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*Judgment: approved by the Court for handing down* | *Delivered:* **26/09/2011**
*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**BETWEEN:**

**HENRY BROTHERS (MAGHERAFELT) LIMITED,**
**F B MCKEE AND COMPANY LIMITED and**
**DESMOND SCOTT and PHILIP EWING**
**TRADING AS WOODVALE CONSTRUCTION COMPANY LIMITED**

**Plaintiffs/Respondents;**

**-and-**

**DEPARTMENT OF EDUCATION FOR NORTHERN IRELAND**

**Defendant/Appellant.**

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**Before: Morgan LCJ, Higgins LJ, and Weatherup J**

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**MORGAN LCJ**

[1] The appellant Government department commenced a competition under the restricted procedure as provided for in Regulation 12 of the Public Contract Regulations 2006 (the 2006 Regulations) for contractors to be placed on a framework agreement (the primary competition stage) whereby they could then tender for individual works contracts (the secondary competition stage). Following their failure to be placed on the framework agreement the respondents, a consortium of building contractors, commenced proceedings under the 2006 Regulations claiming breach of statutory duty, breach of obligations under the EC Treaty and breach of contract. Coghlin J found for the plaintiffs on the issue of liability and ordered that the framework agreement be set aside as the remedy for the breach. The appellant now appeals against those decisions on the grounds that the learned judge erred in finding that price was a mandatory criterion in the selection process for the most economically advantageous tender, that the respondents' claim was not statute barred and that he had the power to set aside the framework

agreement. Mr Giffen QC appeared with Mr McMillen and Mr Williams for the appellant and Mr Bowsher QC with Mr Girvan for the respondents. We are grateful to all counsel for their helpful oral and written submissions.

**Statutory scheme**

[2] The 2006 Regulations were made to implement the obligation of the United Kingdom to transpose Directive 2004/18/EC on procurement through public contracts and also to reflect the requirements of Directive 89/665/EEC which was the operative directive on remedies at the time.

[3] Regulation 2(1) set out the definition of framework agreements.

> "framework agreement" means an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies"

Regulation 12 dealt with the procedures for the award of public contracts and Regulation 19 set out corresponding requirements in relation to framework agreements.

> "**19 Framework agreements**
>
> (1) A contracting authority which intends to conclude a framework agreement shall comply with this regulation.
>
> (2) Where the contracting authority intends to conclude a framework agreement, it shall—
>
> (a) follow one of the procedures set out in regulation 15, 16, 17 or 18 up to (but not including) the beginning of the procedure for the award of any specific contract set out in this regulation; and
>
> (b) select an economic operator to be party to a framework agreement by applying award criteria set in accordance with regulation 30.

(3) Where the contracting authority awards a specific contract based on a framework agreement, it shall—

(a) comply with the procedures set out in this regulation; and

(b) apply those procedures only to the economic operators which are party to the framework agreement…."

[4] The contract award criteria are set out in Regulation 30 and are applied to framework agreements by Regulation 19(2)(b).

"**30 Criteria for the award of a public contract**

(1) Subject to regulation 18(27) and to paragraphs (6) and (9) of this regulation, a contracting authority shall award a public contract on the basis of the offer which—

(a) is the most economically advantageous from the point of view of the contracting authority; or

(b) offers the lowest price.

(2) A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion.

(3) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents or, in the case of a competitive dialogue procedure, in the descriptive document."

Regulation 32 dealt with the provision of information and applied to contracts and framework agreements.

"**32 Information about contract award procedures**

(1) Subject to paragraph (13), a contracting authority shall as soon as possible after the decision has been made, inform any economic operator which submitted an offer, applied to be included amongst the economic operators to be selected to tender for or to negotiate the contract, or applied to be party to a framework agreement, of its decision in relation to—

(a) the award of the contract; or

(b) the conclusion of the framework agreement; and shall do so by notice in writing by the most rapid means of communication practicable.

