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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **25/01/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

McCONNELL ARCHIVE STORAGE LIMITED

Plaintiff;

v

BELFAST CITY COUNCIL

Defendant.

DEENY J

[1] These proceedings raise a novel issue of general application regarding public service procurement contracts. The plaintiff, who was represented by Mr Paul Maguire QC and Mr Paul Boyle, engaged in the provision of document storage, and the collection, retrieval and management of records, in Northern Ireland and is a subsidiary of a larger group of companies. The defendant, which was represented by Mr Michael Bowsher QC and Mr David Scoffield, is the local authority for the City of Belfast. The City Council are vacating Belfast City Hall for a period of two years or so in order that the building be refurbished. One of the consequences of that is that the records currently stored in the building will have to be stored elsewhere. The Council decided that they wished to contract out not only this function but the more general function of storing and retrieving their records over the next 5 years (with possible extensions for up to 5 years more). They prepared tender documents. In compliance with the relevant legal provisions, to which I will turn later, notice was published in the Official Journal of the European Union. The plaintiffs received the tender documents on 20 February 2007. Among other things these documents set out the criteria for awards. 70% of the points were to be awarded for "quality" and 30% for "cost". The plaintiffs were one of five tenderers, or "economic operators" in the words of the Public Contracts Regulations 2006, who tendered for the contract or part of it. One could tender for the document aspect of the contract without tendering, for

example, for the storage of artworks. While the City Council were evaluating the tenders they sent an enquiry by email to the plaintiffs which was answered. The enquiry was also sent to at least one other bidder, namely Morgan Record Management (Morgans).

[2] In the course of a meeting at the City Hall there was some conversation between an official of the Council and an employee of the plaintiff. Although mentioned in the papers it was not pressed by counsel. I consider that was a correct approach. The court would be slow to impose a legal liability on a public authority based on an ex tempore oral statement by a member of its middle management.

[3] On 17 July 2007 the defendant wrote to the plaintiff in the following terms –

> "I am pleased to tell you that your tender for the above has been successful, subject to the ten working day standstill period as outlined in the specifications and to a Form of Contract being drawn up by Legal Services."

This was signed by Valerie Cupples the procurement manager of the Council. The legal consequences of that letter are the subject of detailed submissions to which I will later turn. The reference in the letter to the ten working day standstill period is a reference to regulation 32(3) of the Public Contracts Regulations 2006 which require a contracting authority, such as the Council, to allow a period of at least ten days to elapse between the date of despatch of a notice to the "economic operators" who have been successful or unsuccessful in a tender and the date on which the contracting authority proposes to enter into "the contract". That in turn stems from a decision of the European Court of Justice in Alcatel v. Austria and Others CA-81/98.

[4] Among the unsuccessful bidders was Morgans. They had the second highest number of points being 71.5 consisting of 65.8 for quality but only 5.7 (out of 30) for cost. They were told this information on or about 17 July and the name of the successful tenderer i.e. the plaintiff. They asked for and obtained a debrief meeting on 19 July and raised the objection with the Council that it had grossly over estimated their contract price. Morgans asked for a copy of the spreadsheet used by the Council to evaluate their costs and they were provided with this by email on 20 July 2007. It should be noted that this was the subject of complaint by the plaintiffs at the hearing of this matter. Morgans replied within a few hours of receiving the spreadsheet in the following terms –

> "We have looked at the spreadsheet and your scenario is incorrect as there are a number of very obvious and very significant errors in relation to

> journey charges, specifically in 3.2.1, 3.2.2, 3.4.1 and 3.4.2. For example 3.2.1 asks for 15 boxes per week within office hours next working day. As you have asked for next working day delivery and there are only 5 working days in a working week the maximum number of journey charges should be 5 not 15 as worked out in your figures.
>
> The journey charges are applied on a per trip basis and not per department so for example all requests made on a Tuesday for next day delivery would be made on one trip on the Wednesday incurring only one journey charge. At no point did we say each department would be charged a separate journey charge.
>
> 3.4.1 and 3.4.2 asks for collections of boxes/files by the successful contractor and if you look at our tender response and my email to you of 31 May [referred to above] a journey charge would not be applied as boxes/files would be returned to us on the same delivery trip thus incurring no additional journey charge.
>
> We estimate the total error to be in the region of £80,000 plus which would drastically reduce our overall cost."

