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Judgment: approved by the Court for handing down | *Delivered:* **30/10/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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McLAUGHLIN AND HARVEY LIMITED

Plaintiff;

-v-

DEPARTMENT OF FINANCE AND PERSONNEL

Defendant.

(NO. 3)

_____

DEENY J

[1] Following the decision of this court in McLaughlin and Harvey Limited v Department of Finance and Personnel No. 2, (11 September 2008) the parties were unable to agree on a remedy for the plaintiff on foot of the decision of the court. The matter was therefore listed before the court for hearing on the issue of remedies, and some other subsidiary matters, on Monday 20 October. I had helpful written and oral submissions from counsel. Mr Bowsher QC again appeared for the plaintiff, with Mr Scoffield, and Mr Stephen Shaw QC for the defendant, with Mr McMillen and Mr Williams.

[2] The court had found that the defendant was in breach of its duty under Regulation 47.1 of the Public Contracts Regulations 2006 to the plaintiff (and the other economic operators) seeking to be included in the Framework Agreement for contractors originally advertised on 15 March 2007 by the defendant Department. The Department had not disclosed to them 39 elements or sub-criteria which its panel had subsequently taken into account under the headings BO1 to EO2 in the invitation to tender documents when making their assessment. Nor had it, it follows, disclosed the weightings which the panel attached to those elements or sub-criteria, in the way described in the judgment of the court.

[3] Although it was not expressly debated at the remedies hearing before the court I consider it appropriate to record that in the view of the court the matters complained of were neither minimal nor tangential but entitled the plaintiff to some substantive remedy. Indeed as indicated that was not disputed by the defendant (subject to any right of appeal on the liability issue). In particular, so far as this plaintiff is concerned, and it is the only party which has brought proceedings on foot of these procedures, it was in the position of having come sixth in the competition within 1% of the contractors placed 4th and 5th so that even a modest improvement in its marking could have materially affected the outcome. Of course all other parties would have become aware of the same material as the plaintiff and may have improved their tender bids also. The plaintiff had two points in addition. Some 30% of the marking overall was given under the criterion of price. The plaintiff had the fourth lowest price of the economic operators and therefore was well placed to benefit from any slight improvement in the quality assessment of its tender. Further, as indicated in the No. 2 judgment I concluded on the balance of probabilities that I could not be satisfied that the plaintiff had received additional marking which, in law, it was entitled to, for material in its tender bid which did not conform with the evaluation guidance laid out in great detail by the Department's panel. It will be recalled that some £800m worth of contracts over a period of four years may be allocated under this Framework Agreement. It is obviously a matter of great importance to the plaintiff. It is entitled to an effective remedy.

[4] A central issue which was before the court on this topic was the extent of the court's powers to grant remedies. The plaintiff's first preference was that the court, by way of declaration, mandatory injunction or otherwise, would order the Department to add the plaintiff to the list of preferred economic operators under the Framework Agreement thus increasing the number from 5 to 6. Its second preference was that the court would set aside the Agreement of 28 April 2008 embodying the earlier decision conveyed in the letter of 17 December 2007 selecting five economic operators. It would then be left to the Department to decide whether to rerun the competition or to dispense with the framework agreement completely. If the former course was adopted by the Department it was suggested by the court and agreed on both sides that all eleven of the economic operators who had been invited to compete in 2007 (and no more) should be asked again to compete. The competition would reflect the judgment of this court, or any higher court on appeal.

[5] Two European Directives have relevance to this issue. The first is Directive 89/665/EEC of 21.12.E9. It recites on page 1, inter alia:

> "Whereas the opening up of public procurement to community competition necessitates a substantial increase in the guarantees of transparency and non-

> discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;".

At 2 it further recites as follows:

> "Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully in compensation of persons harmed by an infringement;".

Article 2(1) provides that Member States "shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

> "(a) …;
>
> (b) Either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
>
> (c) Award damages to persons harmed by an infringement."

This Directive is currently applicable but its date will be noted. It was promulgated some years before Framework Agreements became fashionable or common. Furthermore the United Kingdom is entitled to enlarge on the Directive in regulations made for this Member State. But even allowing for that it is of assistance to the plaintiff that Article 2 does require powers to set aside decisions taken unlawfully. I note that a new Directive has been promulgated relating to remedies and amending the 1989 Directive. However it is not yet directly applicable and no regulations have been made under it. I have considered counsel's submissions but I do not consider that the terms of the Directive assist me with the issues before the court, inter alia because the new Directive does not speak directly to the use of language in existing Regulations made in any particular Member State.