(2) The notice referred to in paragraph (1) shall include—

(a) the criteria for the award of the contract;

(b) where practicable, the score obtained by—

(i) the economic operator which is to receive the notice; and

(ii) the economic operator—

(aa) to be awarded the contract; or

(bb) to become a party to the framework agreement; and

(c) the name of the economic operator—

(i) to be awarded the contract; or

(ii) to become a party to the framework agreement.

(3) A contracting authority shall allow a period of at least 10 days to elapse between the date of despatch of the notice referred to in paragraph (1) and the date on which that contracting authority proposes to enter

into the contract or to conclude the framework agreement.

(4) Subject to paragraph (13), if by midnight at the end of the second working day of the period referred to in paragraph (3), a contracting authority receives a request in writing, from an economic operator which was sent a notice under paragraph (1), for the reasons why that economic operator was unsuccessful, the contracting authority shall inform that economic operator of the characteristics and relative advantages of the successful tender.

(5) A contracting authority shall give the information set out in paragraph (4) at least 3 working days before the end of the period referred to in paragraph (3), or where that is not possible, the period referred to in paragraph (3) shall be extended to allow at least 3 working days between the provision of the information set out in paragraph (4) and the date the contracting authority proposes to enter into the contract….

(7) Where a contracting authority awards a contract under a framework agreement, that contracting authority need not comply with paragraphs (1) to (5)."

[5] Finally regulation 47 dealt with enforcement.

"**47 Enforcement of obligations**

(1) The obligation on—

(a) a contracting authority to comply with the provisions of these Regulations….

is a duty owed to an economic operator….

(6) A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court.

(7) Proceedings under this regulation must not be brought unless—

(a) the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2) by that contracting authority or concessionaire and of its intention to bring proceedings under this regulation in respect of it; and

(b) those proceedings are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

(8) Subject to paragraph (9), but otherwise without prejudice to any other powers of the Court, in proceedings brought under this regulation the Court may—…

(b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with paragraph (1) or (2)—

(i) order the setting aside of that decision or action or order the contracting authority to amend any document;

(ii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach; or

(iii) do both of those things.

(9) In proceedings under this regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into."

**Background**

[6] The Northern Ireland Schools Modernisation Programme ("NISMP") was instituted by the appellant as part of a policy aimed at reversing historical under-investment in the schools infrastructure in Northern Ireland. The Investment Strategy for Northern Ireland 2005-2015 ("ISNI"), published on 14 December 2005, set out plans for new investment in the schools estate with a view to the creation of modern infrastructure for schools and youth facilities.

[7] On 13 March 2007 the Central Procurement Division ("CPD"), acting as agents for the appellant, published a Contract Notice in the Official Journal of the European Communities which referred to the NISMP and invited contractor-led teams to apply for appointment to the framework agreement for the design and construction, or construction only, of schools or other projects as might be required by an educational body in Northern Ireland. The Notice stated that the framework agreement would last for a period of 48 months and that the estimated total value of projects to be awarded under the framework was £550 million to £650 million pounds.

[8] Framework agreements allow the preliminary work in procurement to be carried out in one exercise which then provides the contracting authority with a pool of contractors who have been assessed as best qualified to carry out individual contracts that are put out to tender. In this case the first-named plaintiff, Henry Brothers (Magherafelt) Ltd., whom Coghlin J described as a long established firm of building contractors, formed a consortium with the second, third and fourth-named plaintiffs for the purpose of submitting a tender for inclusion within the terms of the Northern Ireland Schools Modernisation Framework Agreement.

[9] In order to apply for the Framework Agreement a two stage selection process was used. Firstly there was a Pre-Qualification Questionnaire ("PQQ") stage which all 12 applicant contractors passed. This was followed by an Invitation to Tender ("ITT") stage. On 19 June 2007 ITT documents were sent to all twelve contractors by way of e-mail. These consisted of four volumes comprising Invitation to Tender, Framework Agreement, Works and Site Information and Tender Submissions. During this stage CPD issued eleven ITT Clarification Notes. In particular Clarification Note 4 indicated that tenders would be evaluated in accordance with the weighting specified in the ITT documents namely, 80% qualitative and 20% commercial. This Note confirmed that the commercial section would be based on a submission of direct fee percentages, sub-contract fee percentages and indicative fee percentages for design services. The fee percentage was applicable to Defined Costs (see below) and varied in bands depending upon the value of the contract. The qualitative section was based on the response to 26 questions across seven weighted sections.

