HC 28/9/04.

THE HIGH COURT

001517

[2000 No. 577 J.R.]

IN **THE MATTER OF COUNCIL DffiECTIVE 89/665/EEC**

AND IN **THE MATTER OF THE EUROPEAN COMMUNITIES**

(REVIEW PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY,

PUBLIC WORKS AND PUBLIC SERVICE CONTRACTS)

NO. 2 (REGULATIONS) 1994 (S.I. 309 OF 1994)

BETWEEN

CLARE CIVIL ENGINEERING LTD.

APPLICANT

AND

THE COUNTY COUNCIL OF THE COUNTY OF MAYO

RESPONDENT

JUDGMENT of O'Neill J. delivered the 9th of July, 2004.

In these proceedings the applicants seeks a review of the award of the contract for the construction of the Knock/Claremorris bypass claiming that the respondents failed to comply with Council Directive 93/37/EEC "the Works Directive" in various respects. The primary relief claimed is confined to damages.

FACTUAL BACKGROUND

On 25th February, 2000, the respondent published in the Official Journal a contract notice in respect of the award of a contract for the construction of the Knock/Claremorris bypass. The respondent was a contracting authority for the purposes of Council Directive 93/37/EEC concerning the co-ordination of procedures for the award of public works contracts (hereinafter referred to as the "Works

Directive"), which directive forms part of Irish Law by virtue of the European Communities (Award of Public Works Contract) Regulations 1992 (S.I. 36 of 1992 and S.I. 293 of 1994) ("the Works Regulations"). The value of the contract was in excess of IR£7 million. In April, 2000 the applicant tendered for this contract. For the purposes of its tender the applicant was supplied with voluminous contract documentation consisting *inter alia* of the Specification, the Instructions to Tenderers, the Method of Measurement for Road and Bridge Works, the Preamble to the Bill of Quantity and the Bill of Quantities.

The notice published in the Official Journal did not specify the award criteria which were in fact set out in the instructions to tenderers at instruction 5 (b). Although the criteria were expressed to be, that the contract would be awarded to the tenderer it judged to be the most economically advantageous to the respondent, instruction 5 (a) limited the criteria to be used to establish the most economically advantageous, to the Tender Price.

On 9th May, 2000, a meeting took place between Andrew Whelan and Paul Whelan for the applicants and Mr. Patsy Burke the project engineer for the respondents. A few days later by letter dated 11th May, 2000, Mr. Burke wrote seeking further information in relation to the applicant's tender. That letter was in the following terms:

"Re: Knock/Claremorris bypass Phase 1 Contract No. 5.

Dear Mr. Whelan,

On behalf of Mayo Co. Co. I would like to thank yourself, Mr. Andrew Whelan and Mr. Mark Duffy for coming to Claremorris on Thursday 10th inst. to discuss matters relating to your tender for the construction of Contract No. 5 on the Knock/Claremorris bypass with Mr. Richard Glancy and myself.

We agreed following discussion that you would submit the following information by Tuesday 18th May;

1. *A statement setting out your company, profile and management /organisational structure and listing the personnel that you propose to commit to the Knock/Claremorris bypass contract.*
2. *A description of the source and the location of the stone and bituminous materials which you propose to use. I require a letter from your proposed supplier confirming his agreement to supply you with the various grades and types of stone, bitumen macadam and asphalt required to complete the contract in accordance with your tendered price.*
3. *A list of your proposed subcontractors and their relevant experience.*
4. *A statement from your bankers that Clare Civil Engineering Limited is financially capable of undertaking a project of this size at this time. We also require a statement from the bankers of the Clare Civil Engineering Limited turnover on construction works for the last three financial years.*
5. *A preliminary works programme and method statement for the construction of the works.*
6. *A complete schedule of basic prices.*
7. *A completed form of undertaking.*

The above information is required to enable us to proceed with the detailed assessment of the tender received from Clare Civil Engineering Limited and would help determine the suitability of Clare Civil Engineering limited to carry out the contract.

Yours sincerely.

P. Burke Project Resident Engineer."

Although the applicants were of the view that the respondents were not entitled to seek much of the information sought in this letter the applicants decided to respond to it fully in the hope of winning the contract. The information sought in the respondent's letter was delivered by the applicant to the respondents on 18th May, 2000.

Late in June, 2000 the applicants heard informally that the respondent's decision on the applicant's tender would not be favourable, even though the applicant's tender was the lowest by a margin of some IR£300,000.

Being concerned at this state of affairs the applicants engaged the well known consultant Mr. Max Abrahamson who wrote to the respondents by letter dated 6th July, 2000 in the following terms;

"Dear Sir,

I advise Clare Civil Engineering Ltd. My clients have been given to understand that their tender for the Knock/Claremorris bypass Phase I Contract No. 5 has been passed over. As you are aware they have a right to know the reasons for this decision and I shall be glad to receive particulars as a matter or urgency.

Yours faithfully."

By letter dated 11th July, 2000, the respondents replied to the letter of 6th July, simply saying that Mr. Abrahamson's letter was receiving attention.

By a letter dated the 25th July, 2000, the respondents wrote to the applicant giving its reasons for the rejection of the applicant's tender. This letter was the first formal intimation to the applicants that its tender had been rejected and is as follows:

"Re: Knock/Claremorris bypass – Contract No. 5 Tender of Clare Civil Engineering Limited.

Dear Mr. Abrahamson,

I refer to your letter of 6th July, 2000 in the above matter.

The Instructions to the Tenderers, as provided for in Condoc V2.10; 10th February, 1998 set out clearly the criteria for the award of the contract and set out the method in which the contractor was required to tender and it is the failure of the contractor to comply with the terms of the Instructions to Tenderers which resulted in the rejection of the Tender.

The following specific non-compliance was identified and warranted the exclusion of Clare Civil Engineering from further consideration."

Article 14 (a) (iv) states that:

'The use of negative rates or prices, the omission of rates, the use of zero or nil rates, the use of the term included or the insertion of a dash in the rate column is prohibited (this includes rates arising from the implementation of Instruction 13 (a).'

This requirement was not complied with in that the tenderer did not enter a rate for Item 20 or for Item 21 on page 2 of the Bill of Quantities.

