Neutral Citation no. [2007] NIQB 19 | *Ref:* **DEEC5747**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **16/3/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

NATURAL WORLD PRODUCTS LIMITED

Plaintiff;

-and-

ARC 21

Defendants.

DEENY J

Introduction

[1] The Plaintiff in these proceedings is a company based in Keady, Co. Armagh whose principal business is the processing and re-cycling of organic waste.

The Defendant is a joint committee made up of eleven local authorities in eastern Northern Ireland which is constituted a body corporate pursuant to the Local Government (Constituting a Joint Committee a Body Corporate) Order (N.I.) 2004. The Defendant wished to award a large contract for the provision of organic waste services, which would include the construction of at least one waste compaction facility. They put it out to public tender. The Plaintiff was invited to bid and did so but was unsuccessful.

In these proceedings they claim that their disqualification at a late stage was unlawful and in breach of the Public Service Contracts Regulations 1993. Of alternative claims under the European Directive 92/50/EC and in breach of an implied contract, the former was not actively pursued at the hearing.

[2] Mr Nigel Giffin Q.C. and Mr Michael Egan appeared for the Plaintiff. They had sought an interim Order before the Court on 1st December 2006, but this was not required as the defendant gave an undertaking not to award the contract until the Order of the Court. However, Mr Stephen Shaw Q.C., with whom Mr David Scoffield appeared, stressed the importance to the public interest in as early a decision as possible. The award of this contract cannot be made until the decision of this court and therefore work cannot commence on this urgently needed waste facility for Belfast and the surrounding council areas. I am indebted to both counsel for their helpful written and oral submissions and to the Plaintiff's solicitors for the trial bundles prepared in a short space of time. I heard oral submissions and evidence over six days of hearing concluding on 2nd of this month.

Common law

[3] The defence contended in their original skeleton argument that the test for the court here is essentially akin to that of a court hearing a judicial review application and applying Wednesbury principles. They acknowledge that may have to be tempered by some element of proportionality shading the stricter applications of that decision. Mr Giffin QC was not minded to dispute this in his opening to the court. Mr Shaw expanded on these submissions in his closing. He acknowledged that the duty on his clients with regard to the reading and handling of the tender bid arose both at common law and under the Public Service Contract Regulations 1993, made under the European Directive, to which I will turn later. At common law he 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 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 Oct.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. An important part of this case is the application of the 1993 Regulations but before turning to them I will say a little more about the facts.

Factual context

[6] The contract in question was to receive and, put simply, turn into compost or similar useful material organic waste which would be collected in the future from homes and gardens. This type of waste was in the papers known as Feedstock II and it is in relation to this the difficulty arose. The contract was to be for 15 years and required the successful tenderer to build facilities. Sites, on commercial terms, were available to the successful bidder at Dargan Road in Belfast, at Antrim and at Drumnakilly near Downpatrick. The latter two were to be transfer stations with the main compacting station to be at Dargan Road. Tenderers were not precluded from offering their own or other facilities.

[7] The Plaintiff was one of four tenderers of eight who had been selected as technically qualified to bid for this contract. Bids were submitted by May of 2006. The plaintiff submitted a main bid with two variant bids indicating, in the alternative to Dargan Road, that they would build their main processing plant at Glenside near Lisburn. This is in a dis-used quarry owned by the Plaintiff company. They have already applied for planning permission for a facility of this kind and are therefore somewhat further down the road than a Dargan Road facility would be.

[8] It is important to note in respect of the Plaintiff that they are already operating a waste disposal facility at Keady, Co. Armagh. It has a capacity, I was told, of some 80,000 tonnes per year of waste. It has, since approximately September 2006 been operating the Gicom technology which the Plaintiff proposes to use if it won the ARC 21 contract. No criticism is made of that technology for composting organic waste. In essence however the Defendants' fear was that the figures for the operation of Dargan Road at peak times were too ambitious and in their advisers opinion, could not produce the quantities of composted waste to be contracted for up to the relevant standard ie PAS 100.

[9] The effect of this is significant. The Defendants technical advisors had serious concerns about the ability of the main plant to be built at Dargan Road to cope with the amount of organic waste which would be supplied at peak times in the final year of the contract. That was the year which they used for the assessment of all bids, presumably on a worst case basis. The directors of the Plaintiff and their advisors disagreed with this analysis but counsel accepted that within the context of the regulations and the authorities this was not a situation where he could show that to be a Wednesbury unreasonable view for the Plaintiff's advisors to take, although disputed by his clients.

[10] In July 2006 the Defendants issued three rounds of questions in turn to the Plaintiff on foot of their written tender. (This was in accordance with

Regulation 17 of the 1993 Regulations). They required answers quite quickly. The Plaintiff got into difficulty at one point because their principal expert was not available. Mr Caolan Woods made an error in replying. I may return to this but I feel it is not of great importance. What is of importance is that in some of the answers to the pertinent questions asked of the Plaintiff he indicated that the material coming into Dargan Road at peak times in the fifteenth year might only be processed for four and a half weeks or less. This contrasted not only with the Plaintiff's own earlier estimates of seven or eight weeks but contrasted with the opinion of ORA Limited that seven or eight weeks was the minimum for satisfactory processing to PAS 100 of organic waste. Furthermore partly from the bid and partly from the answers to questions, ORA were concerned that this issue was exacerbated by the Plaintiff admitting that the loading in their tunnels of this material would be at 2.7 tonnes per square metre while they thought normal parameters from their experience were 1.4 to 1.8 metre tonnes. (I observe that this was not put to Mr Caolan Woods). The issue for the court is not whether they were right or wrong in that estimate, as indicated above. The principal issue for the court is that on foot of those concerns ought the Defendants to have considered whether the shortfall in capacity at peak times at the main facility could be addressed by utilising the Plaintiff's capacity at Keady, or at Glenside or by adding extra tunnels. In an initial draft report they did take the first of those into account. But the project manager for ARC 21, Mr Jonathan Gray, directed them not to do so, as apparently, he thought that Keady was not part of the bid for these purposes. This seems to have been decided at an internal meeting on or about 19 July 2006. Subsequently in early September 2006 the decision was taken not to evaluate the Plaintiff's bid further because the defendant was advised that it was unlikely that the plaintiff could cope with input, especially at peak times in year fifteen and were therefore not going to be contractually compliant. It seems clear that at that meeting Keady was not taken into account.