[10] Letters issued to successful and unsuccessful contractors on 17 October 2007 and the unsuccessful contractors were afforded a debriefing session. Following the debriefing meeting correspondence ensued between the respondents and the appellant. This took place during a standstill period between the respondents' debrief on 29 October 2007 and 5.00pm on 5 November 2007. On 2 November 2007 the plaintiffs wrote to the Department requesting that the framework agreement should not be concluded and confirming that the letter should be treated as notice under Regulation 47(7)(*a)* of the Regulations indicating their intention to institute High Court proceedings. On 5 November 2007 the appellant wrote to indicate that it intended to conclude the framework agreement on 12 November 2007. On 9 November 2007 the plaintiffs wrote to the Department formally notifying their intention to institute proceedings and on 12 November 2007 a Writ of Summons was issued.

**Fee percentages**

[11] At the trial the learned trial judge noted that the use of fee percentages was intended to address the historic problems with lowest price tenders which introduced a low bid/high claim culture. Other mechanisms of assessing competitive cost had been considered including the pricing of sample schemes as recommended by PWC in 2005 and actual historic projects. The expert retained by the appellant explained in his report that these were of limited utility since contractors often found reasons for arguing that the samples were not representative of the projects to be completed or arguments for amending previous prices. He concluded that the appellant's overall approach to the assessment of the most economically advantageous tenders including the assumption that Defined Costs would be constant between bidders was entirely reasonable and appropriate. Defined Costs were those identified in the NEC 3 A and C forms of contract which were the forms of contract to be used in the procurement exercise.

[12] This conclusion about constant Defined Costs was the subject of considerable scrutiny at the hearing. In cross-examination the appellant's expert modified his view that Defined Costs would remain constant but concluded that they would be harmonised over time. He accepted that the fee percentage would not determine outturn cost. He explained that the ultimate contract price would be developed from a pricing process rather than by way of competition at the secondary stage. The successful tenderer at that stage of the competition would already have been chosen on the basis of its submission on scheme design and the available budget for the particular project. The final costs would then be agreed between the contracting authority and the successful tenderer and the fee percentage applied. That did not accord with the appellant's pleaded case which indicated that detailed

questions at the secondary stage would establish which contractor would be able to construct the school at the lowest Defined Cost.

[13] Mr Taylor, a partner in the firm which was responsible for providing procurement services to the appellant, stated in affidavit that fee percentages were the key financial differentiators between contractors when NEC 3 contracts were used as was proposed here. Accordingly they were a very clear indication of the most economically advantageous offer. He contended that the fee percentages would be applied to the same cost to build by every contractor since they were all sourcing their goods in the same market. In light of the averments by the expert retained by the appellant and the partner responsible for the provision of procurement services the learned trial judge found that the assumption that costs would be equal was the basis upon which the appellant relied upon fee percentages as a very significant factor in determining the most economically advantageous offer. It was the basis upon which the appellant believed it had achieved its objective of competition on price.

[14] In cross-examination Mr Taylor accepted that the fee percentage could not predict outturn cost without the addition of other information and that different contractors might be in a position to provide discounts and more advantageous prices. He agreed that not all of the contractors were equally efficient and that capital cost was an element in determining the most economically advantageous offer.

[15] He also accepted that there might be significant differences as to how staff were allocated between the office and working area and since the contractual Defined Costs were linked to staff in the working area there was no way of telling whether, in the case of a contractor with management staff at head office, an increased fee reflected a greater profit margin or higher overhead costs. He agreed that better management would make the contractor more efficient. He also agreed that the scheme did not include any mechanism designed to identify competitive capital costs.

[16] The learned trial judge concluded that the appellant had used fee percentages as a mechanism for competitively assessing price. The underlying assumption was that Defined Costs would be the same for each contractor. That assumption was incorrect and amounted to a manifest error. In addition fee percentages could give misleading results in terms of competitiveness depending on the manner in which a contractor allocated his management staff. As an indicator of price competitiveness they were unreliable on that account also.

