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Judgment: approved by the Court for handing down | *Delivered:* **05/07/11**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

BETWEEN:

RUTLEDGE RECRUITMENT AND TRAINING LIMITED

Plaintiff;

-and-

DEPARTMENT FOR EMPLOYMENT AND LEARNING

-and-

DEPARTMENT OF FINANCE AND PERSONNEL

Defendants.

McCLOSKEY J

Preface [added 24/02/12]

As appears from the above, the judgment herein was delivered by the court on 5th July 2011. It contains references to an Education and Training Inspectorate ("*ETI*") '*not for issue*' inspection report relating to the Plaintiff: see particularly paragraph [6]. The attention of the court has now been drawn to the report of the Northern Ireland Ombudsman, published on 10th January 2012. This report concludes that, in the conduct of its inspection, culminating in the aforementioned report, ETI committed several instances of maladministration. Amongst other recommendations, the Ombudsman recommended that since the ETI assessment "*cannot be relied upon*", the report should not be published [10/02/12]. While this has no impact on the substance of the court's decision, fairness to the Plaintiff dictates that the court draw attention to this post-litigation development.

I INTRODUCTION

[1] This is an application by the Department for Employment and Learning ("*the Department*"), the first-named Defendant herein, for an order pursuant to Regulation 47H of the Public Contracts Regulations 2006 terminating the requirement imposed by Regulation 47G(1) whereby the Department is currently precluded from entering into any contract for the provision of training services under the "Department for Employment and Learning delivery of the Steps to Work Programme" in the Foyle area of Northern Ireland [Project 3657 – hereinafter "*the Foyle procurement project*"].

II EVIDENTIAL FRAMEWORK

[2] As explained in the Department's grounding affidavit, sworn by Mr. McCann, the Foyle procurement project is linked to the statutory functions exercisable by the Department under the Employment and Training (NI) Act 1950, as amended by the Employment and Training (Amendment) (NI) Order 1988. In short, as expressed in Section 1(1) of the 1950 statute, the overarching statutory purposes are those of –

> "*... assisting persons to select, fit themselves for, obtain and retain employment suitable to their age and capacity, of assisting employers to obtain suitable employees and generally for the purpose of promoting employment in accordance with the requirements of the community*".

Training programmes of the kind arising for consideration in these proceedings are delivered by private sector entities with whom the Department contracts, following public procurement exercises. As explained in Mr. McCann's affidavit, from 1998 the relevant training programme was "New Deal". In September 2008, this was replaced by the "Steps to Work" programme, which was considered superior to its predecessor in a range of respects. This is a United Kingdom wide programme. By November 2008, following procurement exercises, nine "Lead Contractors" were appointed for periods of two and a half years, with the possibility of two subsequent extensions of yearly duration. "Steps to Work" is described as the Department's flagship adult return to work programme.

[3] The "Steps to Work" programme was not introduced in the Foyle area of Northern Ireland. It was the subject of two separate procurement exercises, in 2008 and 2009, which did not yield a contract award. The 2009 procurement exercise is linked to the Plaintiff's challenge and is, accordingly, considered at a later stage of this judgment. In the Foyle area, pursuant to a temporary contingency arrangement, the "New Deal" contract, of which the Plaintiff was the beneficiary, was extended. The 2011 Foyle procurement project is the focus of the Plaintiff's challenge in these proceedings. The procurement process spanned the period March to May 2011. The Department's intention was to award a contract for an initial period of nine months, beginning on 27th June 2011, with an optional extension period of 12 months.

[4] The Plaintiff company is described as a vocational training and recruitment provider. At the time when the "Steps for Work" programme was introduced nationally, in 2008, the Plaintiff was the "New Deal" programme contractor in the Foyle area. In 2008 and 2009, the proposed new Foyle "Steps to Work" contract was the subject of three separate procurement processes. The first and second of these exercises did not result in the award of a contract, for reasons which do not require elaboration at this juncture. The third exercise was conducted in 2009 and the Plaintiff was one of the tendering parties. By letter dated 6th March 2009, the Department of Finance and Personnel ("*DFP*" – the central procuring agency which conducts contract procurement exercises on behalf of the Northern Ireland Departments) wrote to the Plaintiff in the following terms:

> "*The assessment has concluded that your tender is the most economically advantageous and the Evaluation Panel has recommended that the contract is awarded to Rutledge Job Link…*
>
> *However, before we can proceed to the award stage of the process, the Directorate is required to notify all other bidders of the outcome of the assessment and will provide any necessary feedback on this decision. The Directorate will notify you when this stage of the process has been completed*".

I construe this not as a letter of contract award, rather an expression of intention to award the contract to the Plaintiff. I consider that, as a matter of law, no contract was concluded between the parties at this stage. I observe that the Plaintiff does not make the contrary case.

[5] The evidence establishes clearly that the Department did not then proceed to award the Foyle contract to the Plaintiff. Rather, by letter dated 23rd March 2009, the Department informed the Plaintiff as follows:

> "*The above 'New Deal' contracts are due to expire on 29th March 2009. However, the Department again wishes to extend the contracts from 30 March 2009 until 26th April 2009. It should be noted that this date may be brought forward depending on the outcome of the current procurement process*".

The pattern subsequently was one of periodic extension of the Plaintiff's "New Deal" Foyle contracts. The extension periods were of varying duration. The proportions of the longest of the extension periods were twelve months, beginning on 1st April 2010. By letter dated 21st March 2011, the Department notified the Plaintiff of a further contractual extension until 24th June 2011. Most recently, yet another extension has occurred. This is more limited and qualified than its predecessors, entailing an arrangement whereby the Plaintiff will continue to provide the "New Deal" contractual training programmes to *all existing trainees only*

viz. those who began their training prior to 24th June 2011. The Department's intention is that, pending final procurement of the new Foyle "Steps to Work" contract, all new applicants will have to train elsewhere than in the Foyle area.

[6] The circumstances in which this lengthy series of "New Deal" contractual extensions have been granted by the Department to the Plaintiff require some consideration. In brief compass, in June 2009 the Education and Training Inspectorate ("*ETI*" – an independent agency) completed a "*not for issue*" inspection report in respect of the Plaintiff.[1] The subject matter of the report was the Plaintiff's performance in the "Training for Success/Apprenticeships NI" programmes. This report identified one "*main strength*" and five "*main areas for improvement*". The report is, on any showing, highly critical of the Plaintiff. This is particularly evident in one of the five negative findings:

> "*Unsatisfactory quality and effectiveness of the education and training provision across all of the professional and technical areas inspected*".