[6] Directive 2004/18/EC of 31 March 2004 is applicable. The theme pointed out by Mr Bowsher is the clear distinction in the Directive between

Framework Agreements and contracts. Framework Agreements are referred to in the eleventh recital at the commencement of the Directive. Furthermore there are important definitions at Article 1. Article 1.5 provides as follows:

> "A 'Framework Agreement' is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged."

Article 1(2) provides at a,b,c and d definitions respectively of public contracts, public works contracts, public supply contracts and public service contracts. For example the former are defined as "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, supply of products or the provision of services within the meaning of this Directive." The Department here would be a contracting authority within Article 1(9) and/or, on occasions a central purchasing body under Article 1(10). Article 32 of the Directive deals expressly with Framework Agreements. The term of such an agreement may not exceed four years (Article 32.2) save in exceptional cases. Article 32.4 says that a Framework Agreement is concluded with several economic operators who must be at least three in number. (I ignore for these purposes Article 32.3). It is relevant to note there is no maximum number. Again clearly contracts are distinguished from Framework Agreements. Express reference is made at Article 32.2 to the use of contract award criteria under Article 53 i.e. they are not presumed to be applicable to Framework Agreements but required express reference. Counsel submitted that Framework Agreements are more important than a single contract when considering the European objective of competitiveness. They can cover four years and can as here deal with a wide range of public contracts under that rubric with considerable expenditure of public money.

[7] The relevant statutory authority in Northern Ireland as stated before consists of the Public Contracts Regulations 2006 which apply here and in England and Wales. Regulation 2 is the interpretation provision and is in my view relevant to a critical issue to be determined by the court. I note first of all "central purchasing body" means a contracting authority which
"(a)….
(b) awards public contracts intended for one or more contracting authorities;
(c) concludes Framework Agreements for work, works, goods or services intended for one or more contracting authorities."
It can be seen that there is a clear distinction between the two relevant categories.

[8] Framework Agreement is defined as "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". This is of great importance. A clear distinction is being drawn by the legislature between Framework Agreements which are "agreements or other arrangements" and the "contracts" subsequently made with economic operators pre-selected under the agreement. The word contract, it seems clear, means a specific contract and is not intended to cover a Framework Agreement. One notes also that as with the Directive, although in slightly different terms, public services contracts, public supply contracts and public works contracts are also defined. At no point does the term "contract" extend to including framework agreements.

[9] Regulation 19 expressly deals with Framework Agreements. Again, for example, at Regulation 19(4) and (5) there is a very clear distinction between the Framework Agreement and the specific contracts to be made thereafter. Again I note that although a minimum number of economic operators is set at three there was no maximum.

[10] One then turns to what Mr Shaw QC rightly described as the critical issue, which is to be found at Regulation 46. That is under the rubric "Enforcement of obligations", and in Part IX of the Regulations which deal with "Applications to the Court". Regulation 47(1) imposes an obligation on a contracting authority to comply with the provisions of these Regulations and with any enforceable community obligation in respect of "a public contract, Framework Agreement or design contest … and … is a duty owed to an economic operator." Again one notes the distinction between the public contract and the Framework Agreement. Regulation 47(6) reads as follows:

> "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."

The Plaintiff has brought such an action and established a breach of duty and the court is now addressing the need to prevent it suffering loss and damage as a result of the breach of duty. An actionable breach of duty in community law and a breach of statutory duty at common law should lead to an effective remedy and this paragraph, at least by implication, gives to this Court the power to grant such a remedy.

[11] Regulation 47(8), so far as relevant, reads as follows:

> "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."

Again one pauses to note that subject to paragraph 9 the court has the power set out at (b) in this situation ie. to set aside "that decision or action" or to order the contracting authority to amend any document. I must return to those matters. It is expressly stated that that is without prejudice to the other powers of High Court which assists Mr Bowsher to submit that a declaration or mandatory injunction could be granted by the court.

[12] One then turns to paragraph (9) of the Regulations which reads:

> "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."

[13] The Department relies strongly on this paragraph as prohibiting the court from granting any remedy other than an award of damages in respect of the breach of duty. Counsel for the Department submits that the words apply to this situation. The contract "in relation to which the breach occurred" is the Framework Agreement, he submits. I reject that submission for the following reasons.