[11] I refer to Keady in particular and that is the first complaint of the Plaintiff ie that the facility at Keady, which is actually on the ground and in a neighbouring county to the areas of operations, was a relevant consideration which was not taken into account by the decision maker and that the decision is thereby unlawful on Wednesbury grounds. Secondly they contend that in addition to the site at Keady they had made it clear in their bid documents that their facility at Dargan was "highly modular" and that tunnels could be added to it if there was a necessity to do so. This also was not taken into account. Thirdly under this rubric they said that the fact that they were going to build a facility at Glenside regardless of whether they won the contract or not, was also a relevant consideration which was not taken into account by the decision maker.

[12] Alongside and consistent with that submission Mr Giffin QC contends that there was a formal breach of the regulations. He contends that the

Defendant should have gone on to complete the evaluation of his client on both legal and factual grounds and that there was no provision for them within the tendered documents to break off their evaluation at a late stage as they did. It appears from the evidence that the Plaintiff had been marked very highly at 54 out of 55 for price. My understanding is that the successful tenderer Terra Eco, a company within the Thames Water Limited Group, shaded them on price. The Plaintiff had been marked at 32 out of 45 on technical grounds until the evaluation ceased for the reasons outlined. This seems to be only two marks overall behind the successful tenderer. It can be seen therefore that this is far from an academic matter so far as the Plaintiff, the Defendant and the successful tenderer are concerned.

[13] As indicated the Plaintiff still relies on paragraph 39 of the statement of claim and in particular the first sentence ie that the defendant failed to provide details of how much it believes the shortfall in capacity of the Plaintiff's facilities would be. That allegation was established as a fact at the hearing. The explanation of Mr Gray on behalf of the Defendants was that this went beyond the Defendants obligation to seek clarification of matters in doubt. The stating of positive opinions was not required of them. I think there was some force in that. I observe that even at the hearing the various estimates of the shortfall in capacity and any need to refer tonnage elsewhere were not categorically set out. In a way of course that is a pointer to an aspect of the matter which the defendants tended to overlook, in my view. As their own documents clearly show the tonnage of organic waste from kitchen and garden which the plaintiffs were undertaking to deal with relates to a process of collection which, with limited exceptions, has not even commenced in Northern Ireland. The Defendants own documents correctly refer to these tonnages as "forecasts" and qualify even that term with the word "estimated". (File 1/319). It seems to me relevant in dealing with the tender bid to bear that in mind. It may have been legitimate to test the bids against the final year of the contract when the inflow of such waste was expected to be at its height, and even against, to a degree, the three month seasonal peak for such inputs. At the same time it did seem to me that the advisors to the Defendants and the Defendant itself tended to treat as mathematical certainties what were, in truth and on their own earlier documents, merely estimated forecasts. While therefore I do not find that paragraph 39 grounds an independent successful claim it does draw attention to one aspect of the matter.

The Public Service Contract Regulations 1993

[14] I now turn to the Regulations which were in force at the time (although they have since been superseded). The Regulations were designed to implement the European Directive but in the event it is not suggested that one needs to go beyond them. I was taken through the Regulations. There does not appear to be a dispute about their applicability or about the correctness of

the approach of the Defendant to them, at least in the earlier stages. It constituted a contracting authority within the meaning of Regulation 3. It was submitted that the contract in question was a services contract pursuant to Regulation 2(2)(a). Clearly the services listed at page 49 of the Regulations includes refuse disposal. Public services contract are defined in the interpretation Regulation, No. 2. It is permissible, and was done here, for the authority to follow the "restrictive procedure" whereby only persons selected by the contracting authority may submit tenders. The Plaintiff is a "services provider" within the meaning of Regulation 4. The restricted procedure was followed here under Regulation 10(1) rather than the negotiated procedure which may be followed under 10(2) in appropriate circumstances. This is something that the Defendant felt to be of importance in the later stages of the contract. The restricted procedure is set out in more detail at Regulation 12.

Regulation 12 deals expressly with this procedure and is of importance in this case. 12(1) reads:

> "A contracting authority using the restricted procedure shall comply with the following paragraphs of this Regulation."

Therefore the language is mandatory as indeed the rest of the language of the Regulation is. I set out Regulation 12(4):

> "The contracting authority may exclude a services provider from those persons from whom it will make the selection of persons to be invited to tender only if the services provider may be treated as ineligible on a ground specified in Regulation 14 or if the services provider fails to satisfy the minimum standard of economic and financial standing, ability and technical capacity required to service s providers by the contracting authority. For this purpose the contracting authority shall make its evaluation in accordance with Regulations 14, 15, 16 and 17."

I draw attention to the words 'from whom it will make the selection of persons to be invited to tender.' Mr Giffin Q.C. argued that the Regulation generally meant that the authority could only exclude someone under Regulation 14, 15, 16 and 17 but those words lead me to question whether that is correct. Is this Regulation not dealing with the first stage of selecting the persons who may tender? Certainly Regulation 14 "Dealing with Criteria for Rejection of Services Providers" cites:

> "as ineligible to tender for, or to be included amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a contract with … or decide not to select a services provider to tender for … on one of the following grounds, namely that the services provider …".