[5] The City Council has decided that these strictures were justified and that they did in fact evaluate this bid erroneously. Indeed two of the other bids had a similar approach and they, like Morgans, were re-evaluated by the City Council. Ultimately the City Council having re-evaluated these three bids concluded that the most economically advantageous bid was that of Morgan's and made a fresh award of the contract to them. That has not been executed pending the outcome of these proceedings. Therefore the plaintiffs having believed they had been awarded the contract in July found a month later, by successive letters, that the matter was being re-evaluated and that they had then "lost" the contract.

[6] The criticism made by Morgans, which was in turn attacked by counsel for the plaintiff, arises in this way. Part of the tender documents was a "Pricing Schedule – Office Records at 112. Removal and storage of records from the City Hall was a relatively simple matter. But the Council also required quotations for: "Cost for the preparation, removal to storage, retrieval and shredding of additional records over the 10 year period of the contract" (sic). Both the plaintiff and Morgans then put a figure opposite each pound sign for

the 21 sub categories identified by the Council. It would appear that most estimates were in pence rather than pounds because of the nature of the work. However the plaintiff's bid diverged from that of Morgans, and apparently that of two other bidders, at 3.8. There the Council had written: "Any other charges – please specify". The plaintiffs mentioned two small charges which they felt had not been covered by the previous categories at that point. Morgans, however, and two other bidders, introduced a journey charge to apply to all deliveries/collections i.e. "a flat charge per journey for up to 200 boxes maximum per journey" depending on how quickly they were needed and whether it was within or without office hours. They said –

> "The above journey charges are there in an effort to encourage environmentally friendly operating i.e. consolidating deliveries/collections."

[7] They also gave details of two other smaller items. Therefore the Morgans bid was to be read on the basis, as their email sought to point out, that they would consolidate deliveries by each working day and charge a small charge for each item and another charge for each journey which they had to make calling at different City Council locations. The plaintiffs were highly critical of the Council for re-evaluating Morgans bid on this basis. They contended that it was Morgans fault for not subscribing to the original scheme laid down by the Council. However they faced the difficulty that 3.8 in the Council's schedule clearly left it open to a bidder to describe other charges in the way that three of the bidders did. Furthermore as averred in the affidavits of Valerie Cupples there were other references in the tender bid by Morgans to this consolidation of journeys for environmental (and no doubt economic) reasons e.g. e-mail of 31 May, pp 185, 186. It was also averred that this was a common industry practice and this averment does not appear to be disputed. The onus is on the plaintiff to prove its case. There was no application to hear oral evidence or cross-examine on the affidavits. I find that this aspect of the Council's decision was a lawful one within the range of reasonable conclusions open to it.

[8] The Council then took legal advice in late July as to how it should proceed. It concluded that it had interpreted Morgans bid erroneously. The Council then wrote to the plaintiff on 15 August 2007 informing them of that and that the Council had "therefore decided to simply re-score the relevant tender on the correct basis, which involves no alteration or amendment to the figures which have already been provided in that bid." The plaintiff wrote on 16 August seeking a meeting and setting out some of the points that they would subsequently rely on. By letter of 21 August the City Council said they would gladly meet with the plaintiff "on completion of the re-evaluation and will arrange this on request". They reiterated that their own evaluation panel had misinterpreted one of the bids. They dealt with some of the other points made by the plaintiff. They did not permit the plaintiff any role or

involvement in the re-evaluation which was then underway. The Council denied that the disappointed bidder had been given access to submitted prices from the other bidders.

[9] Subsequently on 23 August 2007 the City Council wrote to the plaintiff (and others) informing them that Morgans, following the exercise referred to, had been found to have submitted the most economically advantageous tender. A further ten day standstill period was imposed.

[10] The format of the letter in my papers at pages 132, 133 is slightly unusual but the second page of the letter appears to set out Morgans' successful score against the plaintiffs. Morgans had now almost caught up with the plaintiff on cost and had always been ahead of them on quality and now succeeded overall. By undated letter at page 135 of the papers the plaintiff sought a further meeting with a view to a legal challenge. This was followed by a letter of 30 August from their solicitors. Attempts were made to arrange a meeting. The plaintiff's solicitors also wrote on 4 September 2007 seeking answers in writing to some 58 questions. The Council declined to answer those saying that they were in the nature of the interrogatories. However by letter of 10 September 2007 the Council did descend to some particularity about the matters which Morgans had raised. Inter alia they said (at page 154) that they had been advised that Morgans' complaint was well founded and that if it was not evaluated on the correct basis the decision to award the contract to McConnell was liable to be set aside by the High Court. There was subsequently a meeting on 12 September 2007 between representatives of the plaintiff and their solicitor and a number of representatives of the City Council. Two minutes exist of that meeting. As the Council remained of the same position a letter prior to claim was written by the plaintiff's solicitors on 17 September 2007. An originating summons was issued on 21 September seeking, inter alia, an order for specific performance of the (alleged) contract made between the plaintiff and the defendant on 17 July 2007. An application for an interlocutory injunction was compromised on the defendant's undertaking not to enter into a contractual relationship with Morgans until the High Court had had an opportunity of hearing and giving judgment on the matter.

