the tenders and it may affect the uniformity of evaluation. An undetected ambiguity may affect the fairness of the tendering process by impacting on procedures or assessment of tenders according to the criteria or uniform evaluation of tenders.

[10] Qualifications have been introduced by the manner in which the second question has been formulated. The qualifications are, first of all, that fairness requires the absence of an ambiguity that is "material". An ambiguity may be material if it is such as to cause the tenderer to proceed on a mistaken basis or on a different basis to other tenderers. Secondly, fairness requires that the material ambiguity has a "significant" effect on the tender. A significant effect is such as to cause the tenderer to submit a tender which is more than negligibly different from the tender which he would otherwise have submitted.

[11] After the hearing the plaintiffs drew attention to a decision of the European Court of Justice in SIAC Construction Ltd v Mayo County Council [2002] All ER (EC) 272 which concerned a tendering process for public works by Mayo County Council. A Council Directive on awarding public contract works requires Member States to have regard to the procedures provided by the Directive. However the decision does contain certain observations which relate to such a tendering process, although it should be emphasised that the present case is not governed by the Directive. What emerges from the conclusion is -

1. The duty to observe the principle of equal treatment of tenderers lies at the heart of the Directive and tenderers must be in a position of equality, both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority.
2. The principle of equal treatment implies an obligation of transparency in order to enable compliance to be verified. Transparency 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. Further, transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire process.
3. Further, when tenders are being assessed the award criteria must be applied objectively and uniformly to all tenderers. If the documents are not capable of being interpreted by the tenderers in the same way then the process may lose that objective and uniform approach to the assessment of tenders.

[12] In answer to the first question - Do the tender documents give rise to an implied contract, the terms of which are that the employer must act fairly and in good faith? - "Yes".

In answer to the second question - Do the implied terms of fairness and good faith require the absence of any material ambiguity in the tender documents that would significantly affect the tender? - "Yes".