Does one read into that that these are the only grounds in which you can refuse to further consider a tender? Or does one read into it that it is only dealing with earlier stages of the tender process and not the situation which confronted the defendant here? I note that Regulation 14(1)(h) reads:

> "Is guilty of serious misrepresentation in providing any information required of him under this Regulation and Regulations 15, 16 and 17."

Clearly that is something that might well only appear in the course of or even at a late stage in a tender and it does entitle the authority to discontinue. That may assist Mr Giffin's interpretation. Regulation 15 deals with the provision of information as to economic and financial standing which is not an issue here. The requirements for technical capacity are set out in some detail in that Regulation. Regulation 17 permits the contracting authority to ask this as follows:

> "The contracting authority may require a services provider to provide information <u>supplementing</u> the information supplied in accordance with Regulations 14, 15 and 16 <u>or</u> to clarify that information provided that the information so required relates to the matters specified in Regulations 14, 15 and 16." [courts emphasis].

Mr Gray considered that the authority was only entitled to ask for further information to clarify a bid rather than to supplement it. Of course this is dealing with the earlier stage it would appear but it is important to note that, contrary to his belief, supplements are permitted. Under Regulation 21(1)(a) the contracting authority may choose to award the contract on the basis of the offer which is "the most economically advantageous to the contracting authority" rather than the one that offers the lowest price. This is the option that was taken here. Regulation 21(4) provides:

> "Where a contracting authority awards a public services contract on the basis of the offer which is the most economically advantageous, it may take account of offers which offer variations on the requirements specified in the contract documents if –

> (a) the offer meets the minimum requirements of the contracting authority, and
>
> (b) it has stated those minimum requirements and any specific requirements for the presentation of an offer offering variations in the contracted documents in the contract documents,
>
> But if the contracting authority will not take account of offers which offer such variations it shall state that fact in the contract notice."

There was no such notice here and the Plaintiff did put in two very similar variant bids. Essentially they offered to build their main facility at Glenside, where they already owned a suitable site rather than at Dargan Road.

[15] By Regulation 23(2) a contracting authority shall inform a service provider of the reasons why he was unsuccessful. That was done here. Regulation 32 is central to these proceedings. Regulation 32(1) expressly provides that the obligation on a contracting authority to comply with these Regulations is a duty owed to service providers. Regulation 21(2) provides that any breach of the duty shall be actionable by any service provider who, in consequence, suffers a risk suffering, loss or damage. Under Reg. 32(3) proceedings are brought in the High Court. They were brought within the three month time limit laid down. The court is empowered under Regulation 35 if satisfied that a decision or action taken by an authority was in breach of the duty owed, to order the setting aside of the decision or action or order the contracting authority to amend any documents or award damages or both of these things. The parties agreed here that they would not wish damages awarded ie that the authority would be left paying twice for the service to be provided.

[16] Mr Giffin in essence contends that because there was no express Regulation empowering the defendant to cease its evaluation of the Plaintiff's tender bid, because of their doubts about the Plaintiff's ability to perform the contract, it is thereby unlawful. The onus is on the plaintiff to persuade me on this point. It has not done so. I accept the submissions of counsel for the Plaintiff that the Regulations on the face of them do not purport to be exhaustive. They certainly require a harmonised approach on the foot of the European Directive. But that would not point to a detailed and binding straight jacket which left no discretion to the client. While the Regulations do address some of the matters that might come to light in the course of a tender process and make provision for them it does seem to me that there might well be other factors which arise and which must be left to the discretion of the client, provided that they act in a way that is fair and reasonable and in good

faith. Mr Shaw relied on Fairclough as a common law authority to support that construction. I think he is entitled to do so. Nobody could dispute that if fraud or insolvency was discovered on the part of a bidder in the course of the tender process it would be right to reject the bid. It does not seem to me that the Regulations taken on their own preclude the client from rejecting a tender bid if it fairly and reasonably concludes that that bid is, on examination, fatally flawed in a fundamental way. The alternative would be for the client simply to give a low or very low mark to the bid in that situation. But I think the client must have a discretion with regard to which of those courses it takes. I therefore find against the plaintiff on the strict construction point and turn to consider whether in fact the defendant acted fairly and reasonably in its decision to decline to evaluate the bid further but to reject it.

Keady: The plaintiff's bid

[17] I approaching these matters I bear in mind the authorities to which I was referred by both parties. As counsel submitted the test has not been settled authoritatively, save to say that the client must act fairly and in good faith. Whether the duty to act reasonably is a test of Wednesbury reasonableness or a test more easily achieved by a disappointed bidder has not been finally resolved. However in the events that transpire here I do not consider it is necessary for me to attempt to resolve that possible dichotomy. One matter I think can be clearly stated at the beginning. Given that it is trite law that a document must be construed as a whole, there is a duty on the defendant here to read the bid as a whole. This seems to me to clearly extend to the next stage of the bidding process. As mentioned above the defendant sought clarification from the plaintiff, and I understand, the other bidders, in a series of rounds of questions. They also had a face to face meeting at which some matters were raised. It seems to me of the essence of fairness that the defendant should take into account in that clarification process the information it received from the plaintiff, whether good or bad. I mention this as it is my view, that that is not what happened. Mr Giffin properly accepted that Mr Gray had acted in good faith, as I do, but his contention was that he misdirected himself and the defendant in law. Legal advice was not sought at the key period.