The report concludes as follows:

> "*In the areas inspected the quality of training provided by Rutledge Joblink is unsatisfactory; the areas for improvement significantly outweigh the strengths in the provision. The inspection has identified major areas for improvement in leadership and management, achievements and standards and quality of provision for learning which need to be addressed urgently if the organisation is to meet effectively the needs of all of its learners*".

In correspondence, this is described as a "*pre-publication copy*". The Plaintiff was invited to identify "*any matters of factual inaccuracy*". This signalled the beginning of a process which, regrettably, has become protracted. In short, the Plaintiff has strenuously contested the contents of the report and, in doing so, has presented a complaint to the Commissioner for Complaints, whose report is currently awaited.

[7] Against the background outlined above, in March 2011 the Department initiated the new Foyle "Steps to Work" contract procurement process which has culminated in the initiation of these proceedings. The Plaintiff tendered for this contract, unsuccessfully. The Plaintiff's participation in this competition followed a meeting between representatives of both parties on 10th March 2011. This is documented in a minute prepared by the Plaintiff, certain contents whereof are disputed by the Department. According to this minute, the departmental representative intimated that "*… his Department were under severe pressure to have this issue resolved as Derry New Deal* [is] *the only* [extant] *New Deal programme in* [the United Kingdom]." To the DFP representative in attendance is attributed the

[1] Attention is directed to the Preface which has now been added to this judgment.

statement that "*… because of the length of time since the original contract had been awarded they would have to re-tender this contract*". One of the Plaintiff's representatives threatened that if a procurement exercise were initiated, the Plaintiff "*… may take an injunction out against the Department*". The Plaintiff's minute continues:

> "[The departmental representative] *stated that experience of running Steps would not be part of the criteria and that the criteria would remain exactly the same as the previous tender we had submitted … The tender would come out via Esourcingni website which has some word restriction … should we submit a tender and the outcome was not favourable to Rutledge we would still put an injunction in against this*".

The Plaintiff did not mount any legal challenge to the procurement challenge. Rather, the Plaintiff participated therein and duly submitted a tender to DFP. By letter dated 20th May 2011, DFP informed the Plaintiff of the outcome:

> "*… your tender has not been successful and an award of contract decision has been made in favour of North West Regional College.*
>
> *Our evaluation resulted in your tender receiving a score of 415 compared with the winning tenderer who scored 435. Your tender was ranked second out of three*".

Enclosed with this letter were two schedules detailing the scores allocated in respect of each of the contract award criteria by the selection panel to both the Plaintiff and the winning tenderer (hereinafter described as "NWRC").

[8] The DFP letter of 20th May 2011 was the impetus for a detailed letter of complaint, dated 7th May 2011, from the Plaintiff's solicitors. This letter, in very brief summary, complained of the Department's failure to award the Foyle contract to the Plaintiff in 2009; the legality of the 2011 new procurement process; unequal treatment; manifest error in the scoring of the NWRC bid; inconsistency in the scoring of the Plaintiff's successive tenders in 2009 (485/500) and 2011 (415/500); and, finally, the fairness of the scoring methodology. The Departmental Solicitor's Office duly responded, by letter dated 15th June 2011. In between, proceedings were commenced by the Plaintiff, by Writ of Summons issued on 31st May 2011. The Department then brought the present application, by motion dated 13th June 2011.

III THE PLAINTIFF'S CHALLENGE

[9] As appears from the Writ, the twin focus of the Plaintiff's challenge is (a) the Department's failure to award a contract to the Plaintiff at the conclusion of the 2009 procurement process and (b) the most recent decision whereby the Plaintiff's tender

in the 2011 contract procurement process was unsuccessful. In determining the present application it is incumbent on the court to evaluate each of the Plaintiff's grounds of challenge. These, as foreshadowed in the initial letter from their solicitors, have been formulated in the following terms:

(a) Illegality in the non-award of a contract to the Plaintiff following the 2009 procurement process.

(b) Unfairness.

(c) Manifest error in the evaluation of the NWTC tender.

(d) Unlawful contract award criteria.

(e) Disproportionality and want of objectivity in the scoring methodology.

(f) Two manifest errors in the scoring of the Plaintiff's tender.

These grounds of challenge were the subject of well constructed written and oral arguments by Mr. McMillen (of counsel), on behalf of the Department and Mr. Scoffield (of counsel) representing the Plaintiff.

IV LEGAL FRAMEWORK

[10] The legal framework within which this application unfolds is contained in The Public Contracts Regulations 2006 ("*the 2006 Regulations*"), as amended by The Public Contracts (Amendment) Regulations 2009 ("*the 2009 Regulations").* One of the cornerstone provisions of the 2006 Regulations is Regulation 4(3) which provides:

> "*A contracting authority shall (in accordance with Article 2 of the Public Sector Directive) –*
>
> *(a) treat economic operators equally and in a non-discriminatory way; and*
>
> *(b) act in a transparent way*".

Under the scheme of the Regulations, there are two different types of contract, "Part A" and "Part B". [The Foyle procurement project is of the latter variety]. The distinction between these two species of contract is of some significance, given that the regulatory and restrictive regime established by the 2006 Regulations is less intrusive in the case of a Part B public services contract: see, in particular, Regulation 5. Professor Arrowsmith comments:

> "*The open procedure provides for the maximum possible competition. It is also more transparent: there is no discretion in selecting providers to tender …*

> *Open procedures are also less likely to lead to collusive behaviour than formal restricted procedures …*
>
> *However, the overall cost of open procedures … may outweigh the benefits. This may especially be the case when the procurement is complex so that bid and assessment costs are high and/or when many tenders are anticipated …*
>
> *Recent research shows that in practice the restricted procedure is used in more than 60% of cases in the United Kingdom.*"

[The Law of Public and Utilities Procurement, 2nd Edition].

The general principles enshrined in Regulation 4(3), quoted above, apply to both types of contract.

[11] The issue of the criteria governing the award of a public contract is addressed in Regulation 30, in the following terms:

> "*(1) Subject to regulation 18(27) and to paragraphs (6) and (9) of this regulation, a contracting authority shall award a public contract on the basis of the offer which –*
> *(a) is the most economically advantageous from the point of view of the contracting authority; or*
> *(b) offers the lowest price.*
> *(2) A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion.*
> *(3) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.*
> *(4) When stating the weightings referred to in paragraph (3), a contracting authority may give the weightings a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.*
> *(5) Where, in the opinion of the contracting authority, it is not possible to provide weightings for the criteria referred to*

in paragraph (3) on objective grounds, the contracting authority shall indicate the criteria in descending order of importance in the contract notice or contract documents or, in the case of a competitive dialogue procedure, in the descriptive document."