**The submissions of the parties on liability**

[17] The appellant submitted that there were three strands to the learned trial judge's reasoning. At paragraph 25 of his judgment he indicated that he found it difficult to see how one could determine whether a bid was economically advantageous without some reasonably reliable indication of price or cost. He said that it was unnecessary to decide the point because the appellant had conceded that a pricing mechanism was necessary. The appellant submitted that price was only one of the factors which a contracting authority may take into account and the decision whether to do so was within the broad discretionary area of judgment available to the appellant. In this case the appellant chose to reflect its commercial criteria by using fee percentages and the open book negotiating system with the successful contractor. That was the only concession made on behalf of the appellant and it referred to the pricing mechanism established for the secondary phase. It was not, therefore, necessary for the appellant to obtain a reliable indication of overall price or cost.

[18] The learned trial judge referred to the absence of a direct competition on overall price at the secondary stage. It was submitted that Regulation 19(9)(d) required only that the specific contract was awarded to the best tender in the mini-competition on the basis of the award criteria specified. The award of the framework could not have been invalidated by the absence of a direct competition on overall price.

[19] The appellant argued that discretionary judgments are for the contracting authority to make and the court's power to interfere only arises in cases of manifest error. That does not enable the court to intervene because it would have come to a different conclusion. There is nothing to suggest that the appellant ought to have realised that the assumption about contractors using the same Defined Costs was erroneous when made. The concessions by the consultant and the expert called on behalf of the appellant did not amount to a manifest error. The appellant had shown why other approaches to assessment were unreliable.

[20] The respondents submitted that the appellant conducted a procurement exercise on the basis of manifest error. Either the appellant did intend to conduct a comparative financial assessment of bids but was in error in supposing that this could be done by way of comparison of fee percentages or the appellant was in error in supposing that the relative economic advantage of bids could be evaluated without any proper financial comparison at the primary stage.

[21] The respondents also contended that an assessment of an appropriate economic factor such as price or cost must be part of an assessment of the bid which is the most economically advantageous and that financial criteria must

be given appropriate weight. They also submitted that the secondary competition was not transparent because it conferred unrestricted freedom of choice on the appellant.

**Conclusion on liability**

[22] As the submissions of the parties indicate some disagreement as to the learned trial judge's conclusions on liability it is necessary first to identify the basis upon which he found a breach. At paragraph 25 of his judgment he indicated that he had difficulty with the proposition that one could determine the most economically advantageous bid without a reliable indication of price or cost to balance against the qualitative aspects but went on the say that it was not necessary for him to determine the point. We consider, therefore, that he did not determine the liability issue on the basis that there was no direct competition on price. In those circumstances the issue of whether such a competition is necessary does not arise in this appeal.

[23] At paragraph 25 of his judgment he found that the appellant had opted to employ a criterion related to price at the primary competition stage. That mechanism was the use of fee percentages on the basis that since costs were the same or broadly the same between contractors the fee percentage would be a very clear indication of the most economically advantageous offer. The advice to the appellant that this was the case was noted by the learned trial judge at paragraph 19 of his judgment. The appellant is, of course, entitled to rely on the advice of its professional advisers (see SIAC Construction Ltd v County Council of the County of Mayo Case C-19-00) but the advice is subject to analysis to establish whether it was erroneous. In paragraph 20 of the judgment the learned trial judge identified why this advice was erroneous thereby concluding that although the appellant believed it had put in place a competitive pricing mechanism upon which to base its decision making in the primary competition stage in fact it had not done so and was basing its decision making on an unreliable indicator.

[24] At paragraph 28 of the judgment the reliance on this erroneous approach identified in paragraph 20 was held to amount to a manifest error. We do not consider that any criticism can be made of the conclusions reached on this issue by the judge. It is clear that the appellants considered the use of fee percentages was a significant element of the arrangements which would introduce price competition. The error was accordingly significant and was properly described as manifest. We adopt the proposition set out by Morgan J in Lion Apparel Systems Ltd v Firebuy Ltd [2008] EuLR 191 that a case of manifest error is a case where an error has clearly been made.