[18] It is not in dispute that the plaintiff's facility at Keady which was about to become operational as the bid process was continuing, played a prominent part in the plaintiff's bid. The defendant accepts that at least three roles were clearly identified for Keady. One was to meet the demands in the start up facility before the main facility at Dargan Road (or Glenside) was constructed. No planning permission has been obtained, or indeed applied for, with regard to the construction of this facility at Dargan Road. Given the difficulties, acknowledged by all, in completing that process, followed by a process of construction it was clearly going to be several years after the award of this contract before a Dargan Road facility would be operational. In the

plaintiff bid Keady would deal with the organic waste during that period. Secondly, somewhat more controversially, the defendant acknowledges that the bid recognised that Keady would have a role in contingency situation where the main facility at Dargan Road was "not available" for dealing with waste eg. mechanical malfunction, fire, strike or whatever. In their helpful submissions the defendants acknowledged that in the bid at Section K [2/608] one finds the following:

> "Even in the event of plant failure, materials can be accepted. All delivery of kerbside collected feedstock materials can be immediately redirected to NWP Keady site until the Dargan Road In-Vessel facility can re-open."

Thirdly the defendant admits that Keady was available to deal with tonnage of organic waste "above the contractual cap". The figure, which I have pointed out is based on earlier estimated forecasts is, it is right to say, a contractual figure ie 98,000 tonnes per annum. If more came in than that figure the successful bidder was not obliged to take it although the parties may well negotiate some rate for doing so. On the other hand the defendant would guarantee that it would deliver at least 80% of that figure so as to ensure that the bidder was recompensed for the considerable cost of opening and operating the main facility on foot of the contract. But Mr Shaw's contention was that that was that. Keady did not, on the bid, have any role in dealing with the situation contemplated here ie. that the main facility, because of these question marks over its efficacy at peak times on the specifications given by the plaintiff, would not be able to cope with 98,000 tonnes per year. His contention was that it was not part of the bid that Keady could assist the plaintiff in those circumstances or would assist. Mr Caolan Woods in his evidence properly accepted that there was not, in the parts of the bid to which he had been referred, an express reference in the bid to Keady dealing with that particular problem. But he did say that there were many reference to it as an emergency, contingency or overflow facility.

[19] I think it necessary, despite the desire for expedition, to refer to some of the passages in the bid. Before I do so I would like to touch briefly on two matters in the Specification for the Organic Waste Treatment Service Contract sent out by the defendant in November 2005. Counsel for the plaintiff pointed out that at Section K, page 18 [File 1/148] there was an express reference as follows:

> "K1 alternative arrangements in case of any plant failure. K2 alternative arrangements in the event that any of the facilities is Not Available. K3 procedure for notification of any failure in the plant and alternative arrangements to the authority."

At [1/249] at (34) non-availability is defined as follows:

> "Non-availability occurs when an organic waste treatment facility is not available to receive material from the authority. Non-availability will include down time for scheduled and non-scheduled maintenance, breakdown and closure for any reason."

He submitted that on a reasonable reading of that if Dargan Road was not in a position to take more waste at a particular time because it needed longer to process to the necessary standard the waste which it had already received then it would be non-available and therefore covered by the contingency proposals of the plaintiff. While his submissions are not dependent on this interpretation I have to say that I find it a reasonable and proper one. I cannot see why, using the ordinary meaning of words, the manager at Dargan Road might not ring up in 15 years time and say:

> "I am sorry, you chaps were right: this waste will have to spend another fortnight in the tunnels and therefore my facility is not available for any new waste. Please send it to Keady."

I see no straining of language in such an interpretation. Or he might say that Dargan Road was closed to new waste for a fortnight. But "closure for any reason" is included in the definition.

[20] To turn to the bid itself it commenced with a covering letter of 8 May 2006. That included the following paragraph:

> "We are also proposing to use our composting site in Keady as a temporary processing facility for the processing of feedstock type 2. This facility will be used until the permanent facilities have been commissioned and will also be used for the overflow from the permanent facilities." [2/364]

Mr Shaw submitted that that did not assist the plaintiff because overflow meant overflow beyond the contractual level of 98,000 tonnes per annum. It is interesting to note that there is a map at [2/365] which, long before this dispute arose pointed out that the plaintiff's site at Keady and the proposed facility at Dargan Road were each 75 minutes from the Drumanakelly transfer site. As a matter of practicality that meant that if Dargan Road were not available for any reason to cope with the waste from Drumanakelly, which came in from local councils, it could as quickly be sent to Keady as to Dargan Road. That would be about 12,500 tonnes per annum. I also note that the

legend on the map expressly states under the name Keady "40,000 TPA". That refers to the fact that the plaintiff had an existing capacity of that extent available. Later on it is agreed that they undertook to keep that available. Briefly on that point, Mr Woods was cross-examined about that. His firm had won the equivalent contract to this one for "Swamp" which was a consortium of councils in the South and west of Northern Ireland. However the quantities there were significantly less than in the greater Belfast area, perhaps 12,500 tonnes per annum. The Keady facility in all had a capacity of about 80,000 tonnes per annum and the rest of it would be used up in short term or ad hoc contracts which meant that the 40,000 tonnes per annum could be available as contingency for the ARC 21 contract.

[21] At Section B4 of the bid, 2/422 there are further references to Keady not only as a temporary site but as one available to accept materials in the event that the authority produces more feedstock material than projected. This touches on Mr Shaw's overflow point. But at page 423 I note the following paragraph:

> "In the unlikely event that either of the permanent facilities are not available to receive materials from the Authority NWP shall notify the Authority within the specified time frame of one day prior to the non-availability of the facility. NWP shall then inform the Authority that their materials are being processed at the Keady site until re-availability of the Dargan Road site."

Taking the natural and ordinary meaning of language it does not seem to me that those words should exclude a situation where the Dargan Road site is not available because it is taking more time than hoped to process waste to the necessary standard. At B5, 2/425 seasonal variations are expressly addressed. Inter alia the bid says:

> "The Keady composting site will handle any overspill from all of the R21 facilities."