The common law position

[11] A claim of the type brought by the plaintiff arises both at common law and under regulations made pursuant to European Directive. I recently reviewed the position at common law in Natural World Products Limited v Arc 21 [2007] NIQB 19. I adopt what I said in that case at paragraphs 3-5, for convenience.

"[3] At common law [counsel] acknowledged the decision in Blackpool and Fyld Aero Club Limited v Blackpool Borough Council [1990] 1 W.L.R. 1195 C.A. Bingham LJ, as he then was, found that the counsel had a contractual duty to at least open and consider the tender of the plaintiff in conjunction with all other conforming tenders as the parties had intended to create contractual relations to that limited extent. Stocker LJ, was in agreement with this and said at page 1204 that the decision of the council was not limited beyond that provided it was bona fide and honest with each tenderer.

[4] The defence relied on Fairclough Building Limited v Borough Council of Port Talbot 62 BLR 82, C.A. that followed the decision in Blackpool in finding that the Council did have a duty to consider the tender of Fairclough but it distinguished it. In that case after six companies were selected for tender and after Fairclough in particular was invited to tender the wife of a director of Fairclough became the Principal Architect of the Council with the duty of reviewing the tenders. She pointed this out to the Borough Engineer, who, after hesitation, removed her from the review team and reported the matter to the Committee. The relevant Council Committee resolved to remove Fairclough from the select tender list for the project. They brought proceedings for breach of contract. They failed above and below. Parker LJ considered that in that situation the Council either had to remove Mrs George completely from the process or remove Fairclough. At page 93 he said:

> 'It seems to me that the judge was quite right in saying that the question was whether the decision was reasonable, and in that regard it must mean whether it was a reasonable decision for reasonable councillors to take. It is perfectly true that they will consider the position of the tenderer, but what has to be considered is whether the Council acted reasonably or not.'

Nolan LJ, agreed (as did Kennedy LJ) but put the matter slightly differently, at page 94:

> 'A tenderer is always at risk of having his tender rejected, either on its intrinsic merits or on the ground of some disqualifying factor personal to the tenderer. Provided that the ground of rejection does not conflict with some binding undertaking or representation previously given by the customer to the tenderer, the latter cannot complain.'

> [5] In Harman CFEM Facades (UK) Limited v Corporate Officer of the House of Commons QBD (TCC) 28 October 1999, Judge Lloyd QC, in the Technology and Construction Court held, at para. 216, that a contract was to be implied from the procurement regime required by the European Directives 'whereby the principles of fairness and equality form part of a preliminary contract of the kind that I have indicated. Emery (1996) 28 CLR (2d) 1, shows that such a contract may exist at common law against a statutory background which might otherwise provide the exclusive remedy. I consider that it is now clear in English law that in the public sector where competitive tenderers are sought and responded to, the contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly: see the Blackpool and Fairclough cases.' In Pratt Contractors Limited v Transit New Zealand (2003) B.L.R. 143, the Privy Council aprobated the view that the client must act fairly and in good faith, but held that that did not mean that they had to act judicially; it did not have to give Mr Pratt a hearing or enter into a debate with him."

It is interesting to note, per Lord Hoffman, para. 49 of Pratt, that their Lordships agreed with the Court of Appeal in New Zealand that even if there was a breach of the terms of the preliminary procedural contract that did not vitiate the contract if it would have had "no causative effect on Pratt's failure to obtain the contract".