[25] We accept that the learned trial judge then went on to discuss how the use of fee percentages might have been lawfully achieved. That has provoked some of the submissions made to us but those matters were not material to

the decision which he made on the liability issue. We do not intend to comment on them. We therefore reject the submission that the learned trial judge was in error on the liability issue.

**Time limits**

[26] Regulation 47(7)(b) of the 2006 Regulations provides that proceedings may not be brought under Regulation 47 unless those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the court considers that there is good reason for extending the period within which proceedings may be brought.

[27] On 19 June 2007 ITT documents were sent to the twelve contractors who had passed the PQQ stage. Paragraph 8 of the Memorandum of Information and Instruction to Tenderers reserved to the appellant the right to amend of modify the criteria or the way in which they were applied at any time before the impugned decision. Paragraph 1.7.1 of the ITT provided that any notification or modification of the tender documents would be issued through CPD and would constitute part of the tender documents. The appellant issued 11 clarifications in respect of the ITT between 19 June and 7 August 2007. Clarifications 4 and 6 related to the question of fee percentage and were issued in July. The final date for receipt of tenders was 7 August.

[28] The respondents were informed that they had not been successful in the primary stage on 17 October 2007. There was a debrief meeting on 29 October 2007 and the respondents requested further information on the cost headings included in fee percentage. The standstill period was extended to 5 November initially and then to 12 November. Proceedings were issued on that date, notification of an intention to do so having been given on 2 and 9 November 2007.

[29] Before the learned trial judge it was argued by the appellant that he should apply the principles set out by Dyson LJ in Jobsin Co UK v Department of Health [2002] 1 CMLR 44. In that case it was alleged that the Department failed to comply with the Regulations by omitting to set out the criteria on which it intended to base its decision in a tendering document dated 14 August 2000. The plaintiff agreed that this constituted the breach but argued that the right of action arose on 17 November 2000 when the plaintiff was excluded from the competition. Dyson LJ pointed out that Regulation 47(6) of the 2006 Regulations provides a right of action where there was a risk of loss and damage which he held occurred in August. Stanley Burnton LJ took a different view in Risk Management Partners Ltd v The Council of the London Borough of Brent [2008] EWHC 1094 (Admin). By analogy with the decision of the House of Lords in R(Burkett) v London Borough of Hammersmith and Fulham [2003] 1 WLR 1593 he concluded that grounds for

such a claim first arose when the breach which formed the subject matter of the claim first occurred. The learned trial judge decided that he should adopt the approach taken by Stanley Burnton LJ. He concluded that the breach at issue in this case was the exclusion of the respondents from the framework agreement and that it therefore occurred on or about 17 October 2007 when the respondents were advised that they were excluded. The claim was, therefore, within time.

[30] There have been a number of important decisions on this issue since the hearing before the learned trial judge. First Risk Management [2009] EWCA Civ 490 was itself appealed. The Court of Appeal drew a distinction between the anticipation of a breach and an actual breach. It is only the latter that gave rise to a cause of action. On the facts of that case that led them to conclude that the breach occurred on the date found by Stanley Burnton LJ. Both Moore-Bick LJ and Pill LJ went on, however, to indicate their view that the cause of action arose when there was any failure by the contracting authority to comply with any step in the procedure which involved a breach of duty. The risk of loss or damage was sufficient.

[31] The ECJ then gave judgment in Uniplex (UK) Ltd v NHS Business Services Authority. It is unnecessary to rehearse the factual background in that case but the court held that the principle of effectiveness meant that the period for bringing proceedings seeking to establish an infringement of the public procurement rules or to obtain damages should start to run from the date on which the claimant knew or ought to have known of that infringement. It further held that the requirement to act promptly was unpredictable and did not ensure effective transposition of the relevant Directive.

[32] The effect of that ruling was considered by the English Court of Appeal in Sita UK Ltd v Greater Manchester Waste Disposal Authority [2011] EWCA Civ 156. It was noted that the ECJ did not make adverse comment about the fact that the period for issuing proceedings was limited to three months and approved an approach to the Regulations which applied the three month time limit from the date of knowledge. We agree that this is the correct approach which we should apply in this case. There was then some debate between the judges about the formulation of the degree of knowledge required before time began to run. For the reasons given below we do not consider that we have to resolve that debate.