I trust that this clarifies the situation for you.

Yours sincerely"

Mr. Abrahamson responded to this letter by letter of 31st July, 2000 in which he took issue with the approach taken by the respondents as follows:

"Re: Knock/Claremorris bypass Contract No. 5 Clare Civil Engineering Limited.

Dear Sir,

Thank you for your letter of 25th July, 2000.

I must draw your attention to features of the instruction to Tenderers/Condoc (emphasis added) –

'1. ...non-compliance may, and in stated circumstances shall, invalidate (a) Tender.

5 (b) ...

The contract if awarded, will be awarded on the basis of the criteria set out below to the tenderer who has submitted a Tender in compliance with these Instructions and whose tender is judged to be the most economically advantageous to the employer.

The criteria are:

...

(b) the Tender Price (that is) the Tender Total as corrected in accordance with Instruction 13 below.'

You rightly do not allege non- compliance with Article 8 headed 'Requirements for a compliant tender (which in paragraph f applies only to material ...alternations or additions ...to the tender documents, and unlike Articles 5 (b) and 13 does not provide for correction.

You do allege that 'specific non-compliance' contrary to Article 14 (a) (iv) 'warranted the exclusion of Clare Civil Engineering Limited from further consideration', but you do not refer to the immediately proceedings Article – 13 ERRORS AND CORRECTIONS

For the purposes of the assessment of tenders in order to determine the tender price of a tender the following steps shall be undertaken without reference to the tender and the tender price shall form the basis for comparison with other tenders.

13(a) ...Where a number is listed in the quantity column of the Bill of Quantities and a rate has not been entered in the corresponding rate column, the rate shall be considered to be zero even though the Tenderer may have included a sum in the extension column."

In the event that, prior to any corrections being made as referred to above a Tenderer is in contention for the award of the contract, the Tenderer shall be notified of the corrections made in accordance with the provisions of subparagraph 13 (a) to 13 (c) above and its agreement sought to the Tender Price. The employer's decision as to the corrections required to be made shall be binding, subject only to the provisions of Instruction 32. If the tender rejects the corrections to its tender, its tender shall be excluded from further consideration. If the tender accepts the corrections the tenderer shall be bound by the tender price.

So by Article 5 (b) and 13, if the tenderer chooses the alternative of accepting a correction made under 13 (a) by inserting a zero rate, his tender is not 'excluded from further consideration' but 'the contract ... shall be

awarded' using his Tender Price for one of the criteria. If the general clause 14 (a) (iv) has any relevant meaning, which is doubtful particularly because of its use of the word 'prohibited' in referring back to 13 (a) it is limited by those specific provisions and a tender is 'excluded from further consideration' only where the tender refuses an opportunity that he has been given to accept corrections:

In addition –

The bill items referred to are contrary to the warranty in clause 1 of the preamble to the Bill of Quantities in that the bill has been prepared in accordance with the method of measurement for road and bridge works. Clause 2 of the preamble requiring each bill item to give 'brief identifying descriptions and estimated quantities of the work comprise in a contract' is not complied with by these items having regard particularly to the amendment to the standard clause 109 of the specification for Road Work's.

By the specific amendments to the method made in the preamble the Progress Photographs should be billed as an 'item' not a 'number', so that in item 20, at least, a space for 'rate' on which you rely is not properly included in this bill.

In any case the basic 'de minimis' principle and purposeful interpretation prevent the absurdity of disqualifying a tender for the reasons alleged about two out of the hundreds of Bill items. The allegations are of a wholly immaterial failure to enter a rate in one out of the two places in item 20 where effectively it is to be repeated, and failure to write into item 21 a trivial amount of less than .0001 percent of the tender price clearly deducible from what the tenderer did enter in the Item. Neither alleged omission is open

to any of the possible abuses by a tenderer that it is the purpose of Condoc to avoid. For your Council to contract at a price substantially higher than necessary is hardly purposeful.

As the council's purported rejection and exclusion of my clients tender was wrongful and invalid for each and all of these reasons, please confirm that is no longer being applied.

Yours faithfully,

The respondents did not reply to this letter of the 31st July, 2000, and a further letter dated 18th August, 2000 was sent by Mr. Abrahamson to the respondent. By letter of the 22nd August, 2000 the respondents replied as follows:

"Re: Knock/Claremorris bypass Contract no. 5 Clare Civil Engineering Limited.

Dear Sirs,

I wish to acknowledge receipt of your letter of 31st July, 2000 and subsequent reminder dated 18th August, 2000 regarding the above.

The council has signed a contract with Frank Harrington Limited in respect of the work in question on Knock/Claremorris bypass. The council is satisfied that it has complied with all its legal obligations in this contract.

Yours sincerely."

Following this correspondence Mr. Abrahamson had a meeting with the National Roads Authority. On 7th October, 2000, Mr. Abraham ceased to act for the applicants because of a conflict of interest. Subsequent to this the applicants engaged

the firm of Philip Lee Solicitors to act on their behalf. By letter dated 19th October, 2000. Messrs Philip Lee Solicitors wrote to the respondent in the following terms:

"Re: Knock/Claremorris bypass contract No. 5 Tender at Clare Civil Engineering Limited.,

Dear Sir,

We advise Clare Civil Engineering Limited of Quay Road Clarecastle Co. Clare in relation to the Knock/Claremorris bypasss – Contract No. 5.

We have taken over the handling of the matter from Max W. Abrahamson and McCann Fitzgerald because of the potential conflict of interest, which arose between our client's previous legal advisors and the National Roads Authority.

This letter is a notification under Regulation 5 of S.I. 309 of 1994 that our client will seek a review of the contract awarded to Frank Harrington Ltd. for breaches of Council Directive 93/37 EEC.

The directive has been infringed by the award of the Knock/Claremorris bypass contract to Frank Harrington Limited instead of our client. Our client was the most economically advantageous tender submission and in such circumstances your clients had no discretion, in the event of an award of the tender being made but to award the contract to our client.

The Instructions to tenderers stated that the contract would be awarded on price.

We understand that our client's tender submission was in the region of iR£300,000 below that of Frank Harrington Limited. Thus, not only is the

decision to award the contract to Frank Harrington Limited in breach of the Procurement Directives but it is also an unjustifiable waste of public funds.