The subject matter of Part 9 of the 2006 Regulations is "*Applications to the Court*". The whole of Part 9 was substituted by Regulation 10 of the 2009 Regulations. The scheme of Part 9 is, firstly, to impose certain duties on contracting authorities. To this end, Regulation 47A provides:

> "*(1) This regulation applies to the obligation on –*
>
> *(a) a contracting authority to comply with –*
>
> *(i) the provisions of these Regulations, other than regulations 14(2), 30(9), 32(14), 40 and 41(1); and*
>
> *(ii) any enforceable Community obligation in respect of a contract or design contest (other than one excluded from the application of these Regulations by regulation 6, 8 or 33); and*
>
> *(b) a concessionaire to comply with the provisions of regulation 37(3).*
>
> *(2) That obligation is a duty owed to an economic operator.*
>
> *(3) Where the duty owed in accordance with this regulation is the obligation on a concessionaire to comply with the provisions of regulation 37(3) –*
>
> *(a) references in this Part to a "contracting authority" include, despite regulation 3, the concessionaire; and*
>
> *(b) references in this Part to an "economic operator" include, despite regulation 4, any person –*
>
> *(i) who sought, who seeks or would have wished, to be the person to whom a contract to which regulation 37(3) applies is awarded; and*
>
> *(ii) who is a national of a relevant State and established in a relevant State.*

This is followed by Regulation 47B, which is not material for present purposes as it does not apply to Part B contracts.

[12] In short, the obligation imposed on a contracting authority to comply with specified provisions of the 2006 Regulations is characterised "*a duty owed to an economic operator*". The Regulations then make provision for an enforcement

mechanism, under the rubric "Enforcement of Duties through the Court". Per Regulation 47C:

> *"(1) A breach of the duty owed in accordance with regulation 47A or 47B is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.*
>
> *(2) Proceedings for that purpose must be started in the High Court, and regulations 47D to 47P apply to such proceedings."*

Regulation 47D prescribes a time limit for the initiation of such proceedings:

> **"***(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.*
>
> *(2) Subject to paragraphs (3) and (4), such proceedings must be started promptly and in any event within 3 months beginning with the date when grounds for starting the proceedings first arose."*

The initiation of proceedings has important consequences, by virtue of Regulation 47G:

> *"(1) Where –*
>
> *(a) proceedings are started in respect of a contracting authority's decision to award the contract; and*
>
> *(b) the contract has not been entered into,*
>
> *the starting of the proceedings requires the contracting authority to refrain from entering into the contract.*
>
> *(2) The requirement continues until any of the following occurs –*
>
> *(a) the Court brings the requirement to an end by interim order under regulation 47H(1)(a);*
>
> *(b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).*
>
> *(3) For the purposes of paragraph (1), proceedings are to be regarded as started only when the claim form is served in compliance with regulation 47F(1).*

(4) This regulation does not affect the obligations imposed by regulation 32A."

The provision lying at the heart of the present application is that contained in Regulation 47H, which provides:

> *"(1) In proceedings, the Court may, where relevant, make an interim order –*
>
> *(a) bringing to an end the requirement imposed by regulation 47G(1);*
>
> *(b) restoring or modifying that requirement;*
>
> *(c) suspending the procedure leading to –*
>
> *(i) the award of the contract; or*
>
> *(ii) the determination of the design contest,*
>
> *in relation to which the breach of the duty owed in accordance with regulation 47A or 47B is alleged;*
>
> *(d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.*
>
> *(2) When deciding whether to make an order under paragraph (1)(a) –*
>
> *(a) the Court must consider whether, if regulation 47G(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and*
>
> *(b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).*
>
> *(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 47G(1).*
>
> *(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.*
>
> *(5) This regulation does not prejudice any other powers of the Court".*

[13] The remedies which the court is empowered to grant to a successful challenger vary according to whether the contract in question has been executed. Regulation 47I is concerned with available remedies where the contract has not been executed:

> *"(1) Paragraph (2) applies where –*
>
> *(a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 47A or 47B; and*
>
> *(b) the contract has not yet been entered into.*
>
> *(2) In those circumstances, the Court may do one or more of the following –*
>
> *(a) order the setting aside of the decision or action concerned;*
>
> *(b) order the contracting authority to amend any document;*
>
> *(c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.*
>
> *(3) This regulation does not prejudice any other powers of the Court."*

Notably, each of the remedies in the Regulation 47I list is discretionary in nature. This may be contrasted with Regulation 47J, which applies where the relevant contract has been executed:

> *"(1) Paragraph (2) applies if –*
>
> *(a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 47A or 47B; and*
>
> *(b) the contract has already been entered into.*
>
> *(2) In those circumstances, the Court –*
>
> *(a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 47L requires the Court not to do so;*
>
> *(b) must, where required by regulation 47N, impose penalties in accordance with that regulation;*
>
> *(c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in sub-paragraphs (a) and (b);*
>
> *(d) must not order any other remedies.*
>
> *(3) Paragraph (2)(d) is subject to regulation 47O(3) and (9) (additional relief in respect of specific contracts where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 47M(3) or 47N(10)*

(orders which supplement a declaration of ineffectiveness or a contract-shortening order)."

The concept of "*ineffectiveness*" is elaborated in Regulation 47K and is not germane for present purposes. Regulation 47L prescribes certain public interest grounds which may be invoked for declining to grant the remedy of a declaration of ineffectiveness. By Regulation 47M, where such a declaration is made, the contract is deemed ineffective prospectively, rather than retrospectively. By virtue of Regulation 47N, where such a declaration is made the court *must* also order the contracting party to pay a "*civil financial penalty*" of a determined amount. It is unnecessary to consider the outworkings of this regime in the present context.