[33] From these authorities we consider that we can draw three propositions which are material to this case.

(i) The cause of action only arises where a breach of the Regulations is alleged. Anticipation of a breach is not sufficient (see Risk Management [2009] EWCA Civ 490).

(ii) The breach can consist of any infringement of the Regulations which gives rise to the risk of loss or damage (see Risk Management supra at paragraphs 242 and 255, Uniplex at paragraph 29-31 and Sita at paragraph 22).

(iii) Time runs from the date on which the claimant has the requisite knowledge that a breach of sufficient magnitude to justify proceedings has occurred (see Uniplex paragraphs 30-31).

[34] It was submitted by the respondents that since the legal architecture has changed so much since the decision at first instance we should consider remitting the case on this issue. There is no evidence before us that the question of the actual or constructive knowledge of the respondents was ever explored in the trial. We do not, however, consider that such a course is necessary.

[35] The manifest error found by the learned trial judge in this case consisted of the application by the appellant of a criterion on fee percentage in the assessment process on the basis that it was a significant reliable indicator of price competitiveness at the primary competition stage whereas the use of fee percentage alone was inadequate and unreliable for assessing price competitiveness. That assessment necessarily commenced after the receipt of the tenders. They were not due for submission until 7 August 2007. We consider, therefore, that the earliest date on which the appellant could argue for an infringement in this case is 7 August 2007. If that is correct the time limit expired on 7 November 2007. In those circumstances the claim was 5 days late. We note, however, that the claim was lodged on the last day of the extension of the standstill period on 12 November 2007. The original standstill period would have expired within the three month limitation period and was extended because of ongoing correspondence and exchange of information between the appellant and the respondents. If the respondents had the requisite knowledge on 7 August 2007 so that time runs from that date we consider that in view of the fact that the respondent is only 5 days outside the limitation period and that this is contributed to by the ongoing correspondence and extension of the standstill period the limitation period would inevitably have been extended in those circumstances.

[36] The respondents argue that the infringement did not take place until 17 October 2007 at the earliest or that they did not have the requisite knowledge until sometime after 12 August. If they are right in that submission they were within the primary limitation period. Whichever view of the date of the infringement or the date of knowledge one takes we consider that the respondent's claim is not barred by reason of the provisions of Regulation 47(7)(b) of the 2006 Regulations.

**Remedy**

[37] Regulation 47(8) of the 2006 Regulations provides that where a decision by a contracting authority breaches the duty owed to an economic operator a court may order the setting aside of that decision, award damages or do both. These rights are subject to Regulation 47(9) which states that the court does not have power to award any remedy other than damages if the contract in relation to which the breach occurred has been entered into. The learned trial judge held that the Regulations distinguished between agreements to enter a framework agreement and contracts. He held, therefore, that Regulation 47(9) of the 2006 Regulations did not apply to limit the remedy where a framework agreement had been entered into. In those circumstances it was open to him to set aside the framework agreement and he did so.

[38] The appellant submitted that the term contract in Regulation 47(9) included the making of framework agreements. Such an interpretation did not offend EC legislation. The Remedies Directive 89/665/EEC provided in Article 2(6) that member states be permitted to limit the remedy for infringement of the duty owed to an economic operator to damages where the contract had been concluded and awarded. Since the procurement directives in force at the time this Directive was made did not include framework agreements the Remedies Directive did not make any reference to them. This Directive has now been amended by Directive 2007/66/EC which specifically defines framework agreements as contracts and enables member states to limit the remedy to damages where the agreement has been entered into. Although the obligation to transpose that Directive had not arisen in relation to the events with which these proceedings were concerned the appellant nevertheless asserted that the submission for which it contended was consistent with EC law.