The peaks which worry the advisors to the defendant are indeed seasonal variations. In the Spring there is always going to be an above average collection of organic garden waste. This is common case. Here this seasonal variation is expressly addressed by the bid and Keady is nominated to handle any overspill. Why can that not apply to an overspill caused by a disappointing performance at Dargan Road as much as any other reason? I think the plaintiff's interpretation that that meant only overspill over and above 98,000 tonnes per annum is a strained and unnatural interpretation. In March, April or May one would not know whether the annual tonnage was going to exceed 98,000 tonnes or not. One might consider the possibility that

it was going to do so but in the Spring season peak the operators and the Authority would not be worrying about that but where their waste was going to be processed. Mr Shaw's distinction here does seem to me as one reads the various references including those still to come to be a distinction without a difference.

[22] I turn next to [2/459]. I would point out, of course, that there are many more references to Keady in the bid than these particularly apposite ones which I now quote. I think the repeated references there to Keady are consistent with the defendant's contention relating to the temporary use of Keady in the construction phase, as are those at pages 460 and 461. Mr Giffen pointed out that at D7 the bid deals with the capacity of each of the permanent facilities and says:

> "If the ARC 21 tonnage exceeds the capacity available at Dargan Road surplus tonnage will be transferred to the NWP facility at Keady, which has spare capacity."

This would fall under Mr Shaw's stricture that it was dealing with the situation of over 98,000 tonnes per year, but if the difference between that and an under-performance in Dargan Road is indeed a distinction without any substantive difference the reference there would also assist the plaintiff. The same might be said of the reference at Section K[2/608] ie. that if there is a plant failure delivery of material can be immediately redirected to Keady until Dargan Road can re-open. If the defendant accepts that Keady is available for that purpose why does it not accept that it is available if Dargan Road underperforms? That is my paraphrase of Mr Giffin's argument. K2 on the same page is interesting.

> "**ALTERNATIVE ARRANGEMENTS IN THE EVENT THAT ANY OF THE FACILITIES ARE NOT AVAILABLE**.
>
> In the unlikely event that the Dargan Road facility is unavailable material can be transferred to the Keady site for composting."

That is a reiteration of the point made earlier ie. there is no limitation or qualification there on the phrase "not available" and it covers a situation, it seems to me, where Dargan Road is not available because it needs a longer time to process the waste.

[23] Finally for these purposes Mr Giffin referred to another passage not included in the defendant's otherwise helpful summary of quotations, namely that at [2/829] Section P. Under the overall heading of contractors identifying activities or areas where they will add value to the service the

bidder included a category 3 "Buffer capacity". The third sub-paragraph therein reads:

> "NWP have available capacity at our plant in Keady currently 40,000 t/pa. If successful in our bid for ARC 21 we will retain this capacity for ARC 21."

Mr Giffin says what could be clearer? There is no qualification to this. They are undertaking, and Mr Gray referred to this, indeed volunteered it in his own evidence, to retain 40,000 tonnes per annum if the bid was successful. If the bid had been or is in the future granted on this basis I do not see any prospect of the plaintiff evading its commitment by making to a court then the argument which Mr Shaw is now making ie. that they were only talking about using that capacity in certain limited situations but that it was not to cover underperformance in their own main facility at Dargan Road. I feel confident that a court would interpret the bid, including this sentence, as requiring the plaintiff to indeed make available that amount of capacity at Keady in any contingency situation, or be liable in damages if, in breach of the contract, it had failed to do so.

[24] Without going into more detail of the thorough submissions of counsel, it does seem to me that on an ordinary reading of the language of the bid it was offering to keep 40,000 tonnes per annum of capacity at Keady not only during the start up phase but for various contingencies during the lifetime of the contract. I do not think the plaintiff could have escaped liability by arguing in the way that Mr Shaw now does in his interpretation of the contract. It seems to me therefore that, subject to one issue, the authority misdirected itself in its reading of the contract in holding that it should not take Keady into account. I observe that I am strengthened in that conclusion by the undisputed fact that in the technical appraisal of the bid by Ora, the experts retained by the authority, that course was expressly contemplated. It can be found at File 7/456: Appendix A. It raises this issue about the peak time calculations for the tunnels at the main facility then goes on to say "So the bidder has three options." The third option is "treat approx. 35kt per annum/12.5kt per annum respectively at the Keady facility. However this is likely to have a significant impact on the bidders financial model". Pausing there in the course of the evidence it was established that given the height of the tunnel and related data the relevant figure was the 12.5 kt pa or perhaps 14 kt pa. I do not think it necessary to go into that evidence in detail.

[25] Appendix A later says:

> "It is likely therefore that the bidder will be regularly required to transfer waste to the existing Keady plant for treatment on a frequent basis."

If the level of transfer is of those levels it would simply mean that the South Down waste, in effect, would go to Keady instead of up to Belfast. Mr Woods says that would therefore have absolutely no impact on the financial model. In the evaluation of this bid that I consider in law must now take place, the Authority is entitled to address the financial model of the plaintiff and see whether coping with this problem would alter the scoring previously arrived at, but I do not suggest that it would.