The European and Statutory Law position

[12] Some of the principles guiding the European Courts in this sphere date from the Treaty of Rome itself. The most recent expression is found in

European Directive 2004/18/EC with regard to the procedures for the award of contracts by public authorities. The principle of equal treatment is one of the principles to be found in the directive at recitals 2 and 46. The directive has been incorporated into domestic law by The Public Contracts Regulations 2006 which apply in England, Wales and Northern Ireland. It is not in dispute that the contract in question here is a Part V services contracts under Part B of Schedule 3 to the Regulations. As a result of that only some of the provisions of the Regulations apply. The defendant here is a contracting authority within the meaning of the Regulations and the plaintiff is an economic operator – see Regulations 3 and 4. Regulation 4(3) provides:

> "That a contracting authority shall …..
>
> (a) treat economic operators equally and in a non-discriminatory way; and
>
> (b) act in a transparent way."

As the plaintiff rightly submits the requirements of fairness depend on the circumstances and facts of a particular case. As Lord Bridge said in Lloyd v McMahon [1987] A.C. 625 at 702:

> "To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which affects the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

The European Court of Justice has held that the principle of non-discrimination applies to all the stages of the tendering procedure. Commission v France (Case C-16-98 at paras. 107-108). Having briefly referred to those principles I will consider further relevant regulations in the context of the case for the plaintiff.

[13] While the full extent of the duty on a public authority in this context has not been conclusively defined it is clear that it must act in good faith, and fairly and apply equal treatment to each tenderer in the interpretation and assessment of the tender bids. But it is not deprived of a considerable area of discretion so far as its assessment of the bids is concerned and nor is it obliged to give a hearing to the bidders. It must apply the Regulations and the procedural rules set out in its own documents, and, where necessary, give reasons for its decisions.

The approach on an application of this kind is analogous to a judicial review of a decision by a public body.

Plaintiff's principal argument

[14] The plaintiff submits that it was not permissible for the defendant having "awarded the contract" to the plaintiff to re-award it to another tenderer. The essence of their submission is that the ten working day standstill period merely allows a contracting authority to apply, in the United Kingdom, to the High Court to set aside its own decision to award the contract to the economic operator named in the initial notice. One first looks to the Regulations themselves to see whether they support such a contention. No such support is to be found. I set out the express wording of Regulation 32(3). "A contracting authority shall allow a period of at least ten days to elapse between the date of dispatch 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." (emphasis added) That clearly conveys that the parties are not in contract at that stage. Nor does the language of Regulation 31 relating to a contract award notice support the plaintiff's contention. It does not seem to me that the other Regulations support this contention either. Regulation 47 deals with the enforcement of obligations and the duty of the contracting authority to an economic operator. Article 47(6) provides that a breach of the duty is actionable by any economic operator which, in consequence, suffers loss or damage and such proceedings shall be brought in the High Court. It is interesting to note Article 47(7), equivalent to Regulation 32(4)(a) in the previous Regulations, which imposes a duty on the economic operator to inform the contracting authority of its intention of bringing proceedings. Furthermore paragraph (b) of that Regulation says that proceedings must be 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. Regulation 47(8) sets out the powers of the court, not only in relation to an interim order but, where a contracting authority is in breach of its duty, to set aside the decision or award damages to the economic operator or both.

[15] Regulation 47(9) provides that the court does not have power to order any remedy other than 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." However if Mr Maguire is right would not all disappointed economic operators applying to the High Court be facing the situation where the contract had been entered into, as he contends, by the issuance of the contract award notice? In those circumstances what is the purpose of Regulation 47(8)? This seems to me to also point strongly against his submissions.

[16] As I said in paragraph 3 the standstill period stems from the decision of the European Court of Justice (Sixth Chamber) in Alcatel Austria AG and Others v Austria. However I reject the suggestion that this is authority for the propositions of Mr Maguire in this regard. Paragraph 29 refers, in dealing with the first question before the court to the contracting authorities decision "prior to the conclusion of the contract". Paragraph 37 finds that Article 2(6) of Directive 89/665 draws a distinction between the stage prior to the conclusion of the contract, to which Article 2(1) applies and the stage subsequent to its conclusion, when damages may be awarded. Paragraph 38 points in the same direction as does paragraph 43. It seems to me that no contract has been concluded at the time that the standstill agreement comes into effect.