[14] The new legal proceedings regime contained in Part 9 of the 2006 Regulations, as substituted, gives effect to what is commonly described as the "Amending Remedies Directive". The 2009 Regulations constitute the domestic transposition of Article 1 of Directive 2007/66/EC of the European Parliament and Council amending Council Directives 89/665/EEC and 92/13/EEC. It is clear that the overarching aim of the Amending Remedies Directive is to improve the efficacy of the procedures for review and challenge in the context of contract procurement processes governed by the 2006 Regulations and the earlier instruments of European law. Its fundamental rationale is readily ascertained from certain of its recitals:

> *"(3) Consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms established by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. Consequently, the guarantees of transparency and non-discrimination sought by those Directives should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC. Directives 89/665/EEC and 92/13/EEC should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.*
>
> *(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers*

concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.

(5) The duration of the minimum standstill period should take into account different means of communication. If rapid means of communication are used, a shorter period can be provided for than if other means of communication are used. This Directive only provides for minimum standstill periods. Member States are free to introduce or to maintain periods which exceed those minimum periods. Member States are also free to decide which period should apply, if different means of communication are used cumulatively…

(17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

(18) In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective sanctions should apply. Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004/17/EC to the extent that those infringements have affected the chances of the tenderer applying for review to obtain the contract…

(25) Furthermore, the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective."

Finally, the recitals address the issues of effective remedy and fair hearing:

"(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter."

V GOVERNING PRINCIPLES

[15] Two of the most important governing principles, those of equality and transparency, are enshrined in Regulation 4(3) of the 2006 Regulations (paragraph [10], *supra*). In one of its most comprehensive expositions of the principles in play, the European Court of Justice ("*ECJ*") has stated:

> *"[32] The Court has held in this regard that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, inter alia, Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 16).*
>
> *[33] In accordance with that objective, the duty to observe the principle of equal treatment of tenderers lies at the very heart of Directive 71/305, as amended (Case C-243/89 Commission v Denmark [1993] ECR I-3353, paragraph 33).*
>
> *[34] More precisely, tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority (see, to this effect, Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 54).*
>
> *[35] As for the criteria which may be accepted as criteria for the award of a public works contract to what is the most economically advantageous tender, Article 29(1), second indent, of Directive 71/305, as amended, does not list these exhaustively.*
>
> *[36] Although that provision thus leaves it to the adjudicating authorities to choose the criteria on which they propose to base their award of the contract, that choice may relate only to criteria aimed at identifying the offer which is economically the most advantageous (Case 31/87 Beentjes [1988] ECR 4635, paragraph 19).*
>
> *[37] Further, an award criterion having the effect of conferring on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer would be incompatible with Article 29 of Directive 71/305, as amended (Beentjes, cited above, paragraph 26).*

[38] The mere fact that an award criterion relates to a factual element which will be known precisely only after the contract has been awarded cannot be regarded as conferring any such unrestricted freedom on the adjudicating authority.

[39] The Court has already ruled that reliability of supplies is one of the criteria which may be taken into account in determining the most economically advantageous tender (Case C-324/93 Evans Medical and Macfarlan Smith [1995] ECR I-563, paragraph 44).

[40] However, in order for the use of such a criterion to be compatible with the requirement that tenderers be treated equally, it is first of all necessary, as indeed Article 29(2) of Directive 71/305, as amended, provides, that that criterion be mentioned in the contract documents or contract notice.

[41] Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (see, by analogy, Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31).

[42] More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

[43] This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure (see, along these lines, Commission v Belgium, cited above, paragraphs 88 and 89).

[44] Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known precisely only in the future is in principle capable of guaranteeing compliance with that condition."

(***Siac Construction –v- Mayo County Council*** [2001] ECR I – 7725).

[16] The present application is brought under Regulation 47H of the 2006 Regulations. I am in agreement with the consistent line of decisions in England that applications of the present *genre* are to be determined by applying the principles in ***American Cyanamid –v- Ethicon*** [1973] AC 396. In short, it is incumbent on the court, fundamentally, to decide at this stage whether the Plaintiff has a good

arguable case (or has raised a serious issue to be tried) and, further, to evaluate the balance of convenience, taking into account particularly (but not exhaustively) the adequacy of damages as a remedy; the availability, terms and apparent efficacy of any cross undertaking in damages by the Plaintiff; the possibility of irremediable prejudice to third parties; the obligation imposed by Article 4(3) of the Treaty on European Union (frequently labelled "*the Maastricht Treaty*") to take all appropriate measures to ensure the fulfilment of obligations arising under the Treaties; and the demands of the public interest. The correct approach in principle was expressed by Akenhead J in ***Exel Europe –v- University Hospitals Coventry and Warwickshire NHS Trust*** [2010] EWHC 3332 (TCC) in the following way:

> *"26. For many years, the Courts of England and Wales have, with regard to interlocutory or interim injunctions, applied the principles and practice laid down in the well-known case of* ***American Cyanamid Co v Ethicon*** *[1975] AC 396. The first question which must be answered is whether there is a serious question to be tried and the second step involves considering 'whether the balance of convenience lies in favour of granting or refusing interlocutory relief that is sought (page 408B). The 'governing principle' in relation to the balance of convenience is whether or not the claimant 'would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was thought to be enjoined between the time of the application and the time of the trial.'*
>
> *27. It is quite clear that, prior to the amendments to Regulation 47 made by the 2009 Regulations (see above),* ***Cyanamid*** *principles were applied in considering whether or not an injunction should be granted to an unsuccessful or discontented tenderer preventing the placing of the relevant contract or agreement by the contracting authority. A good example is the recent case of* ***Alstom Transport v Eurostar International Ltd and another*** *[2010] EWHC 2747 (Ch), a decision of Mr Justice Vos. The Court of Appeal had upheld this approach in* ***Letting International v London Borough of Newham*** *[2007] EWCA Civ 1522.*
>
> *28. The issue arises whether these principles apply following the imposition of the amendments to the Regulations. Regulation 47H addresses interim orders which the Court may make in circumstances, where, pursuant to Regulation 47G, the commencement of proceedings, as in this case, has meant that the contracting authority (the Defendant in this case) is statutorily required to refrain from entering into the framework agreement (in this case). In my judgement this is primarily simply a question of interpretation of Regulation 47H. Regulation 47H(1) gives the Court the widest powers in terms of what it may do*

with regard to entering into contracts. It is in Regulation 47H(2) that one finds what exercise the Court 'must' do: it must consider whether, if regulation 47G(1) was not applicable, 'it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract'; it then goes on to say that it is 'only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a)'. This is saying in the clearest terms that the Court approaches the exercise of interim relief as if the statutory suspension in Regulation 47 G(1) was not applicable. That means that one does not as such weight the exercise in some way in favour of maintaining the prohibition on the contracting authority against entering into the contract in question. What in practice it means is that the Court should go about the ***Cyanamid*** *exercise in the way in which courts in this country have done for many years.*"

I concur fully with this approach.