[26] Mr Shaw sought to argue that even if the interpretation which he put forward did not win favour with the court, the problem at Dargan Road was of such a scale that Keady could not contain it. I do not, with respect find that at all convincing. The evidence of Mr Duncan Abernethy, whom I found a convincing witness, was confined to the question of the loading of the tunnels. He was not asked for an estimate of the overall under-performance of Dargan Road generally or at peak times and he did not provide one. Mr Shaw relied on Dr Hugh Bulson. When asked by Mr Shaw if the plaintiff's capacity at Dargan Road was twice the size would that cure the problem, he agreed it would be a very robust solution to the problem. He also agreed that on present estimates there would be very high risks of substantial quantities at Dargan Road not meeting PAS 100. If the capacity was twice as currently designed the reservations would definitely be gone. But he did not give an estimate in a way that his colleagues had before the dispute as to the likely amount of waste that might have to be diverted to Keady at peak times. Implicitly it was more than 40,000 tonnes from those answers but not necessarily so. In any event I have some reservations about the reliability of this witness. Mr Giffin in cross-examination was seeking to establish that Dr Bulson's colleagues had been directed to disregard Keady by the defendant. It was clear to me, and I believe to everybody in court, that his answers to this line of questions were evasive and unsatisfactory. Despite repeated questions he delayed and prevaricated in regard to this issue. I formed the conclusion that he believed that it would be harmful to the defendant's case to say that his firm had been told to disregard Keady and therefore would not admit that. In fact that was a foolish position to adopt as Mr Gray, who seemed an honest and straightforward witness, frankly admitted that he had given such a direction to Dr Bulson's firm.

[27] I also observe that in answer to me the witness indicated that the 12,500 tonnes per annum referred to by his colleagues in the Appendix A document was the relevant figure given that the height of the tunnel had been identified as 8 metres. Re-reading my notes it does seem to me that this gentleman was more concerned not to embarrass his client than to assist the court. In particular his claim that it was obvious that his colleagues did consider Keady and came to the conclusion that it was not part of the bid for the Dargan Road site and that this was obvious from their first reports is something that is simply not sustainable on ones examination of the documents. Either the witness had not read the documents or he was seeking

to construe them in a way which he considered to be of advantage to his client but which was not accurate.

[28] In answer to questions from the Bench at the conclusion of his evidence, after consideration of his colleagues calculations he agreed that it was possible to take tonnage from one place to the other. That figure might be 40% of 35,000 tonnes (ie. cl4000t.) over a period of three months but he did not rule out problems occurring at other times.

[29] I listened carefully to the evidence of Mr Jonathan Gray the programme and contracts manager for the defendant and I take into account his evidence. Having done so I do not really feel that he explained why he concluded that underperformance at Dargan Road could not be a contingency which could be met by Keady. As indicated above he did reach that conclusion and directed Ora that Keady could not be properly taken into account. One of his difficulties, he said, was in assessing Keady for the purposes now contemplated by the plaintiff. I have some difficulty with this as Keady is using the same technology as the defendant and its experts approve of at Dargan Road, it was already up and running or was so by September 2006 and it is considered satisfactory for both contingency and start up purposes at least to the extent of 40,000 tonnes per annum. He seemed anxious not to get into what he described as negotiations with the plaintiff in the process. That is a proper and understandable concern but led him into the erroneous position of excluding from his mind perfectly proper facts being drawn to his attention and that of his experts by the bidder in compliance with questions that had been properly asked under Regulation 17 of the Regulations. I formed the impression that he mistakenly thought the reality of the situation ie. that the plaintiff had an important advantage over other bidders because it owned Keady, conveyed an unfair advantage over other bidders. It did not. In bending over backwards to be fair to others he was unfair to the plaintiff.

[30] Having agreed that his definition of contingency was something unexpected he then admitted that he acknowledged that scheduled maintenance was included in that definition which clearly was not unexpected. He accepted that Keady was clearly contemplated as a backup if the whole or merely part of Dargan Road had been rendered not available by fire. If so, Mr Giffin asked why is Keady not available as a contingency if Dargan Road were partly unavailable for underperformance? He had no answer to that. He agreed that Keady would be used if one of the ten tunnels at Dargan Road were "non-available" and therefore 90,000 tonnes per annum could be processed instead of 98,000. It is interesting to note that he could not "honestly say" that he had gone through the plaintiff's bid to check on the references to Keady before arriving at the decision that Keady should be disregarded from the bid. That may well explain what happened here. He had of course seen it before as had others but nobody, lawyer or layman,

seems to have carried out that exercise, almost certainly essential in the circumstances, before arriving at the legally effective decision to exclude Keady from evaluation of the bid. It seems to me that he did not really have an answer for Mr Giffin's point that the argument now being advanced by the plaintiff ie. that Keady was only available for temporary purposes or various breakdowns or if the capacity went over 98,000 tonnes was really the prevailing view of the authority and its officials and advisors at the time that the decision was taken. I do not think that I need to go through that in detail. His estimate of the tonnage that might need to be diverted to Keady at peak times was 30,000 or 35,000 tonnes per annum. It will be borne in mind that this is within the 40,000 tonnes per annum which the bidder had offered to keep as buffer capacity for the main facility. It seems to me that that answer gives the coup de grace to the defendant's case that the exclusion of Keady would not make a material difference to the outcome of the bid. On the evidence before this court including that of Mr Gray and the original Ora expert it seems very likely that Keady could cope with any perceived shortfall at Dargan Road, which, of course, the plaintiff says will not occur in any event. I conclude therefore that at common law this was a relevant consideration which the Authority failed to take into account. In the alternative they misdirected themselves as to the proper meaning of the plaintiff's bid. Further, it was unfair not to take Keady into account. On this ground alone I would set aside the awarding of the tender under Regulation 32(3) of the 1993 Regulations.

Keady: Post tender clarification

[31] I now deal with the second principal argument of the plaintiff, in case I am wrong on my interpretation of the written bid. As mentioned above the Authority, quite lawfully, sought supplementary information or clarification after the written bid was received. Mr Giffin's contention is that even if, contrary to his submissions, there was some uncertainty or ambiguity about the role of Keady in the original written tender, which he disputes and with regard to which I find in his favour, nevertheless what is beyond peradventure is that the plaintiff spelt out the role of Keady in this connection in answer to direct question from the defendant and that the defendant failed to take those answers into account as a relevant consideration, it constituted unfairness and even a wholly unreasonable attitude on the part of the authority. The facts can be stated fairly succinctly. As will be remembered the expert evaluation by the Authority's advisors had raised a question mark about the efficacy of the tunnels in processing the amount of waste. They put forward three options that the bidder might go for. The Authority then, quite properly, issued to the bidder on Tuesday 13 June 2006 its series of questions, some 26 in all. See [File 4 Tab 9 page 1426 to 1428]. I set out question five in full:

> "Mass balance and seasonality:
>
> Please clarify the feedstock factors (percentage above annual mean) that have been developed for seasonality and if the proposed treatment facilities are able to process the annual peak amounts to the full extent? If not, how is the surplus managed?"