[14] It seems clear to me that the proper analysis of Regulation 47 is that the court is empowered by Regulation 47(6) and (8) to grant a wide range of

reliefs to a party which has suffered or risks suffering loss and damage as a result of a breach of the duty under Regulation 47(1). Paragraph (9) is a restriction on that power of the court but it is a restriction which applies when the court is dealing with a breach in relation to "the contract" which has been entered into. By that is meant a public services, supply or works contract as defined in the Regulations. It would also extend to a specific contract under a Framework Agreement. There can be no doubt as to that in my mind when one considers the above matters, including the wording of Regulation 47.1 itself. The contention of the Department that it extends to a Framework Agreement flies in the face of the ordinary meaning of the terms used. Furthermore it is frankly contradicted by the interpretation provision of these very Regulations which clearly distinguish between a contract and a Framework Agreement. In doing so they are consistent with the relevant Directive of 2004. If the court is dealing with a public contract or a specific contract under the Framework Agreement (which is just another type of public contract) and the party bringing the proceedings has either not sought or been refused interim relief then the court is not at liberty to set aside that specific public contract. Damages are the only remedy. But if "the contract" is not a contract within the meaning of these Regulations paragraph (9) has no application.

[15] The purpose of that is clear. By definition the contract will have been given to a third party which, by the time the matter is before the court, may well be engaged in the very works of supply or construction under the contract. It would be entirely unfair on that third party and, indeed, on the public, to interfere in that contract which has been made. The economic operator under such a contract will have performed work for the Department and will have received or will have been promised remuneration as consideration in return. For the court to set aside a contract which may be partly or wholly performed would be contrary to principle and inappropriate. But the position is completely different with regard to a Framework Agreement. That consists of the pre-selection of certain economic operators who will be allowed to bid, without competition from parties outside the Framework Agreement, for specific contracts during the life time of the Framework Agreement. As Mr Shaw candidly admitted and as examination of the Framework Agreement on 28 April 2008 shows, the Department has not made any promises to the economic operators who were successful under this Framework Agreement. It has not promised them a minimum amount of work or a minimum number of contracts during the duration of the contract. It has not in fact awarded any specific contracts since the decision letter of 17 December 2007 or the conclusion of the agreement on 28 April 2008. The economic operators have been required to keep up their health and safety and other relevant certification and enjoined to make their IT compliant but that is all. The factual matrix is entirely different from a specific contract.

[16] It is also noteworthy that "the contract" to which Mr Shaw says (9) refers is not so described. The Framework Agreement, to be found at bundle 7 tab 9, nowhere refers to itself as a contract but always as an agreement cf recitals and para. 5.3. Para. 6 reads:

> "6. Non-exclusivity
>
> 6.1 The Authority does not give any guarantee and/or warrant the actual value of any of the Works and/or number of NEC Contracts (if any) which may be procured in connection with this Agreement and the parties acknowledge that the Authority or any Employer is not bound to enter into any new NEC Contract or other contractual arrangement with the Contractor as a result of entering into this Agreement.
>
> 6.2 The Authority and any Employer may procure any works or services (including such works as are contemplated under this Agreement) with any third party for the duration of this Agreement."

I accept the submission of counsel for the defendant that the definition of a public service contract is a matter of community law in this context see A.P.D.E.R.Y.N.D.E.C. v Administracion Del Estado: [2007] ECR 1-2175 at paragraph 50. That does not seem to me to assist the defendant here. In any event as they acknowledge Article 2(6) of Directive 89-665 EC leaves to national law the exercise of the powers of remedy. The court accepts that a Framework Agreement is a species of contract but clearly not the species identified in Regulation 47(9).

[17] I do not accept the submission in the defendant's skeleton argument that the defendant would be at risk of significant litigation from the five successful economic operators (or groups of economic operators) if the court were to grant the plaintiff here the second of it's preferred remedies. At the very most, on a setting aside, those other parties might conceivably complain at having to re-apply. If they were unsuccessful the second time round they might well be disappointed but they would be in a similar position to the plaintiff in McConnell Archive Limited v Belfast City Council 2008 NICH 3. They have not succeeded the second time but, subject to any further order of the court, the second procedure was lawful while the first procedure was conducted unlawfully. They have not lost anything to which they were lawfully entitled. If in fact they are the best economic operators under the Framework Agreement, it is likely that they will succeed on a re-run of the Framework Agreement procedure. If they do not it is because the second procedure is fairer and more transparent than the first.