We understand from your letter of 25th July addressed to Mr. Abrahamson that the County Council's purported excuse for awarding the contract to Frank Harrington Limited relies on the rejection of four clients tender due to its alleged failure to insert a rate opposite items 20 and 21 in the Bill of Quantities.

Item 20 and 21 relate to the production of progress photographs. It is quite clear from the amendments to the method of measurement (page 11) that progress photographs are not subject to any unit of measurement but are defined as being an "item". The preamble to the Bill of Quantity states in clause 5, that each individual item 'shall have a realistic raise or price entered against it.'

Clare Civil Engineering entered realistic prices against items 20 and 21. This does not appear to be disputed.

That progress photographs are as "item" and not a quantity against which units are appropriately placed is abundantly clear from page 40 of the specification which describes what is required of progress photographs stating.

> *'The contractor shall allow the engineer access to the site With a hoist on a monthly basis or otherwise agreed for the purposes of taking progress photographs.'*

This matter is even further reinforced by instruction 13 (c) which makes it clear that in the event of any discrepancy between the Bill of

Quantities and the contract specification, the contract specifications takes precedence.

Thus, it is abundantly clear that out clients correctly completed the Bill of Quantities.

Even if the specification was not as described above and if there was not an amendment to the method of measurement as described above, it is a breach of your own instructions to tenderise to have sought to eliminate our client in the manner and for the reasons as set out in your letter of 25th July. Instruction 13 makes it clear that where a tender is in contention for the award of the contract the tender shall be notified of any corrections made in accordance with sub-paragraph 13 (a) and 13 (c) and its agreement sought to the tender price. If the tenderer accepts the correction the tenderer shall be bound by the tender price. No opportunity was afforded to our clients to accept or comment on a proposal by a Mayo Co. Co. to amend the tender price in accordance with article 13 of the instructions. Should such a proposal have been presented to my clients they would have either accepted the deletion of those fugues and been bound by the resulting tender price or may have presented to the Co. Co. the explanation that in fact items 20 and 21 of the Bill of Quantities are 'items' against which no units have been provided for and in relation to which it is not appropriate to have submitted rates. No such opportunity was afforded our client.

The attempted elimination of a tender for such spurious grounds is not only inappropriate conduct of a public authority, unreasonable and irrational but is also disproportionate and inconsistent with the obligations of a State entity under European Law. We also consider that the unjust treatment of our

client constitutes discrimination against out client and unequal treatment of tenderers in breach of the European Court of Justices interpretation of the procurement directives.

We reserve our right to refer to other irifringements of the procurement directives or European law in forthcoming proceedings in relation to this matter.

We request that you corifirm that the dispute regarding the award of the contract of Frank Harrington Limited was referred to the National Roads Authority in accordance with instruction 33 and forward to us a copy of the review carried out by the National Roads Authority together with the explanatory memorandum on monitoring compliance referred to in instruction 33.

Unless we receive by close of business today corifirmation that liability is admitted and that full compensation shall be paid to our clients our instructions are to issue proceedings immediately. I request you to nominate a solicitor for acceptance of service of the proceedings in this matter.

We also request you to forward to us by return a clean and unmarked version of the former instructions to tenders for this project in order to facilitate the court. Our client only retained extracts of the instructions to tenderers.

We put you on notice that it is out intention to immediately lodge a formal complaint with the European community for breach of the European Community Directives.

Yours faithfully. "

By its notice of motion dated 24th October, 2000 the applicant commenced these proceedings in which they seek damages. The application was grounded on the affidavit of Andrew Whelan and exhibits referred to therein. A statement of opposition was filed date the 8th December, 2000. Affidavits were filed on behalf of the respondent by Tim Aherne, Senior Project Manager of the National Roads Authority and Joseph Beirne, County Engineer of the respondents.

Inter alia in these affidavits a number of documents are exhibited and in particular the following:

1. A memo from Mr. P. Burke Project Resident Engineer to the County Engineer dated 8th June, 2000, being the Knock/Claremorris bypass - Contract No. 5 Tender Report, a further memo from Mr. P. Burke to County Engineer dated 15th June, 2000, being an appendix to the aforementioned tender report, Mayo Co. Co. Order No. R/T.33/2000, dated 16th June, 2000, a letter dated 16th June, 2000, from G. Groarke for the County Secretary to the Secretary of the National Roads Authority, a letter dated 10th July, 2000 from the National Roads Authority to the County Secretary Mayo County Council, a letter dated 12th July, 2000, to Frank Harrington Limited, Kilkelly, Co. Mayo from the respondents, a National Roads Authority Memorandum from Pat Maher to Tim Ahern, Senior Project Manager dated 4th July, 2000.
2. As a result of sight of these exhibits the applicant sought leave to amend their statement required to ground their application for the review of the award of a public contract and by order dated 26th February, 2001 leave was granted to the applicants by Mr. Justice Kelly to deliver to the

respondents and file an amended grounding statement. In response to this the respondents delivered an amended statement of opposition."

ISSUES

These proceedings raise the following issues for determination.

1. Did the respondent rely on material in the report of Mr. Burke dated 8th June, 2000 other than those portions of that report which dealt with the elimination of the applicant's tender under Article 14 (a) (iv) of the instructions to tenderers.
2. If the respondent did so rely on such other material in the report of Mr. Burke dated the 8th June, 2000, was that reliance impermissible and did it render unlawful the decision of the respondents to eliminate the applicant's tender.
3. If the respondents did not rely on any part of the report of Mr. Burke other than those parts dealing with the elimination of the applicant's tender under Article 14 (a) (iv) were the respondents correct in concluding that the applicants failure to have inserted a rate for items 20 and 21 on page 2 of the Bill of Quantities, was zero rating, which had the inexorable effect of eliminating the applicant's tender under article 14 (a) (iv).
4. If the applicants were in error in failing to have inserted a rate for items 20 and 21, was there an obligation on the respondents under Article 13 of the instructions to tenderers to have effected a correction of that error, and sought the agreement of the applicants to that correction and

only if such agreement was withheld were the respondents entitled to eliminate the tender of the applicants under article 14 (a) (iv).