As Mr Gray acknowledged to counsel the word surplus in that context could only refer to amounts within the estimated tonnages under the contract which the main facility was not capable of processing to the full extent. The plaintiff replied to this question at File 4 pages 1442-1443 to clarify or supplement information about the operation of the plant and its assessment of seasonal variations. The Authority responded with a question list two issued to the bidder on 5 July 2006. The first four questions related to seasonality and the feedstock 2 tunnel treatment, capacity height and maturation. In answer to questions 1 and 2, which expressly were addressed to seasonality and peaks the plaintiff set out or repeated some details about the operation of the tunnels and added this paragraph. (P4/1527 and not P2 as in the plaintiff's closing submissions):

> "As mentioned in our bid we have the option of using our facility in Keady for processing any feedstock type 2 if necessary, it is not our intention that this will be necessary as the facilities we have offered have all been sized to handle the annual tonnages and handle the peak loads. If we take the approach that sometime in the future we may temporarily, not be able to handle some or all of the feedstock type 2 we have the option to transport the material to our facility at Keady, we cannot foresee why this might happen but have this option if needed."

[32] Mr Giffin strongly relies on this paragraph as directly addressing the very point now in contention ie. as part of the lawful bid process the plaintiff was saying that Keady would be available to handle the relevant type of feedstock and waste if, contrary to their expectations, that was necessary. The obvious time when it might temporarily be necessary, if the defendant's concerns prove justified, is during the peak season.

[33] For completeness and because it was relied on by Mr Shaw I refer to the third set of questions put forward by the Authority. Questions 2,3 and 4 address this concern about the effective capacity of the tunnels to process the feedstock to the necessary standard. The answers of the plaintiff follow and largely consist of technical clarification including higher floor loadings and

shorter maturation times but they do conclude with the following single sentence:

> "Nor should the available capacity of our other sites be ignored."

While, if taken out of context and in isolation, it might be possible to indeed overlook that sentence, it does not seem to me that it would be either fair or a proper reading of the contractual documents to construe that overall answer as in some way, on 27 July invalidating the firm answer given at page 1527 on 10 July. I say that in its own right perhaps with additional force because I note from page 1532 that the plaintiff seems to have been given less than 48 hours to reply to that question. Evidence was given that the plaintiff was without its advisors at that time because of their holiday commitments. The defendant undoubtedly took into account both the error that occurs elsewhere in the plaintiff's answers, of a mathematical kind, and their other answers as giving fuel to the fears about the capacity of the tunnels at the main plant. It must be of the essence of fairness, an extension of audi alterem partem, that one takes into account matters advanced in favour of the plaintiff's position as well as answers which were used against them. I therefore conclude under this heading, both as a supplement to my last finding and as an independent finding, that if one approaches this as a matter of public law, it was a relevant consideration which was not taken into account, or as a matter of fairness, it was unfair to overlook it or as a matter of contractual interpretation, it was a misdirection not to read it as part of the bid. In any analysis I find that the defendant acted unlawfully and the decision should be set aside independently on this ground.

Additional tunnels

[34] The plaintiff advances two further arguments in the alternative and independently of their submissions regarding their facility at Keady. The first of these is the contention that the defendant failed to take into account their ability to add to the number of tunnels to be constructed at the main facility at Dargan Road. In the principal bid [2/384], for example one finds:

> "In case more tonnes of material need to be composted, tunnels can be added, since the GICOM tunnels system is highly module."

[35] Of course this is consistent with the interpretation of building the tunnels if organic waste does come forward in greater quantities than the estimated forecasts contemplate. At page 406 in the course of a lengthy discussion of the advantages of tunnel composting reference is again made to the construction being highly modular; "lending itself well to simple expansion over time should this be necessary". There is a further reference to

increasing the capacity of Dargan Road by the addition of more tunnels at [2/524]. Against the plaintiff is the fact that there is not an express reference to adding additional tunnels when they deal with buffer capacity at page 829 although they do refer to Keady, as mentioned above. Mr Giffin also had to concede that when asked questions on this topic on three occasions by the Authority in July 2006 they did not proffer additional tunnels as a solution to the identified problem. I also consider it a point against them that in the main bid at page 425 when dealing with seasonal variations they do not proffer additional tunnels. They were right not to do so. As the defendant's witness Mr Abernethy pointed out these tunnels are of concrete or similar construction more than eight metres high. They cannot be run up easily. On the contrary they would require planning permission. While any problems about the working of the organic waste in the tunnels would emerge gradually and not be sudden it does seem to me that it was within the range of proper and reasonable responses for the authority not to take the possibility of additional tunnels into account when assessing the bid. There seems to be simply too much uncertainty in that regard and with regard to the issue in question. That is reinforced by the absence of any reference to the tunnels at the meeting on 28 July.

Glenside

[36] The Regulations contemplate a bidder putting in variant but compliant bids. The plaintiff's second and third bids were all based on the premise that they would built their main processing facility for the defendant at Glenside. As mentioned this was a disused quarry in their ownership for which planning permission had already been applied for approximately two years before. It was therefore significantly in advance of a Dargan Road facility. This was particularly so as apparently no objections had been raised to the scheme which obviously makes it rather more likely to succeed. They said that they had had positive feedback from the planners but were still awaiting the decision.