VI CONSIDERATION AND CONCLUSIONS

First Ground of Challenge: Non Award of 2009 Contract to the Plaintiff

[17] In argument, it was clarified by Mr. Scoffield that this aspect of the Plaintiff's case does not entail any direct challenge to the Department's May 2011 decision. Thus this discrete challenge is not pursued under the aegis of the 2006 Regulations, as amended. Rather, it is founded on the fundamental rules of Community law and Treaty principles. The central proposition advanced is that the Department has not terminated the 2009 contract award process lawfully. In argument, it was submitted that this gave rise to a requirement of a formal written, reasoned termination decision. While the Plaintiff does not allege any breach of the 2006 Regulations in this respect, the argument advanced can be linked to the principle of transparency.

[18] It is clear that contract award authorities are empowered to terminate procurement processes. It has been held by the ECJ that, in this matter, they enjoy a broad discretion and, in particular, termination is not confined to exceptional cases or serious grounds: see ***Metalmeccanica Fracasso*** [1999] ECR I – 5697 and the ***Hospital Ingenieure*** decision [2002] ECR I – 5553. In the latter case, the ECJ highlighted in particular the principles of equal treatment and transparency. The fundamental ruling made by the court was that where termination occurs it must be challengeable by review in the court and capable of being annulled where appropriate "*… on the ground that it has infringed Community law on public contracts or national rules implementing that law*": see paragraph [55].

[19] I find that the evidence assembled at this stage of the proceedings indicates that, to the Plaintiff's undoubted knowledge, the main factors in the non-award of the 2009 contract to the Plaintiff and the clearly communicated departmental

decision to initiate a fresh procurement process in March 2011 were the adverse ETI report, the substantial elapse of time (two years) and the progressively intolerable absence of the "Steps to Work" programme in the Foyle area. The evidence establishes that the Plaintiff was fully aware of these considerations. Moreover, the Plaintiff's own note of the meeting conducted on 10th March 2011 records an unequivocal intimation by departmental representatives to the Plaintiff that there would be no contract award arising out of the 2009 process; that the old "New Deal" contracts would be extended once again; and that a new Foyle "Steps to Work" contract procurement process was to be initiated. The departmental representatives conveyed unambiguously to the Plaintiff that the status quo had become intolerable and could be perpetuated no longer. I find that the 2009 contract procurement process was terminated unequivocally at this meeting and, further, that relevant and sustainable reasons for such termination were provided. The non-provision of a formal, written termination decision (which would probably reflect best practice) did not infringe any relevant Community rule or principle. In particular, the requirements of equal treatment and transparency were fully satisfied in the fact sensitive matrix in question. I conclude that this limb of the Plaintiff's challenge does not raise a serious question to be tried.

Second Ground of Challenge: Unfairness

[20] The Plaintiff complains of unfairness. The argument runs that the non-award of the 2009 contract to the Plaintiff deprived the Plaintiff of the opportunity to obtain experience as a "Steps to Work" provider; the Plaintiff received no credit for its performance in the 2009 contract procurement process; and the Plaintiff was handicapped in attracting contractual partners/subcontractors on account of a perception that the Department would not award it the contract.

[21] The relevant legal standard in play is not that of fairness at some general or abstract level. Rather, Regulation 4(3) of the 2006 Regulations obliged the Department to treat relevant economic operators equally and in a non-discriminatory manner. In law, discriminatory treatment does not occur in the abstract or in some vacuum. Rather, it involves consideration of allegedly less favourable treatment. In consequence, as a general rule, the court's scrutiny is directed to the treatment afforded to the Plaintiff and some other party. Moreover, the modern authorities make clear that the primary question for the court is *why* the offending treatment occurred. These issues were considered by the court in ***Megahead –v- Queen's University Belfast*** [2010] NIQB 77, which involved a complaint of discrimination on the ground of race. In my judgment I made the following general observations:

> "[33] *As appears from the language of the 1997 Order (and other statutes in the discrimination field), less favourable treatment of the complainant lies at the heart of unlawful discrimination. This, in turn, conjures up the notion of disadvantage or disbenefit and frequently stimulates detailed*

(and sometimes complex) enquiries into so-called "comparators". In ***Shamoon –v- Chief Constable of the Royal Ulster Constabulary*** *[2003] UKHL 11, the existence of this phenomenon and its potential to generate 'needless problems' were noted by Lord Nicholls in paragraph [8]. Adverting to the practice whereby tribunals frequently consider, firstly, the issue of whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was on the relevant proscribed ground, his Lordship observed:*

> *'[8] No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question:* ***did the claimant, on the proscribed ground, receive less favourable treatment than others****?'*

[My emphasis].

In his Lordship's view, the 'reason why' issue lies at the heart of the enquiry to be conducted by the court or tribunal. He continues:

> *'[11 This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.]'*

> *Notably, in the context of discrimination under Article 14 ECHR, the House of Lords has advocated a similarly simplified approach. See* ***R –v- Secretary of State for Work and Pensions, ex parte Carson and Reynolds*** *[2005] UKHL 37 – per Lord Nicholls, paragraph [1]; Lord Rodger, paragraphs [43] – [44]; and Lord Carswell, paragraph [97], in a passage which contains the following general observation:*
>
> > *'Many discrimination cases resolve themselves into a dispute, which can often seem more than a little arid, about comparisons and identifying comparators, where a broader approach might more readily yield a serviceable answer which corresponds with one's instincts for justice …*
> >
> > *Much of the problem stems from focussing too closely on finding comparisons …'.*
>
> *This is the doctrinal framework within which the race discrimination complaint falls to be determined in this appeal."*

Professor Arrowsmith (*op. cit)* states (at paragraph 4.16):

> "*The equal treatment principle under the Directives prohibits* ***differentiation between economic operators*** *unless it is justified, regardless of whether the differentiation is on grounds of nationality or on other grounds …*
>
> [Thus] *in a competition an entity cannot permit one operator to alter its offer and gain an advantage and entities must follow a principle of 'open competition' in awarding contracts*".

[My emphasis].