5. Even if the failure to insert a rate for items 20 and 21 was in error and if such error was not amenable to correction under article 13 of the instructions to tenderers, was there a want of proportionality on the part of the respondent in eliminating the tender of the applicant under Article 14 (a) (iv), having regard to the fact that the amount involved in respect of these two items was so small and hence could not have altered the ranking of the tenders which were in contention, should the respondents have exercised a discretion to ignore or overlook the error in question.

6. Did the respondents have any discretion to overlook any such error or were they precluded by law from exercising such a discretion once there was a breach of a prescriptive obligation in the tendering process.

7. What is the appropriate test to be applied in an application such as this to a review the award of a contract, under the public procurement process.

SUBMISSIONS

For the applicant it was submitted that there was no error on their part in not inserting a rate for items 20 and 21. The standard specification at clause 109 was amended so as to remove the obligation to take progress photographs from the contractor and to place that on the engineer. The only obligation placed upon the contractor was to provide access to the site to the engineer with a hoist for this purpose, either on a monthly basis or as otherwise agreed. The failure to delete or

appropriately amend sub-clauses 2 and 3 of clause 109 resulted in a situation where the sub-clauses were inconsistent with sub-clause 1 of 109, i.e. the amended sub-clause and as the specification itself provides in such a situation the amended sub-clause prevails. Hence, as a result of the amendment of 109(1) of the specification the standard obligation on the part of the contractor to take progress photographs is removed from him and transferred to the engineer.

The method of measurement is similarly amended to reflect this change but again the amendment is not consistently carried through so the final result is inconsistency between the amended portion and the original unamended portions. It was submitted that the amendment prevails over the original in this regard too.

The preamble to the Bill of Quantities directs that the tenderer to be guided by the Method of Measurement when completing the Bill of Quantities. Thus, in following these contractual requirements the applicant found themselves in a position of being directed by the contractual documents to prefer and follow a direction emanating from the amended clause 109(1) of the specification, whose intent is confirmed by the amendment to the Method of Measurement, resulting in an inevitable conclusion that the provision in the Bill of Quantities for a 'number' in regard to items 20 and 21 was inconsistent with clause 109(1) as amended and the method of measurement and hence was properly to be regarded as an error pursuant to the direction in the preamble to the Bill of Quantities: The correct approach was to ignore the insertion of "NR" in the Bill of Quantities in respect of items 20 and 21 and treat these items as "items" as directed in the Method of Measurement and not to put a rate in for these items.

Even if there could be said to be ambiguity as between the aforementioned contract documents on this issue as distinct from simple inconsistency, it was not

open to the respondents to take advantage of ambiguity created by them, they having an obligation to observe the principle of transparency.

Hence it was submitted that the failure by the applicant to insert a rate for items 20 and 21 was the correct approach, and that the determination by the respondents that it was an error which was to be regarded as zero rating which was caught by article 13(a), which in tum had the effect of bringing it within article 14(a)(iv) thus requiring the elimination of the applicant's tender, was a clearly established or manifest error on the part of the respondents and a breach of its obligation to award the contract to the applicant, they having submitted the tender with the lowest price.

It was submitted that even if there was error on the part of the applicant in not putting in a rate for items 20 and 21, that was an error in respect of which there was an obligation on the part of the respondents to effect a correction under article 13(a) and for that purpose to seek the agreement of the applicant to that correction and only in the absence of such agreement could there be an elimination under article 14(a)(iv). This was not done in this case, hence the failure of the respondent to effect a correction under article 13 was a breach of their obligation to the applicant under these contractual documents.

It was further submitted that even if this corrective procedure was not available having regard to the magnitude of the error and the amount of money involved and that the error in failing to put in a rate could not affect the ranking of those tenders in contention, that the respondents possessed a discretion to overlook this error and were not precluded by the principles of equality or transparency or objectivity from doing this; on the contrary, the principle of equality as between all tenderers requires that in a situation where an error was *"de minimus"* proper respect

for the principle of equality required that the error be overlooked as otherwise the applicants was in reality and in principle denied equality of treatment. It was submitted that the caselaw of the European Court of Justice does not support the respondents' contention that they had no discretion once a prescriptive obligation in the tendering process was breached, to overlook or excuse such a breach.

For the respondents it was submitted that the strict prohibition on zero rating contained in article 14 of the Instructions to Tenderers was there for the purpose of eliminating unbalanced bids so that there could be a proper and objective comparison of tenders and so that the employer, in this case, the respondent could exercise proper control over the management of the contract as it was worked out. It was submitted that the prohibition on zero rating was entirely consistent with the governing principles of equality, transparency and objectivity and was so found in the case of *South of Ireland Asphalt Company v. Mayo County Council* Unreported judgment of the Supreme Court dated the 9th day of May, 2002.

It was submitted that having regard to sub-clauses (1), (2) and (3) of clause 109 of the specification, that it was to be concluded that when taken together and read with the amendment to the Method of Measurement, that the obligation to take progress photographs was not transferred from the contractor to the engineer. Hence it was appropriate that the Bill of Quantities would deal with this item as a number rather than as a "item", as had been the position prior to these amendments. The provision in the Bill of Quantities requiring a rate for items 20 and 21 was correct having regard to the foregoing, and in any event, it was not open to the applicants to attempt to second guess the clear requirement as set out in the Bill of Quantities, to insert a rate, and in ignoring that requirement and not putting in a rate the applicants inevitably and unavoidably put themselves in the position of having zero rated these

items and hence drew down upon themselves the strict and very clear prohibition against zero rating contained in article 14 of the Instructions to Tender and in particular article 14(a)(iv) and the strict and unavoidable consequence of this was, as is clearly provided for in article 14, the elimination of their tender.

The process of correction provided for in article 13 did not apply because this only applies where in fact a rate is inserted and cannot apply where no rate is inserted and there is a clear interaction between article 13(a) which provides for a situation where no rate is inserted and therefore the rate is deemed to be a zero rate and article 14(a)(iv) clearly and unequivocally provides that where this happens, it is deemed to be zero rating for the purpose of article 14(a)(iv), thus resulting in an elimination of the tender.

It was submitted that, where there was a breach of a prescriptive obligation in the tendering process that there was no discretion on the part of the respondents to excuse or overlook such error and indeed, once the problem fell to be dealt with under article 14, it expressly provided for the exclusion of the tender.