[17] There is nothing surprising about such a conclusion. While it is true to say that some public bodies which have made a decision, normally when acting in a quasi judicial capacity, are not at liberty to vacate that decision themselves, even if they might wish to do so, it is more generally the case that a public body not acting in a quasi judicial capacity is permitted to alter its decisions when good reasons occur. It would be contrary to public policy to require a contracting authority in this context to be obliged to go to the High Court every time it has identified a flaw in its own conduct of the contracting process which leads it to conclude that the notice of awarding the contract should be vacated and the tender procedure revisited. One of the public policy reasons would be the avoidance of cost necessarily involved in such an application. This would be cost to the contracting authority but both the successful tenderer and the potentially unsuccessful tenderers may feel obliged to join in or oppose such an application to the court. Inevitably delay will be caused while such an application is decided, or least the effluxion of time. If, on the other hand, a contracting authority is at liberty to correct its own errors, the only applications to the court will be from unsuccessful tenderers at the conclusion of the initial tender process and any extension or re-evaluation thereof, and in the light of all the circumstances. Such applications are likely to be less numerous. Pursuant to Regulation 47(6) they would have to be brought by an economic operator which "in consequence suffers or risks suffering, loss or damage." As Mr Bowsher contended that

would exclude those without a realistic chance of succeeding in the tender if the contract was set aside.

[18] In support of the view which I have formed I note a number of obiter dicta relied on by the respondent. In Luck v London Borough of Tower Hamlets [2003] EWCA Civ 52, at paragraph 42 Rix LJ on behalf of the court was dealing with the then requirement under Regulation 32(4)(a) for an economic operator to put the contracting authority on notice of intended proceedings.

> "Fourthly, inasmuch as it has been said on behalf of Mr Luck that para (a) lacks rationality or is a disproportionate restriction on access to justice, in breach of the ECHR, we disagree. The reason for para (a) is obviously twofold. First, to put the contracting authority on notice of the complaint even before any proceedings are commenced, at a time when it may still be possible not only to avoid litigation but actually to remedy the default. That is why it is necessary to draw attention to the duty in Regulation 32(1) and to the particular breach complained of: so that the contracting authority can take action straight away to remedy the situation if the complaint is recognised as valid." (Emphasis added).

I respectfully agree with the view expressed therein. The respondents also rely on dicta at paragraph 36 of Kauppatalo Hansel Oy (C – 244/02) and at paragraph 74 of Universale-Bau AG and Others (KC-470-99). For all these reasons I find that a contracting authority is at liberty during the standstill period, or an extension of the same, to re-open the contract assessment and award the contract afresh when it is satisfied that it is right to do so because the initial decision to award the contract to one economic operator was in fact grounded on illegality, bad faith or material unfairness or misinterpretation.

Plaintiff's other criticism of the respondent's conduct of the tendering process

[19] In considering the plaintiff's other criticism of the conduct of the tendering process by Belfast City Council I think it helpful to begin by referring to a judgment of the court of first instance of the European Court in Tideland Signal Limited v Commission of the European Communities (Case T-211-02). In that case the Commission itself was the contracting authority. Among the findings of the court were the following:

> "33. The Court recalls that the Commission enjoys a broad margin of assessment with regard to the factors

> to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Review by the Community Courts is therefore limited to checking compliance with the applicable procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers."

I move on to deal with Mr. Maguire's criticisms in his skeleton argument and oral submissions.

[20] The plaintiff contends that Morgans did not complete the tender documents in a proper and compliant way and it was therefore unlawful of the Council to accept let alone prefer their bid. (See 5.9 and 5.14 of skeleton argument and oral submissions). However for the reasons set out at paragraphs 4 to 7 of this judgment I find that the approach adopted by Morgans (and two other bidders) was a valid approach to the tender documents and that the City Council were entitled to accept that approach.

[21] The plaintiff then makes a series of criticisms of what happened after Morgans learnt that the Council were proposing to award the contract to the plaintiff. The first of these complaints (5.11 of the skeleton argument) is that Morgans were allowed to provide new and additional information about their costs in relation to the frequency of journeys and the capacity of a single journey to subsume collections into deliveries. It will be recalled that an economic operator in the position of Morgans has a statutory right under Regulation 32 to make a request during a ten day standstill period for the reasons why that economic operator was unsuccessful and the contracting authorities are under a duty to provide such information. It must be an inherent part of the operation of this system, given the finding I have made on the plaintiff's principal point, that a disappointed economic operator such as Morgans is entitled to comment on the reasons for their rejection and draw attention to a material error, if such exists, on the part of the contracting authority. Therefore generally the court would be slow to criticise a contracting authority in the exercise of its discretion (see Regulation 32(13)) as to the disclosure of information to the disappointed operator or the receipt of information from it. In any event on a factual basis I find that in documents such as those to be found at pages 183, 184 and 186 Morgans had indicated their approach in relation to the frequency of journeys and the capacity of a single journey to subsume collections into deliveries, at an earlier stage than the award to McConnell. I note that the Council also relies on paragraph 22 of the Instructions and Information For Tenderers regarding arithmetical errors in support of its case. It also relies on the decision of this court in the Arc 21 case as authority for the proposition that clarification of a bid by a tenderer is permissible. It must be borne in mind that the overall purpose of these regulations is to ensure that public bodies discharge their procurement