[39] Secondly the appellant submitted that in any event framework agreements are contracts as a matter of domestic law and there was, therefore, no reason to treat them differently in Regulation 47(9). It was, however, accepted that framework agreements can arise in many different forms some of which give rise to obligations and some of which specifically do not create any obligation on the parties to the agreement. In the alternative the appellant argued that the framework agreement the subject of these proceedings was a contract as a matter of domestic law and that was sufficient.

[40] Thirdly the appellant placed emphasis on the standstill provisions in Regulation 32. These provisions required the contracting authority to communicate its decision and provide information to disappointed applicants at least 10 days prior to entering the contract. The appellant relied on the fact that these provisions also apply to framework agreements to support its submission that the policy of the 2006 Regulation is to treat framework

agreements as contracts. In particular Regulation 32 provides that these standstill provisions do not apply where the contract being awarded is entered into pursuant to a framework agreement. In other words the only standstill period where the contracting authority is using a framework agreement to award contracts is the point of entry into the framework agreement itself.

[41] Lastly the appellant submits that the wording of Regulation 47(9) also supported its interpretation. The provision applied if "the contract in relation to which the breach occurred has been entered into". If the breach alleged was the entry into the framework agreement that supported the view that the policy of the Regulations was to treat framework agreements as contracts. On the other hand if there has been a breach in entering into the framework agreement that will constitute an infringement for any contract awarded under it in which there is a risk of loss or damage to the relevant economic operator.

[42] The respondents submitted that the definition of "framework agreement" in regulation 2(1) made it clear that a framework agreement is a different legal concept from the award of a contract. That distinction is also found in Regulation 19 which draws the distinction between a framework agreement and a specific contract awarded under it. Where the Regulations were intended to apply to framework agreements specific provision was made even within regulation 47 itself.

[43] The respondents also submitted that the policy of the 2006 Regulations was to protect vested contractual rights arising from the award of a contract. There were good policy reasons for distinguishing between protection for those who had entered into a binding contractual relationship governed by one contract and those who had the prospect of achieving such contracts over what might be a 4 year period if successful in any secondary competition.

**Discussion on remedy**

[44] The issue is the meaning of the term contract in Article 47(9) of the 2006 Regulations. That must depend upon a reading of the 2006 Regulations as a whole and the domestic and European background against which they were promulgated (see A-G v Prince Ernest Augustus of Hanover [1957] AC 436 at 463). Framework agreements are defined in Regulation 2(1) as agreements or arrangements under which economic operators will enter into contracts with contracting authorities. There is, therefore, an immediate distinction drawn between the award of a contract and the entry into a framework agreement.

[45] Regulation 12 describes the mechanisms which a contracting authority can use for the award of public contracts using principally the open or restricted procedure. Regulation 19 sets out a parallel template for entry into

framework agreements up to the point of the procedure for the award of any specific contract. That tends to reinforce the distinction within the Regulations between framework agreements and public contracts. Public contracts are those which are subject to the regime set out in Directive 2004/18/EC. We do not consider that the reference to specific contracts assists the appellant. A framework agreement may contemplate a series of contracts with somewhat different features and this terminology is designed to catch any such contract.

[46] Regulation 19(3) deals with the award of a specific contract under the framework agreement. While we accept that this provision and those immediately following it does not purport to determine the status of a framework agreement as a matter of domestic law it does support the contention that a distinction is drawn in the Regulation between contracts and framework agreements.

[47] The distinction between the award of public contracts and the entry into a framework agreement is further apparent from Regulation 30 dealing with award criteria. Framework agreements are subject to the same criteria because of the provisions of Regulation 19(2)(b). This is another example within the Regulations of expressly applying a provision to framework agreements where it is intended to do so. The distinction between framework agreements and contracts is necessary because the function of a framework agreement is to provide a pool from which the award of a contract can be made.

[48] The appellant laid considerable emphasis on Regulation 32 set out at paragraph above. These provisions implement the standstill provisions required by the ECJ decision in C-81/98 Alcatel Austria AG [1999] ECR I-7671. Regulation 32(1) requires the contracting authority to advise any economic operator who has made an offer or applied to be party to a framework agreement to be informed of the award of the contract or the conclusion of the framework agreement (we have left out of account the other methods of entering the contract which are not relevant). In our view this once again emphasises the distinction within the Regulations between the award of a contract and entry into a framework agreement.