[37] Clearly therefore the Authority was aware of Glenside. They had taken into account two variant bids with regard to it. The issue here is, when doubts formed about the capacity of the main facility on the principal compliant bid ie. at Dargan Road to cope with the expected waste, ought they have taken into account that the defendant would, in addition to Dargan Road, also have a similar facility at Glenside which could act as a backup to Dargan Road, in addition to Keady. In that regard the first thing that must be said is that nowhere in the original written tender bid is it ever suggested that Glenside will in any event be built and will therefore act as a backup facility in any way to the Dargan Road facility. Mr Shaw submits that that in itself is fatal to this contention. Furthermore when in June and July of 2006 questions are asked about the processing of feedstock type 2, no reference is made to Glenside in response to the first and second list of questions. The third set of

questions is answered by NWP at pages 2/1533-1534. This covers various issues. The final paragraph on 1534 does point to the variability of incoming feedstocks which "no one really can predict". The last sentence reads:

> "Nor should the available capacity of our other sites be ignored."

The use of the plural there might and indeed certainly does indicate Glenside because no other site has been disclosed to the court as belonging to the plaintiff. But I would be loathe to criticise any authority for overlooking what is in effect a single letter in a single line at the end of a complex technical paragraph.

[35] The plaintiff here can only make an arguable case because of an exchange that took place at the face to face meeting on 28 July 2006. A record was kept of that meeting by Mr Declan Mee of the well known engineers Taggarts who were acting for the plaintiff. At paragraph 8.03 he records:

> "JQ asked if NWP planned to build the Glenside facility regardless of the outcome of the R21 tender. NWP confirmed they intended to do so."

That note also reflected Mr Mee's recollection that Brendan Woods, the managing director of the plaintiff expressly said that enthusiastically. Mr Caolan Woods had in cross-examination agreed that he might have just proffered that in the course of another conversation. But Mr Mee's note makes it the response to a question from the Chief Executive of the defendant. That gentleman did not give evidence to contradict that. Mr Gray, his colleague , was asked about this in cross-examination although not in examination-in-chief. His recollection was that there was a discussion about the start up of the process and the transfer to Keady. Mr Caolan Woods mentioned that if Glenside was up and running before Dargan Road then it could act in dealing with waste rather than Keady. He was then asked will you build Glenside in any event then? More than one of the plaintiff's representatives nodded or said yes they would.

[39] As indicated above both fairness, and indeed consistency, requires that the authority takes into account matters in favour of the plaintiff that are learnt after the bid process as well as matters adverse to the plaintiff. It is not disputed that this meeting was part of the bid process. Indeed some of the answers of the plaintiff at the meeting were considered unhelpful to them subsequently. It seems to me therefore that, strictly speaking, the authority could, subject to one point, take this information into account. The qualification is that it constituted information which was clarification or supplementary under Regulation 17 rather than a wholly new departure. To put it in this way: if they did take this into account could another bidder

legitimately complain that the plaintiff had been permitted to make a significant departure from its original bid to address a problem of which they were not aware of the time that they submitted the bid? While the matter is not absolutely free from doubt I am inclined to the view that another bidder might have just cause for complaint. However it seems to me that in any event there can be no question of condemning the decision of the Authority for failing to take into account the single answer to a single question. They were not sent the minutes of the meeting at that time. There was no follow up letter saying that for clarification the plaintiff was undertaking to build Glenside in any event and that it could be used as a backup facility for Dargan Road. I think it would be entirely unfair to the Authority to criticise it for overlooking an ex tempore answer to an ex tempore question in a meeting of this kind. If the plaintiff had committed itself earlier and in writing to this as a response to the supplementary questions it is possible that a different outcome might be justified.

[40] I take into account Mr Giffin's submission that there was at least uncertainty about the matter and they should have clarified it. However I do not think there is enough prior to the meeting to say that there was ambiguity or uncertainty requiring them to clarify it. Taking the exchange at the meeting at its height I do not think they were under a duty to take it further thereafter. I therefore find for the defendant on this ground also.

Conclusion

[41] I therefore confirm that the availability of Keady to deal with a wide range of contingencies, and the non-availability of the Dargan Road facility, for whatever reason, either wholly or partially, was a relevant consideration which the authority failed to take into account. In the alternative they misdirected themselves as to the meaning of the bid and the effect of the answers to the questions which the authority itself put. Further in the alternative it was unfair not to take it into account.

[42] I therefore set aside the decision of the authority to award the contract to Terra Eco, and I do so under Regulation 32(3) of the Public Service Contract Regulations 1993. If an order of certiorari is required I will grant one. Both parties have sought guidance on how the authority should now proceed. It emerged in the course of the case that the decision to disregard Keady as a potential solution to the under-performance issue seems to have been made at a meeting of the defendant on or about 19 July. I put it in that way as it must have been rather casually made because it is not minuted and there does not seem to be any other written record of the decision. I consider the defendant need not and should not re-evaluate the other bids here but that they are obliged to return to the plaintiff's bid and complete their evaluation of it as from that date but taking into account the availability at Keady of 40,000 tonnes per annum of capacity for the duration of the contract. I confirm that

they need not take into account the possibility of adding additional tunnels at Dargan Road or the plaintiff's assertion that it will build Glenside in any event. On foot of that evaluation it may be fair and reasonable for the authority to seek clarification or supplementary information from the plaintiff pursuant to Regulation 17. I have not been addressed and make no ruling on whether they should or could put any supplementary questions to the other bidders in the light of this ruling. They are entitled to rely on the plaintiff's written offer to keep 40,000 tonnes per annum of capacity at Keady available for the duration of the contract to assist with any contingency which would arise from the partial or complete non-availability of the main facility at Dargan Road (or indeed Glenside) to process the organic waste under the contract.