Thus, for example, the equal treatment principle is infringed where an authority accepts a tender which is non-compliant with the relevant requirements: see the ***Store Vaelt*** case [C-243/89 (1993) ECR I – 3353, paragraph 33]. I would add that the principle of equal treatment, in virtually every juridical context in which it arises, is frequently expressed in the proposition that the relevant authority must treat like cases alike, while being alert to the requirement that different cases normally qualify for different treatment.

[22] As regards the contract procurement process under scrutiny, I consider the following factors to be of particular significance:

(a) As the Plaintiff achieved second place in the competition, the treatment of which the Plaintiff complains must be compared with the treatment afforded to the successful tenderer, NWRC.

(b) Neither the Plaintiff nor NWRC had previous experience of a "Steps to Work" programme and, in any event, this was not one of the contract award criteria.

(c) To have given the Plaintiff any kind of credit for its performance in the 2009 contract procurement process would have involved breaching the terms of the 2011 process (which made no provision for this kind of credit) and would also have resulted in inequality of treatment vis-à-vis NWRC and other competitors.

(d) The "*partners' handicap*" claim is advanced on the basis of bare, unparticularised assertion in the Plaintiff's affidavit evidence and is not substantiated anywhere in the evidence.

(e) In any event, I consider that the draft ETI report provided ample objective justification for not awarding a contract to the Plaintiff following the 2009 procurement process and, coupled with the other factors rehearsed in paragraph [19] above, for the decision to initiate a new procurement process in March 2011.

At this stage of the proceedings, it seems to me that the playing field as between the Plaintiff and NWRC (and other competitors) was a level one. I can discern no inequality of treatment amounting to a serious issue to be tried.

Third Ground of Challenge: Manifest Error in Assessment of the NWRC Bid

[23] The factual matrix upon which this discrete complaint is constructed is uncontentious. In short, NWRC, the successful bidder, had previously operated (at least in part) under the style of NWIFHE. There is an unchallenged assertion that NWIFHE received an unsatisfactory performance assessment in providing the "New Deal" training programmes, to the extent that NWIFHE was replaced by the Plaintiff in 2007. In the "Instructions to Tenderer" governing the "Steps to Work" Foyle programme, one of the expressed selection criteria was "*technical or professional ability*", requiring demonstration of "*successful track record of delivering similar services*". The Instructions continue:

> "*The tenderer must clearly demonstrate that they meet the Track Record Minimum Standards delivered by providing a*

> *minimum of three detailed examples of previous assignments with dates …*
>
> *Tenderers must … (a) clearly demonstrate a successful track record of achievement in delivering services of a similar nature within the last three years including statistical evidence of the number of job outcomes and associated details …*".

The intrinsic frailty in this particular ground of challenge is, in my view, betrayed in its formulation:

> "**If** *NWRC has relied on its provision of the New Deal programme in Foyle previously, I believe the Department has fallen into manifest error in considering that it has a successful track record for the reasons given above*".

[Extracted from the Plaintiff's affidavit – emphasis added]. It is further asserted that the Department *must have* disregarded the NIFHE historical unsatisfactory performance. While this conjecture is said to be substantiated in some way by the DSO letter of 15th June 2011, I can find no such substantiation therein. In my view, there is *no evidence* of any of the lapses attributed to the Department in its evaluation of the NWRC tender. In particular, as the relevant tender requirements made clear, it was incumbent on each tendering party to submit statistical evidence of job outcomes and associated matters. There is no evidence that NWRC failed to provide this evidence, either at all or to the necessary standard. While the court would be prepared, in principle, to make appropriate inferences, this would be justifiable only if a suitable evidential foundation existed. In my view, this is manifestly lacking. I conclude that this ground of the Plaintiff's challenge is characterised by bare, unsubstantiated assertion and speculation. It follows that this ground raises no serious question to be tried.

Fourth Ground of Challenge: Change in Award Criteria

[24] The Plaintiff's complaint, as formulated, relates to a change in *one* of the award criteria. The Plaintiff complains that the only award criterion attracting a score of 4/5 for the Plaintiff in the 2009 competition (identification of employment opportunities) was increased in importance from 15% to 35% in the 2011 contract procurement process. Relying, *inter alia*, on its note of the March 2011 meeting, the Plaintiff makes the case that this entailed the frustration of its legitimate expectation and also lacked transparency. In the Department's affidavit evidence, this discrete complaint stimulated the following response:

> "*DEL strongly rejects this claim. 'Steps to Work' is an employment programme and lead contractors are primarily measured on the achievement of sustained employment outcomes. The targets are 22% into unsubsidised*

> *employment sustained for 13 weeks, with 85% sustaining that employment for a further 13 weeks. In DEL's view it was correct that the weights should reflect the primary purpose of the 'Steps to Work' programme. Furthermore, the weightings were determined over several weeks and agreed internally within the Employment Service business area in DEL and all those involved were satisfied that they reflected DEL's requirements. These weightings were also used in the procurement competitions for the provision of 'Steps to Work' services in the Antrim and South and East Belfast contract areas advertised on 5th April 2011. The Plaintiff also submitted a tender for both these contract areas and was unsuccessful in both …*
>
> [The Plaintiff] *did not raise that or any other concern with the Defendants but was content to submit its tender*".

The deponent further avers that, *based on the evidence submitted*, the Evaluation Panel was satisfied that a mark of 4 (for the Plaintiff) and one of 5 (for NWRC) were "*wholly justified*".

[25] The EU principle of legitimate expectation is conventionally expounded within the framework of the principle of legal certainty (see the discussion in European Union Law, Wyatt and Dashwood, 6th Edition, pp. 328-332). The authors of the latter work state (at p. 328):

> "*The principle of legal certainty requires that those subject to the law should be able clearly to ascertain their rights and obligations. The related concept of legitimate expectation constitutes what has been described as a corollary to this principle: those who act in good faith on the basis of the law as it is or as it seems to be should not be frustrated in their expectations. The principle of legal certainty requires that EU Rules must enable those concerned to know precisely the extent of the obligations which are imposed upon them*".

In the present case, I am prepared to accept that there is *prima facie* evidence (which I note to be contentious) that, arising out of the *inter-partes* March 2011 meeting, the Plaintiff had an expectation that the 2011 contract procurement award criteria would be the same as their 2009 predecessors. However, this falls to be analysed in the following way:

(a) The representation attributed to the departmental representative was confined to the issue of *contract award criteria.* Nothing was said about *weightings*.

(b) Accordingly, I find that the Plaintiff had no expectation (legitimate or otherwise), induced by any representation on behalf of the Department, that the *contract award criteria weightings* would be unchanged from those employed in the 2009 procurement exercise.