It was submitted that only such an approach could properly respect the principle of equality because if the error on the part of the applicant was overlooked that would properly have to be regarded as an indulgence granted to the applicants where no commensurate kind of indulgence was available to any other tenderers. It was submitted that in order to make the principle of equality work so as to ensure that there were no barriers to the provision of services or supply of goods right across the community, that this objective could only be served by a strict observance of the clearly defined tendering provisions. Any other approach would render vulnerable tenderers from other countries.

It was further submitted that only the approach adopted by the respondent in this case properly served the principles of transparency and objectivity. If there were to be indulgences such as mentioned in this case granted to one tenderer, the entire basis for the award of the contract would not be apparent to all tenderers. Similarly, if indulgences of this kind were entertained it would compromise the working out of the principle of objectivity in the assessment of all tenders.

THE TENDER DOCUMENTS

The following portions of the tender documents are relevant to the issues in this application.

THE SPECIFICATION

Preamble to the Specification

"2. *A sub-clause as indicated by the Prefix* 'S' *is an amendment of a clause or part of a clause in the relevant specification referred to in 1(b), 1(c) and 1(d) and supersedes that clause in whole or in part as the case may be . . .*

4. *Where a reference is made in any of the contract documents to a clause which has been amended by substitution or addition of a sub-clause then the provisions of that reference shall include the relevant substitution, addition or appendix clause as the case may be. Insofar as any substitute or additional or appendix clauses may coriflict with or be inconsistent with any provision of the above-mentioned specifications referred to in 1(a), 1(b), 1(c), 1(d) and 1(e) the Substitute or Additional or Appendix clause shall always prevail.* "

Clause 109:

"109 Progress Photographs.

S. *109.1 The contractor shall allow the engineer access to the site with a hoist on a monthly basis or otherwise agreed, for the purposes of taking progress photographs. "*

The unamended clause 109:

"109 Progress Photographs

1. *The contractor shall arrange as described in the contract to have record photographs for the work taken by a professional photographer approved by the engineer. These photographs shall cover such extent of the works as the engineer shall direct.*
2. *All prints shall be marked on the reverse side with the date of exposure, name and address of photographer, identification reference number, and brief description of the work including drainage and direction of the view.*
3. *The copyrights of all photographs shall be revested in the employer and the negatives and prints shall be delivered to the engineer within four weeks of exposure. The photographs shall not be used for any purpose whatsoever without the engineer's approval. "*

THE INSTRUCTIONS TO TENDERERS

"Instruction 1. Invalidation of Tender

TENDERERS are required to fully comply with these instructions to tenderers when preparing their tenders. Tenderers 'particular attention is drawn to the fact that non-compliance with such instructions may, and in stated circumstances shall, invalidate their tender. . . .

5(a). Suitability of Tenderers.

After the suitability of tenderers (not excluded on the basis of the criteria set down in article 24 of Council Directive 93/3 7/EEC J has been checked by the employer in accordance with the criteria for economic and financial standing, and of technical knowledge or ability referred to in articles 26 to 29 of Council Directive 93/37/EEC, the employer shall determine to whom the contract, if awarded, should be awarded.

Evidence of the tenderer 's economic and financial standing shall be furnished by a statement of the tenderer 's turnover on construction works for the last three financial years together with a statement from the tenderer 's bank that the tenderer is financially capable of undertaking a project of this size at this time.

Evidence of the tenderer's technical knowledge and ability shall be furnished by:

(a) a statement of the tenderer 's educational and professional qualifications and/or those of the firm's managerial staff and, in

particular, those of the person or persons responsible for carrying out the work, and

(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where necessary, the competent authority shall submit these certificates directly to Mayo County Council, and

(c) a statement of the tools, plant and technical equipment available to the tenderer for carrying out the work, and

(d) a statement of the technicians or technical bodies which the tenderer can call upon for carrying out the work, whether or not they belong to the firm, and

(e) a description of the source and location of the materials specified in the contract.

5 (b). Contract Award criteria.

The employer does not bind itself to accept the tender with the lowest stated tender total or any tender, and will not pay any compensation whatsoever in connection therewith.

A contract, if awarded, shall be awarded on the basis of the criteria set out below to the tenderer who has submitted a tenderer in compliance with these instructions to tenderers and whose tender is a judge to be the most economically

advantageous to the employer. A criteria which will be used to establish which tender is the most economically advantageous are:

(a) the tender price (that is the tender total as corrected in accordance with instruction 13 below) ....

8 Requirements for a compliant tender.

Tenderers are required to comply with the following requirements:

(a) Tenders shall not be qualified and shall be submitted strictly in accordance with the tender documents.

(b) No additional items shall be inserted in the tender documents.

(c) Tenders shall not be accompanied by statements which could be construed as rendering the tender equivocal or placing it on a different footing from other tenders.

(d) Non-adjustment item exceeding 5% of the tender total shall be included in the tender.

(e) The tenderer shall sign the form of tender and shall insert therein the tender total.

(f) No material unauthorised alterations or additions shall be made to the tender documents.

(g) Any tender which does not comply with the above requirements shall be excluded from further consideration. The employer's decision as to whether or not a tender complies with the stated requirements shall be binding on the tenderer, subject only to the provisions of instruction 33 ....

13. Errors and corrections.

All priced Bill of Quantities will be extracted from their sealed envelopes and will be inspected and examined for errors which might alter the tender placing determined from the figures in the form of tender.

FOR THE PURPOSE OF THE ASSESSMENT OF TENDERS and in order to determine the tender price of a tender, the following steps shall be undertaken, without reference to the tender, and the tender price shall form the basis for comparison with other tenders:

13 (a) if, on receipt of any tender any error shall be apparent in the extension of any item in the Bill of Quantities, the extension shall be adjusted so as to be the product of the quantity and the rate set against the item and a tender total shall be adjusted accordingly. Where a number is listed in the quantity column of the Bill of Quantities and rate has not been inserted in the corresponding rate column, the rate shall be considered to be zero even though the tenderer may have included a sum in the extension column.

13 (b) If, on receipt of any tender, any error in addition shall be apparent, it shall be corrected and the total amount of the tender total altered accordingly.