duties in as efficient a way as possible, unclouded by any bias or error. It is therefore right that they can seek and that a tenderer can provide clarification. I acknowledge Mr Maguire's argument that Morgans may not have made it crystal clear originally what they had in mind. However given the unchallenged evidence that their approach is customary industry practice and the duty on the contracting authority to achieve the most economically advantageous outcome I do not see that as a ground for quashing this decision by the Council.

[22] The plaintiff complained that the Council gave to Morgans, commercially sensitive information about its bid. It transpired that in fact the plaintiff had signed a form saying the information was not commercially sensitive. The Council told Morgans that McConnell's bid was 81.7% cheaper than Morgans. The Council however pointed out that recording the cost scores of 5.7 versus 30 for McConnell would convey exactly that information. In any event to perform its duty under Regulation 32 the Council has to convey sufficient information to the disappointed economic operator. Mr Bowsher submitted that some substantive indication must be given e.g. whether they were just behind in quality or just behind in cost or somewhat or very far behind in one or other topic and that the precise information that would be given in any situation would be a matter for the discretion of the Council. If an economic operator during the standstill period so requests, the contracting authority is obliged under Regulation 32(4) to "inform that economic operator of the characteristics and relative advantages of the successful tender". Finally, the mere possession of the information would only lead to unfairness justifying the striking down of the contract if Morgans had been permitted in the light of the information to change its bid. I am satisfied that that did not happen here. I therefore reject this submission also. Mr Maguire did point out that subsequently his client was not given the same information as Morgan had been given. I will return to this subsequently.

[23] It was suggested that the plaintiff should have been involved in the re-evaluation of the bid of Morgan and the other two bidders once the Council had decided it had interpreted their bids erroneously. I can see no legal basis for such an obligation. Furthermore having read the evidence and heard the submissions in this case I cannot see that the intervention of the plaintiff at that stage would have altered the outcome.

[24] It is contended by the plaintiff that the re-evaluation was on a "different (and hitherto unheralded) methodology of assessment". This allegation is not borne out. There is an onus on the plaintiff to prove its case and it has not discharged that onus. I do not find this an accurate description of the approach adopted by the Council. Rather, it seems to me, that they were proceeding in re-evaluating three other bidders having grasped, belatedly, what they intended to convey by journey charges under 3.8 of their tenders.

[25] The plaintiff's final point was that they were not treated equally with Morgans in that Morgans had been given information when the plaintiff was "awarded" the contract which the plaintiff was not given after August 27 when Morgan was "awarded" the contract.

There seems some substance on this point. I do not consider it is answered by saying that the Council were not acting in a quasi judicial capacity at that time. As I have said above they were under a duty to act fairly and equally between the economic operators. Nor do I think that Regulation 32(13) really helps the respondent. It provides that a contracting authority may withhold information in this situation in certain circumstances. It does not seem to me that any of the four circumstances envisaged there justify not telling McConnells the exact equivalent information that had been conveyed to Morgans.

[26] On the other hand the Council did engage in a lengthy debriefing meeting with McConnell's. I do not consider they were obliged to answer all the written questions from the plaintiff's solicitors, while I understand why they were asked. At the end of the day what Mr Maguire complained of was that the spreadsheet relating to McConnell's own bid was only furnished to them on Friday 5 October just before the case started. Mrs Cupples explains that to some degree in her second affidavit. It is regrettable that that was not provided earlier. I have to say one does detect a lack of sensitivity on the part of the Council towards McConnell after the re-award of the contract. That was after all caused by an error on the Council's part and one might have expected them to be somewhat more apologetic and cooperative with McConnell's who would be understandably disappointed by this. However it does not seem to me that the provision of the spreadsheets at an earlier stage or a more wholehearted cooperation with McConnell's after the re-award of the contract would have made any material difference to the outcome so far as the contract is concerned. I will hear counsel on whether it might have made a difference to the bringing or hearing of the application before this court. In all the circumstances therefore I find for Belfast City Council in this matter.