(c) Furthermore, the representation on which the Plaintiff relies was made at a time when the contract award criteria had been neither formulated nor promulgated.

(d) Even if there was a representation in the terms canvassed by this ground of challenge, it no longer applied from the moment when the contract award criteria were published and communicated to the Plaintiff. Any expectation engendered at an earlier stage was extinguished from that moment, unequivocally and transparently.

(e) The Plaintiff could have chosen to challenge the procurement process at that stage, advancing this complaint, but chose not to do so.

(f) Fundamentally, taking the Plaintiff's case in this respect at its absolute zenith, the Plaintiff can complain of no unfairness in the conduct of the procurement exercise which materialised following the meeting. The alleged representation *per se* did not cause any detriment or disadvantage to the Plaintiff *and* all tendering parties were treated with absolute equality.

In my view, the overarching principle of legal certainty was fully observed at all material times. I conclude that this discrete ground of challenge raises no serious issue to be tried.

Fifth Ground of Challenge: Structural Disproportionality/Lack of Objectivity

[26] This discrete ground of challenge is directed to the scoring methodology employed in the procurement process under scrutiny. The Plaintiff complains that this was insufficiently graduated and, in consequence, "*open to abuse*". The focus of this complaint is the adoption of "*chunks*", or bands. The permissible scores were 0 – 5 and the weightings methodology required multiplication by the appropriate weighting, which ranged from 10% to 35%. Thus a score of 4 governed by a weighting of 35 would attract 140 marks, while 175 marks would be allocated to a score of 5. The total marks available were 500. The Plaintiff bases this discrete challenge on recital 46 of the Public Sector Directive, which requires that contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency and equal treatment. The Plaintiff's argument further relied on the decision in ***Traffic Signs and Equipment –v- DRD and DFP*** [2011] NIQB 25, paragraphs [65] – [66]. In that case the concern related to the allocation of 40% of the total marks to quality and the substantial subjective element in assessment ensuing therefrom. The court was of the opinion that this discrete

scoring mechanism required explanation and justification, particularly since it effectively determined the contract award decision. The court found that there was no explanation or justification, giving rise to the conclusion that the principles of objectivity and transparency had been contravened. In ***EVN and Wienstrom –v-Austria*** [2004] 1 CMLR 22, the ECJ stated:

> *"[35] In its order for reference, the Bundesvergabeamt states that even if an award criterion which relates to environmental issues, such as the one applied in the case at issue in the main proceedings, had to be regarded as compatible in principle with the Community rules on the award of public contracts, the fact that it was given a weighting of 45% would create another problem since it could be objected that the contracting authority is prohibited from allowing a consideration which is not capable of being assigned a direct economic value from having such a significant influence on the award decision.*
>
> *[36] The defendant in the main proceedings submits in that regard that given the discretion enjoyed by the contracting authority in its identification of the most economically advantageous tender, only a weighting which resulted in an unjustified distortion would be unlawful. In the case at issue in the main proceedings there is not only an objective relationship between the criteria of price and electricity produced from renewable energy sources but, in addition, precedence is accorded to purely arithmetical economic considerations, since the price has a weighting 10 points higher than that given to the capacity to supply such electricity.*
>
> *[37] It must be recalled that according to settled case-law it is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer (see, to that effect, Case 31/87 Beentjes [1988] ECR 4635, paragraphs 19 and 26; Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraphs 36 and 37; and Concordia Bus Finland, paragraphs 59 and 61).*
>
> *[38] Furthermore, such criteria must be applied in conformity with both the procedural rules and the fundamental principles laid down in Community law (see, to that effect, Beentjes,*

> *paragraphs 29 and 31, and Concordia Bus Finland, paragraphs 62 and 63).*
>
> *[39] It follows that, provided that they comply with the requirements of Community law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.*"

The court held that the application of a weighting of 45% to the relevant award criterion was not incompatible with Community public procurement rules.

[27] The adoption of objective contract award criteria is designed to further the principles of transparency and equal treatment. Thus the question for the court becomes: did the contract award scoring methodology adopted and applied in the procurement process under scrutiny lack objectivity to the extent that either of the principles of transparency or equal treatment was infringed? In my view, this ground of challenge does not qualify to be condemned as hopeless. However, I consider it frail. As regards the principle of transparency, there was no obscurity or concealment of any kind. As regards the principle of equal treatment, the contract award criteria applied equally to the Plaintiff and its competitors. True it is that, ultimately, the final scores of the Plaintiff and the successful tendering party (NWRC) were separated by the comparatively narrow margin of 20 marks, in circumstances where the weightings for the five award criteria ranged from 10% to 35%. However, this does not, in my view, give rise to any prima facie infringement of either of the principles in play. It is also appropriate to reflect on the formulation of this ground of challenge: the Plaintiff complains that the scoring methodology was "*open to abuse*". Evidentially, I find that this complaint is made in a vacuum, there being no evidence, direct or inferential, of actual abuse on the part of the Evaluation Panel or the Department. The basic touchstone, in the words of the ECJ in ***Siac Construction*** (*supra*) is whether the professional assessment made was –

> "*… based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made*".

I find no evidence, direct or inferential, that this standard was not applied in the evaluation of the Plaintiff's tender. Moreover, the matrix of the present case differs markedly from that which caused the court concern in ***Traffic Signs***. I conclude that this discrete ground of challenge does not raise a serious question to be tried.

Sixth and Final Ground of Challenge: Manifest Error in the Scoring of the Plaintiff's Tender

[28] This discrete ground of challenge has two components. Firstly, it is contended that the Plaintiff's score of 415 marks out of 500 in the 2011 procurement exercise is "*quite remarkable*" having regard to its score of 485 in the 2009 competition. This reduction in the Plaintiff's 2009 score is labelled "*inexplicable*" and "*radical*". Significantly, these are the only ingredients in this complaint, as the Plaintiff's affidavit makes clear and, based thereon, the Plaintiff alleges *"manifest error in the marking*". This is unsupported by any evidence. There is, however, evidence in tabular form recording the marks allocated to both the Plaintiff and NWRC for each of the five contract award criteria, coupled with narrative summarising the respective tenderers' responses and perceived shortcomings and weaknesses. **This** is the evidence upon which the court must focus particularly in evaluating this freestanding ground of challenge. Furthermore, I reiterate the ***Siac*** formulation, set out in paragraph [27] above. I conclude that this particular challenge resolves to bear unsubstantiated assertion and conjecture devoid of any direct or inferential evidential support. This impels inexorably to the further conclusion that this ground raises no serious issue to be tried.