13 (c) If, on receipt of any tender it shall be discovered that there is a discrepancy between the Bill of Quantities and the contract specifications or contract drawings the said document shall be applied in the following order of precedence.

(i) *contract specifications;*

(ii) *contract drawings;*

(iii) *Bill of Quantities.*

If any discrepancy is discovered between the quantity stated in the Bill of Quantities and the quantities as described in or determined from the contract specifications or the contract drawings, the latter quantities shall be applied to the rates and prices stated by the tenderer in its tender and the tender total shall be corrected accordingly.

This instruction 13 (c) shall only be applied by the engineer to discrepancies which can be clearly demonstrated to be the result of an error in the computation of quantities in the Bill of Quantities. No unsolicited information regarding any such discrepancy received after the latest date for receipt of communications (instruction no. 26) shall be considered in the assessment of tenders and where practicable shall be returned.

13 (d) Notwithstanding instruction no. 8 (d), no alterations shall be made to the lump sum adjustment item inserted by the tenderer arising from the above corrections.

In the event that, prior to any corrections being made as referred to above, the tenderer is in contention for the award of the contract, the tenderer shall be notified of the corrections made in accordance with the provisions of sub-paragraph 13 (a) to 13 (c) above and its agreement sought to the tender price. The employer's decision as to the corrections required to be made shall be binding, subject only to the provisions

of instruction 33. If the tenderer rejects the corrections to its tender its tender shall be excluded from further consideration itself. If the tender accepts the corrections, the tender shall be bound by the tender price.

14. Rates and prices

Only those tenders which comply with the following requirements shall be considered.

14(a) Subject to instruction, 14 (b) any tender which does not comply with the following requirements shall be excluded from further consideration:

(i) All "items" or "sums" in the Bill of Quantities shall be priced.

(ii) All "quantities" in the Bill of Quantities shall be priced.

(iii) Each rate or price should properly cover the full inclusive value of the work covered by the item description and shall reflect the quantity set against that item.

(iv) The use of negative rates or prices, the omission of rates, the use of zero or "nil" rates, the use of the term "included", or the insertion of a dash in the "rate" column is prohibited. This includes a zero rates arising from the implementation of instruction 13 (a).

(v) The use, in the rating of item's, by tenders, although not normally high or normally low rates or prices which expressions shall include the use of procedures or strategies which have the effect (or possible effect) of the tenderer

benefiting disproportionately from anticipated quantity increases or decreases is prohibited.

(vi) Should any question arise as to whether any rate or price in the Bill of Quantities is abnormally low or as to whether it properly covers the full inclusive cost to the work covered by that rate or price, then the tenderer shall (if requested) provide a breakdown of such rate or price to the employer and show that the tenderer has properly included for the cost of each of the following;

(a) required materials at prices current at the designated date,

(b) labour at rates not less favourable than those laid down by the National Joint Council for the Construction Industry,

(c) site overheads and staff both on and off site but excluding those elements of cost for which specific items are provided elsewhere in the Bill of Quantities.

14 (b) If it is considered that a tenderer's rates or prices are abnormally high or, alternatively abnormally low, the tenderer shall be requested in writing, to provide any details of the constituent of which the tender or the employer considered relevant. The employer shall verify those elements and take into account the explanations received in determining whether or not the Tender complies with the requirements set out above. The employers decision as to whether or not a tender has complied with the above requirements shall be binding subject

only to the provisions of instruction 33 and any failure to comply with the above requirement, if confirmed, shall exclude the tender from further consideration.

14 (c) The pricing of items, in the Preliminaries/General items section of the Bill of Quantities, by tenderers so as to provide for substantial payments at the outset of the contract disproportionate to the actual expenditure anticipated by the employer as being reasonably required to be expended by the tenderer shall be carefully examined to establish whether or not the same can be accepted by the employer. If, in the opinion of the employer, such substantial payments appear excessive in relation to the requirements of the contract or in relation to the funds available from time to time for the performance of the contract, the employer may require the tenderer to whom the contract is awarded to spread, over the duration of the contract such proportions of the rated prices of the effected items as are so considered to be excessive....

26. Communications

Any communications in connection with the tender and requests for visiting the site shall be forwarded to: Mr. P. Burke, Project Restaurant Engineer, Thornhill House, Ballyhaunis Road, Castlebar, Co. Mayo or Mr. R. Glancy, Acting/Senior Executive Engineer, Thornfield House, Ballyhaunis Road. Claremorris Co. Mayo.

The latest date for receipt of communications from a tenderer in connection with the tender shall be six working days before the latest date for receipt of tenders stated in its instruction no. 4 above. All queries and resulting replies given will be

circulated to all tenderers not later than three working days for the latest date set for receipt of tenders....

27. Ambiguity, Discrepancy, Error, Omission,

The tenderer shall immediately notify the employer should he become aware of any ambiguity, discrepancy error or omission in or between the tender documents. The employer shall upon receipt of such notification notify all tenders of his ruling in respect of any such ambiguity, discrepancy, error or omission. Such ruling shall be issued in writing by the employer and shall form part of the contract documents.

33. Monitoring compliance.

Compliance with these instructions shall he monitored by the National Roads Authority.

Should any question arise as to whether a tender has been submitted in compliance with these instructions the employer shall refer the matter to the National Roads Authority for adjudication.

Any review by the National Roads Authority shall be undertaken without prejudice to rights of tenderers or the employer.

In making any determination pursuant to the provisions of this instruction no. 33, the National Roads Authority shall apply such provisions and practices as shall be set do-wn in an Explanatory Memorandum of Monitoring Compliance, as may be issued by it from time to time and in effect on the date set for receipt of tenders.

THE PREAMBLE TO THE BILL OF QUANTITIES.

1. METHOD OF MEASUREMENT

"This Bill of Quantities has been prepared in accordance with 'Method of Measurement for Road and Bridge Works' (Her Majesty's Stationery Office, U.K 1997) as amended by 'Method of Measurement for roads and bridge works supplement no. 1' (Her Majesty's Stationery Office U.K. 1978) unless stated otherwise. It is essential that this document be referred to in pricing and in operating this bill of Quantities....