[49] The appellant contended that Regulation 32(7) which provided that a contracting authority did not have to comply with the standstill provisions where it was awarding a contract under a framework agreement supported the view that once the framework agreement was entered into it should receive the same protection from challenge as the award of a contract. We do not accept that such an inference follows. A framework agreement is intended to be a mechanism for call off of contracts. It can last for a period of up to 4 years. The policy choices open to the legislature were to make the award of each contract subject to the standstill period or to have one such period at the entry into the framework stage. We consider that Regulation 32(7) was an

administrative convenience which did nothing to diminish the distinction within the Regulations between contracts and framework agreements. An economic operator who has any concern about any of the contracts to which the framework agreement may apply has an opportunity to utilise the standstill provisions before the award of any contract through this mechanism. We do, of course, accept that by the time any framework agreement is entered into any infringement of the duty owed to an economic operator should be apparent as should the risk of loss or damage. That explains why the Remedies Directive was amended in 2007 in the way in which it was.

[50] Regulation 32(5) provides for the 10 day standstill period between the date on which the contracting authority sends the notice under Regulation 32(1) and the date on which the contracting authority proposes to enter into the contract or conclude the framework agreement. This is the clearest possible distinction between the award of contracts and the conclusion of framework agreements. Regulation 32(4) provides a mechanism for the economic operator to require the contracting authority to provide information which by Regulation 32(5) it must provide at least 3 working days before the expiry of the 10 day period or alternatively extend the said period so that the information is provided at least 3 working days before the contracting authority proposes to enter the contract.

[51] The appellant contended that in this instance the Regulations must have equated the award of a contract with entry into a framework agreement. We do not agree for three principal reasons. First it is necessary to remember that the purpose of a framework agreement is to enable a contracting authority to proceed unhindered in calling off a series of contracts. Once the framework agreement is in place, the call off can proceed quite rapidly. Making the provision of the necessary information dependent on the time at which the contracting authority intends to award a contract under the framework agreement generally will not therefore lead to any significant extension of the timescale.

[52] Secondly, framework agreements usually give rise to very limited obligations if any. The fact that the contracting authority has entered into a framework agreement which may then have to be set aside is not likely to create the same considerations of vested contractual rights and impacts on third parties that would arise if a contract were set aside.

[53] Finally it is necessary to remember that the enforcement obligations in these Regulations were formulated against the background of Directive 89/665/EEC. Article 2(6) provided that the power to limit the remedy to an award of damages was only available after the conclusion of a contract following its award. In our view that explains why the draftsman focussed on the issue the contract when looking at the circumstances in which the remedy

could be limited and the extended time limit for the provision of the information. On this view of the Directive it was not open to a member state to limit the remedy to damages at the stage of entry into the framework agreement because no contract had been concluded following its award. That would only happen under the framework agreement. Whether that is necessarily so may be the matter of some debate but it explains the structure of the Regulations.

[54] We do not consider that this issue is affected by Directive 2007/66/EC. There is now a clear power to limit the remedy to damages at the framework stage but there is no obligation to do so. There is also nothing in the making of the amended Directive which undermines the analysis set out above.

[55] We consider that the use of the term contract in Regulation 47(9) was intended to exclude framework agreements. We do not consider that there is any basis for failing to give proper effect to the clear differentiation in the Regulations between contracts and framework agreements. Accordingly we agree with the learned trial judge that it was open to him to set aside the framework agreement.

**Conclusion**

[56] We have considered the application to refer to the European Court three points of law. The first point is whether price must be a component of any award criteria. We do not consider that this point arises on the approach we have taken to this case. The second point is whether the use of fee percentages constitutes a legitimate price mechanism. That is plainly a matter of the application of the law to the facts of the case. The third point is whether the restriction in national law implementing Directive 89/665/EEC to the remedy of damages where the contract has been entered into precludes the same restriction for framework agreements. We have made no decision about this question in this appeal. We consider, therefore, that we should not refer these issues.

[57] For the reasons set out we consider that this appeal must be dismissed.