[29] The second limb of this ground of challenge complains about the score of 140 (out of a maximum of 175) marks allocated to the Plaintiff in respect of the first of the contract award criteria, which was:

> "*Describe how your organisation intends to identify employment opportunities to assist participants and sustain work, detailing how your organisation will respond to employment opportunities within the local contract area as well as those at a regional area*".

In purely quantitative terms, one would unhesitatingly describe the Plaintiff's written attempt to comply with this criterion as quite detailed. The response speaks for itself and, having considered it, I do not propose to rehearse its contents here. This criterion is clearly directed to the post-training programme scenario. At its heart, it is concerned with the conversion of training into actual employment. In the relevant sections of its tender, the Plaintiff responded under three headings – Identification of Employment Opportunities; Assisting Clients to Obtain and Sustain Work; and Responding to Local and Regional Employment Opportunities. In its summary comment, the Evaluation Panel stated:

> "*Good response which details how opportunities will be monitored and identified, however the panel considered the response should have expanded upon how these opportunities will be maximised*".

This assessment is readily comprehensible: the Panel considered the response to be strong with regard to monitoring and identification of employment opportunities

for trainees, but less strong in the matter of *maximisation* of such opportunities. In the case of NWRC, the Panel's summary comment was:

> "*Excellent response covering both local contract area and regional opportunities which clearly sets out an action focussed approach detailing how opportunities will be identified and employment sustained*".

While the language of these two summary assessments is not identical, it is not difficult to link the notion of *sustaining employment* [NWRC] with that of *maximising employment opportunities* [the Plaintiff].

[30] This discrete ground of challenge does not involve any attack on the contract award criteria *per se*. Rather, it is an unvarnished challenge to *the application* of one of the five criteria by the Evaluation Panel. The correct approach for the court to this discrete challenge is conveniently summarised in ***Lion Apparel Systems –v- Firebuy Limited*** [2007] EWHC 2179 (Ch):

> "[37] *In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a 'manifest error'.*
>
> [38] *When referring to 'manifest' error, the word 'manifest' does not require any exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made*".

I also refer to ***Siac Construction***, paragraph [45]. Notably, the Plaintiff does *not* make the case that the award criterion in question is impermissible on the ground that it conferred unrestricted freedom of choice on the Evaluation Panel. This reinforces the court's assessment that this ground of challenge is directed exclusively to the *application* of the relevant criterion. Furthermore, it is well settled that contract award authorities are positively obliged to exercise discretion in determining what is the most economically advantageous tender: see in particular ***Commission –v- Italy*** [1985] ECR 1077, the rationale being that the Public Works Directive obliges authorities to exercise discretion "*on the basis of qualitative criteria that vary according to the contract in question*" (paragraph [25]). While the reviewing court will always be alert to ensure that the procurement exercise under scrutiny has been compliant with the overarching rules and principles of Community law, I consider it uncontroversial that in matters of qualitative or evaluative judgment the contract aware authority/Evaluation Panel must be accorded a certain margin of appreciation. The reviewing court cannot lay claim to the qualifications or expertise of those performing the evaluation.

[31] I have scrutinised all of the evidence bearing on this ground of challenge carefully. Having done so, I have formed the view that such merit as this discrete

challenge may possess is, at this stage of the proceedings and based on all presently available evidence, superficial at best. In my view, there is no evidence, direct or inferential, which would warrant assessing this ground more favourably from the Plaintiff's perspective. In particular, I consider that the evidence bearing on the Evaluation Panel's assessment of the Plaintiff's tender confounds this freestanding complaint. The Evaluation Panel's assessment of the relevant element of the Plaintiff's and NWRC tenders bears the hallmarks of a considered, careful and rational approach containing no indication of manifest error. I conclude that it falls measurably short of giving rise to a serious question to be tried.

VII THE BALANCE OF CONVENIENCE

[32] While the court's determination of the issues set out above is decisive of this application, I shall, nevertheless, consider the balance of convenience.

[33] The evidence, in my view, establishes a compelling need to award the "Steps to Work" Foyle contract without further delay, interruption or uncertainty. Foyle is the only area of the United Kingdom where this important employment training programme is not provided. There is a clear detriment to vulnerable and socially disadvantaged members of society. I have no reason to question the Department's claims that "Steps to Work" is a superior model to its "New Deal" predecessor, which continues to prevail in the Foyle area. Furthermore, this is reflected in the clear and consistent Government policy throughout the United Kingdom. During the *inter-partes* meeting on 10th March 2001, the departmental representative spoke of "*severe pressure*". I take into account that the Plaintiff has had the benefit of "old" contract extensions for a period approaching two and a half years and I also have regard to the transitional arrangements, which will entail a phased transfer from the existing programme to its successor. I note also the evidence of an estimated 1,700 beneficiaries and a current waiting list of 100. Finally, there is evidence that the "job outcomes" rates following trainees' completion of the new programme are markedly higher than their "New Deal" counterparts.

[34] The counterbalancing factors put forward by the Plaintiff are, in the main, an assertion that damages would not be an adequate remedy; future jeopardy to the Plaintiff in competing for contracts of this kind; asserted damage to the Plaintiff's reputation; and the availability of contractual extension mechanisms. I am of the opinion that, considered collectively, these factors pale when juxtaposed with the public interest in play, identified above. The status quo in the Foyle area is plainly intolerable and should not be permitted to continue, absent some compelling justification. In my view, no such justification exists. The potent desirability of awarding the relevant contract without further delay, interruption or uncertainty is, by some measure, the dominant factor in the balance of convenience equation, comfortably eclipsing the countervailing considerations advanced by the Plaintiff. Finally, I take into account the substantial obstacles in the way of listing this case for substantive trial before November 2011, having regard to the current state of the court lists and the limited judicial manpower available.

VIII CONCLUSION

[35] For the reasons elaborated above, I accede to the Department's application. There will, accordingly, be an order pursuant to Regulation 47H of the 2006 Regulations terminating the requirement imposed by Regulation 47G(1), the effect whereof will be that the Department is at liberty to award the Foyle "Steps to Work" programme contract forthwith.

While it follows that the Department is, in principle, entitled to its costs of this application, which was vigorously contested by the Plaintiff, there will be an opportunity for further argument on this discrete issue.