3. GENERAL DIRECTIONS

In this Bill of Quantities subheadings and item descriptions identify the work covered by the respective items, but the exact nature and extent of the work to be performed is to be ascertained by reference to the drawings, specifications and conditions of contract as the case may be read in conjunction with the matters listed against the relevant marginal headings

- *'Item coverage' in part IV of the Method of Measurement... "*

AMENDMENTS TO THE METHOD OF MEASUREMENT

PROGRESS PHOTOGRAPHS

Page 17: Delete existing paragraphs 23, 24, 25 and 26 and insert the following:

Units 23. The units of measurement shall be; -

1. Progress photographs.....Item.

24. *Separate items shall be provided for a progress photos in accordance with Part II, paragraphs 3 and 4 and the following.*

Group	*Feature*
1.	*Progress photographs*
25.	*The item for Progress Photographs shall in accordance with the Preamble to Bill of Quantities General Directions include for:*

ITEM COVERAGE

(a) making allowance for the provision for access and accommodation for the taking of progress photographs as per specification requirements;

(b) delivery of prints and negatives and prints to the engineer;

(c) identification marking on the prints;

(d) Albums.

ORIGINAL UNAMENDED METHOD OF MEASUREMENT

Re: Progress photographs in method of measurement for roads and bridge works.

"PROGRESS PHOTOGRAPHS

Units 23

The units of measurement shall be:

(i) A set of progress photographs, a set of aerial progress photographs ..... number.

(ii) Additional progress photographs, additional aerial progress photo graphs.

MEASUREMENT

24 A set of photographs shall comprise such numbers of negatives and prints as described in the Contract taken on any one flight or visit to Site.

Where in any one flight or visit to Site the Engineer ordered less than one complete set of photographs, then one set shall be measured.

Where in any flight or visit the Engineer orders progress or aerial photographs in excess of a number in the set then the additional photographs shall be measured and be deemed to include the negative and the same number of prints per negative as those in the set.

ITEMISATION

25 Separate items shall be provided for progress photographs in accordance with part II paragraphs 3 and 4 and the following:

Group	Feature
1.	Set of progress photographs.
2.	Set or aerial progress photographs.
3.	Additional progress photographs.
4.	Additional aerial progress photographs

PROGRESS PHOTOGRAPHS, AERIAL PROGRESS PHOTOGRAPHS, ADDITIONAL PROGRESS PHOTOGRAPHS, AND ADDITIONAL AERIAL PROGRESS PHOTOGRAPHS

26. The items for progress photographs, aerial progress photographs, additional progress photographs and additional aerial progress photographs shall in accordance with the preamble to the Bill of Quantities general directions include for:

(a) delivery of negatives and prints to the Engineer;

(b) identification marking on the prints."

THE BILL OF QUANTITIES

"Item ID	*Item Description*	*Unit*	*Quantity*	*Rate*	*Amount*
	Progress Photographs				
20	*Set of progress photographs in colour*	*nr*	*1*	____	*2,400*
21	*Additional Progress Photographs in colour*	*nr*	*2*	_____	*1,200*

DECISION

The first question to be addressed is the appropriate test to be applied in the determination of questions arising on an application such as this for a review of the award on a contract which is regulated by the Works Directive.

This was a topic of some controversy in the case of SIAC Construction Limited v. County Council of the County of Mayo in which the unreported judgments of the Supreme Court were delivered on 9th May, 2002 and Fennelly J. had the following to say in this regard starting at page 49 of his judgment:

"There are obvious common threads which run through any system of review of administrative decisions, where especially the primary decision making

function is administrative or governmental. The function of the courts is to guarantee legality though that notion itself has a number of elements, some procedural and some substantive. The passages which I have cited speak of 'manifest' error as the test for judicial review adopted by the community courts. This is the standard which applies to the appreciation of facts by the decision maker. They do not say that this test must be adopted by the national courts. I would observe however, that the word, manifest should not be equated with any exaggerated description of obviousness. A study of the case law will show that the community courts are prepared to annul decisions at least in certain contexts where they think an error has clearly been made.

The decisive additional consideration in the area of the public procurement is the explicit concession of a wide margin of discretion to awarding of authorities.

I do not think, however that the test of manifest errors to be equated with the test adopted by the learned trial judge, namely that, in order to qualify for quashing, a decision must 'plainly and unambiguously fly in the face of fundamental reason and common sense. "

It cannot be ignored that the Advocate General thought the test should be "rather less extreme". Such a formulation of the test will run the risk of not offering what the remedy directive clearly mandates, namely a judicial remedy which will be effective in the protection of the interests of disappointed tenders. It is significant, I think, that member states are required to make available, where appropriate and necessary, measures of interim relief (i. e. potentially halting the public procurement procedure) and damages.

The courts must be ready, in general to render effective the general principles of the public procurement, already discussed. Where a failure to respect the principles of equality, transparency or objectivity is clearly made out, there is, of course, no question of permitting a margin of discretion. Equally, where the tender is on the basis of the lowest price, (first indent of article 29 (1)) the courts must be ready to restrain any breach. Even in cases of the most economically advantageous contract it is clear that unlimited discretion cannot be permitted. The margin of discretion enjoyed by the awarding authority does not absolve it from explaining a choice, such as was made in the present case, of a tender other than the lowest. Indeed, Laffoy J. did not hesitate to express her view that the County Council had been incorrect in its treatment in the 100% reduction adopted by SIAC to the £90, 000 provisional sum for days works materials.

Therefore I am satisfied that the courts by recognising that awarding authorities have a wide margin of discretion, must recognise that this cannot be unlimited. The courts must exercise their function of judicial review so as to make the principles of public procurement directives effective. In the case of clearly established error they must exercise their powers. The application of these principles may not in practice lead to any real difference in result to the judicial review of purely national decisions and of those which require the application of community law principles. "

From this passage, I take it to be the case, that before this court intervenes by way of Judicial Review on an application such as this, the applicant carries the onus

of and must satisfy this court that the decision of which he complains has been made in clear error.

Clearly established error must mean in my view more than being simply wrong; i.e. error resulting from a mere difference of opinion. It must be shown that the decision or step taken which gives rise to complaint was plainly, unambiguously, or unarguably wrong.