[18] The position is less clear with regard to the plaintiff's first preferred remedy ie. adding it as a sixth economic operator to the Framework Agreement. In that event the work available to the other five economic operators (or groups of economic operators as it transpires in several cases) will be or may be diluted to the extent of having an additional competitor. An additional competitor is in itself consistent with the strong aim of encouraging competition in community law. But these parties entered into a procedure by which they were selected as one of only five economic contractors eligible for this substantial quantum of work over the next four years. If the original competition in 2007 had been run more transparently and fairly in the way the court has found two outcomes could have occurred. The five successful parties would have been successful in any event. Secondly one or more of them would have been ousted by the plaintiff or by one (or more) of the remaining five tenderers currently ranked seventh to eleventh. To add on the plaintiff now would have the effect of diluting the work for all five of the current parties under the Framework Agreement although in fact most of them, in all likelihood, would have been successful in any event. It would therefore introduce some element of unfairness to the best of the tenderers, although of course they may continue to assert any superiority they have when individual contracts are called off in the course of the life of the Framework Agreement. I do not say that they would have any cause of action from the addition of the plaintiff as the sixth contractor but I do not think the defendant's submission in that regard is beyond the bounds of possibility. Therefore there might well be litigation causing further delay and uncertainty. In any event the court desires to achieve fairness and transparency according to law. The setting aside of the decision would, in all likelihood, lead to a rerun of the Framework Agreement competition. It would be rerun in the more transparent way indicated by the court. That would be in the public interest to secure the tenderers who would be most economically advantageous to the public. If the plaintiff is right it may well improve its performance but if it does not, as above, the fairer new procedure should lead to the five best tenderers succeeding, whether or not they are in the present top five or six.

[19] The above matters are relevant to seeking the proper interpretation of Regulation 47(9) and also to the step that follows the view taken upon that. I conclude that (9) does not prevent the court in this case from exercising its powers under 47(6) and (8) with regard to this concluded Framework Agreement.

[20] Mr Bowsher is unable, after what I am sure was industrious research, to find any precedent for his submission that I should add his client to the list of contractors. It is true to say that Silber J proposed that course in Letting International Limited v London Borough of Newham[2008] EWHC 1583 (QB) but I note from paragraph 150 of that judgment that this was "merely a suggestion and I will happily hear submissions if this were not to be mutually

acceptable." Counsel submits that the court's power to order the authority "to amend any document" extends to amending the Framework Agreement by the addition of his client. It is right to say that a court can and does grant leave to amend proceedings by the addition of parties from time to time. In doing so it is seeking to ensure that any relevant party who may be liable to the plaintiff or who should be added as a plaintiff is before the court when the matter is resolved. It seems to me a somewhat different matter from actually making the decision to amend the Framework Agreement by inserting the plaintiff, although I acknowledge that in a literal way that could be done. I am inclined to view this as a somewhat strained interpretation. On the other hand the words of Regulation 47(8)(b)(i) permit the court to set aside "that decision or action". I am entirely satisfied that the court has the power to set aside the decision to enter into a Framework Agreement with five parties but excluding the plaintiff. The defendant acted on that decision by sending out its letter of 17 December 2007 and subsequently by entering into the Framework Agreement of 28 April 2008. For the reasons set out above I consider that of the first two remedies sought by the plaintiff the second, setting aside the decision is both open to the court and preferable.

[20] The defendant submits to the court that the proper remedy here is one of damages. In the application for an interim injunction I dealt briefly with the issue of damages in McLaughlin and Harvey Ltd v Department of Finance and Personnel (No. 1) [2008] NIQB 25. I was there applying the decision of the House of Lords in American Cynamid Company v Ethicon Ltd [1975] AC 296. A key factor in that decision is whether the plaintiff "would be adequately compensated by an award of damages for the loss he would have sustained." See paragraphs 9-11 of the judgment. The plaintiff is a profit making body. The defendant would be a mark for damages. The Framework Agreement covers only five contractors and a period of four years and not the period of twenty years which faced Coghlin J in Partenaire Limited [2007] NIQB 100. I acknowledged that damages would not be easily assessable here but had no evidence before me that the plaintiff company would suffer in some crucial or intangible way over and above the loss of profits arising from not participating in the Framework Agreement.

[21] The issue before me now is a different one. Which is the most appropriate remedy to grant to the plaintiff, it having succeeded in proving a breach of duty? The assessment of the loss of profits might well have to wait for some time, perhaps years, to allow the court to make a reasonable estimate of the profits which the successful economic operators will enjoy from the Framework Agreement. I consider that would be necessary here and clearly it is not ideal. The profits of the economic operators who are given contracts under the Framework Agreement (or who are not) will not necessarily be publicly available, particularly as they apply to each contract. Indeed as some of these contracts are of a very substantial nature it may take years for them to work out before one would know what profit, if any, the

economic operator made out of a particular contract. As indicated earlier the court would have to value the percentage of any profits which the plaintiff here should recover ie. the value of the loss of its chance consistent with the principles laid down in Chaplin v Hicks [1911] 2 KB 786. But reliably fixing the value of that percentage loss of chance would take time, face difficulties and be costly. Mr Bowsher made the point at this hearing that there could be very live arguments as to what margins any particular contractor might charge or might recover. So I acknowledge that the defendant is entitled to say that damages could be an adequate remedy. However in my view they are manifestly an inferior remedy here to that of setting aside the Framework Agreement. I say that not only for the reasons set out above but for public policy reasons. At the present time there is a question mark over whether the best five economic operators were selected under this Framework Agreement. Given that some £800m of works are said by the Department to be at stake here it must be in the public interest to try and ensure that the best five, whether or not that includes the plaintiff, are in fact selected. Secondly it cannot be in the public interest for the public to pay for these new buildings and to pay the plaintiff again a percentage of the profits of the contractor who actually builds the new buildings. That is in the most literal sense of the word a waste of money. It may be that in some circumstances there is no alternative to such an award being made, but where, as here, there is a much better alternative I consider it preferable to opt for it.

[22] I therefore conclude that the most appropriate remedy for the plaintiff here is to order, pursuant to the Public Contracts Regulations 2006 that the decision of the Department of Finance and Personnel, Central Procurement Directorate, to enter into a Framework Agreement with Bowen Construction Limited, Farrens (Construction) Limited, Herron Brothers Limited, Tracey Brothers Limited, John Graham (Dromore) Limited, Henry Brothers (Magherafelt) Limited, H & J Martin, Dawson Wam Limited, J H Turkington and Sons Limited and Lagan Construction Limited and the Agreement of 28 April 2008 acting upon that decision be set aside. It is a matter for the defendant as to whether it wishes to persist with a Framework Agreement covering the works in the competition conducted by it herein in 2007. If it does wish to conclude a new Framework Agreement that should be open to the eleven tenderers who competed in the process in 2007 and no others. Obviously they are not obliged to compete. Furthermore in accordance with the normal practice in the High Court the process should be determined by a different panel. It no doubt will be necessary for that panel to consider the judgment of the court and take advice. The court appreciates that this will cause delay in the implementation of any new Framework Agreement. However it seems to me that this delay will be a matter of months rather than years. Furthermore the Department will be at liberty to enter into specific contracts, as it is now apparently ready to do, with regard to particular projects which are ready to proceed. No doubt the parties who were successful in the last process will be eligible for those specific contracts. I note

that the Department did not in fact, contrary to indications given at the hearing of the interim injunction, call down any contracts under the Framework Agreement between February 2008 and October 2008. The only contract put out to tender in that period was put out to tender outside the Framework Agreement. I am therefore satisfied that the fears expressed by counsel for the defendant in this regard should not inhibit the court from making a setting aside order here.

[23] I will now deal briefly with the other points raised at the remedies hearings. The defendant is to pay the plaintiff's costs of the action save for the costs incurred in the application for an interim injunction. Such costs are to be taxed in default of agreement. As to the costs of the interim injunction they were reserved by me until this stage. I reserved both parties' costs. In favour of the plaintiff it has ultimately succeeded in the action. Furthermore it can point to some respects in which the defendant did not assist the court at the time of the interim injunction. In favour of the defendant is the basic principle of taxation that costs should follow the event. If the event was the application for an interlocutory injunction then the defendant succeeded in that regard. In balancing these and the other submissions for counsel I conclude that the proper course is to make no order between the parties as to the costs of the application for an interlocutory injunction. The costs of that application will lie where they fall. The parties raised the issue of the time for appealing the order of the court. The order of the court will follow shortly on this judgment and the parties have six weeks from today in which to appeal to Her Majesty's Court of Appeal, if either so desires, although given the views expressed by the Department and the fact that they have had my earlier judgment for five weeks an earlier decision from that quarter would be appropriate.