It is to be borne in mind of course, as was pointed out by Fennelly J. that this standard "applies to the appreciation of facts by the decision maker". The decision of the respondent which is impugned in these proceedings was a decision to the effect that the applicant was guilty of zero rating, a conclusion based upon the respondents construction of the contract documents. The decision in question would appear to me to have been a decision as to facts based upon either a correct or an erroneous construction of the contract documents. In this context the range of appreciation of fact is quite narrow and therefore, range of discretion on the part of the decision maker correspondingly confined, and hence the existence or absence of error much more easily or clearly discernable than in a situation where the decision maker had to consider and weigh a broad range of, perhaps, conflicting factual material.

The first issue to be confronted is whether or not the respondents relied on other material in the report of Mr. Burke beyond that which related to the elimination of the applicant's tender under clause 14 (a) (iv) of the Instructions to Tenderers.

In this regard the onus rests on the applicants to satisfy me, on the balance of probabilities that the respondents did so rely on such other material. I am not satisfied on the evidence adduced, that the applicants have discharged that onus, and I am therefore compelled to conclude on the balance of probabilities, that the respondent's decision was confined to, or relied solely upon that aspect of Mr. Burke's report

which dealt only with the elimination of the applicant's tender under clause 14 (a) (iv).

I must therefore consider whether that decision was a vitiated by clear error in the light of the test discussed above.

Whether or not the respondents were in error in eliminating the applicants' tender depends on whether the applicants were right in their opinion as to the correct construction of the contract documents.

I am quite satisfied that clause 109 of the specification was amended so as to remove from the contractor the obligation to take progress photographs and to transfer that function to the engineer. There is no doubt that there is inconsistency between the amended sub-paragraph 1 of clause 109 and sub-paragraphs 2 and 3, which were not changed. However the specification itself, makes it quite clear that where such an inconsistency exists with a substituted clause, the substituted clause always prevails. What that means, in my view, is that sub-paragraphs 2 and 3 of clause 109 were rendered meaningless or redundant.

The fact that the function of taking progress photographs was switched from the contractor to the engineer does not of itself determine or necessarily indicate that the function provided for in the substituted clause 109 (1) was to be a once off provision and therefore naturally to be treated as an "item" in the Bill of Quantities or a function which was to have been repeated and therefore, in that context, to be treated in the Bill of Quantities as requiring a "rate". The discharge of this function could equally have been dealt with as a once off provision or it could have been divided into a number of units, therefore requiring a rate. In saying this, I am mindful of the fact that what was required by the substituted clause 109 (1) was for the contractor to allow the engineer access to the site "on a monthly basis or as otherwise

agreed...". The obligation here on the contractor could easily have been treated as a series of units based on monthly visits. Equally the provision could have been treated on a once off basis, having regard to the nature of what had to be done or provided by the contractor.

The matter was, however, in my view, clearly settled in the amendment to the Method of Measurement.

The Method of Measurement was amended specifically to provide that this obligation under the substituted clause 109 (1) was to be treated as an "item" necessarily implying therefore that it was being regarded by the respondents as a once off provision. It is quite clear that the process of amending the Method of Measurement as with the specification was not carried through so as to delete parts of the original so as to eliminate inconsistency or conflict with the amendment. However I am of the opinion that it was clearly intended that the Method of Measurement was to be amended so as to treat the obligation of the contractor under the substituted clause 109 (1) in the specification as an "item". Subparagraphs (b), (c) and (d) under the heading of Item Coverage in the amended portion of the Method of Measurement are clearly inappropriate, where the obligation to take progress photographs was shifted to the engineer and in my view it is quite obvious that the failure to delete these sub-paragraphs was simply an oversight in the preparation of these documents.

The completion of the Bill of Quantities must be done as directed by the Method of Measurement. The Preamble to the Bill of Quantities makes this perfectly clear. The whole purpose of the Method of Measurement is to provide direction to a tenderer when filling out the Bill of Quantities. Hence the provision in the Preamble

to the Bill of Quantities, *"it is essential that this document be referred to in pricing and in operating this Bill of Quantities".*

When the applicants were filling out the Bill of Quantities and when they came to deal with the progress photographs i.e. items 20 and 21, they came to the conclusion that the provision in the Bill of Quantities in the "unit" column for a number designated as "NR" was an error because it was wholly inconsistent with the relevant provision in the Method of Measurement and hence they followed the direction from the Method of Measurement and did not put in a "rate" for these two items.

In my view in faithfully following the direction in the Method of Measurement they adopted the correct approach and as a result were put in a position of being unable to avoid a conclusion that the requirement for a "NR" in the Bill of Quantities was an error.

The respondents now say that they should simply have put in the rate as indicated in the Bill of Quantities and should not have engaged in second guessing what was in the Bill of Quantities.

In my opinion, in order to uphold this approach of the respondents one has to take the view that the direction given in the Method of Measurement should have been disregarded. Such a view in my opinion is wholly unsustainable and plainly and unarguably wrong. I have therefore come to the conclusion that the opinion which the applicants formed as to the correct construction of the above portions of the contract documents was correct and the conclusion reached by the respondents which led to their decision to eliminate the applicant's tender was a clearly established or manifest error. The applicants had not engaged in "zero rating". Hence the manner in which they dealt with items 20 and 21 in the Bill of Quantities did not bring them within

clause 13 (a) of the Instructions to Tenderers, with the consequence of activating clause (14) (a) (iv) of the Instructions to Tenderers.

The foregoing conclusion is sufficient to determine the question as to whether or not the applicant is entitled to the relief claimed in these proceedings and it is unnecessary for me to consider the other issues set out above. However, in deference to the learned submissions of counsel, I feel I should express opinions on these issues.

The problem which has arisen in this case was correctly regarded by the applicant as one of inconsistency rather than ambiguity, i.e. inconsistency between the treatment of progress photographs in the Bill of Quantities and the method of measurement. Nonetheless however in my view the error which was identified by the applicant in the Bill of Quantities was an error to which clause 27 of the Instructions to tenderers applied. The applicants submitted that because this error came to light only within the last six days before the latest date for receipt of tenders, they were precluded by Article 26 from raising the matter for consideration by the respondents.

Clause 26 does contain a clear prohibition of communications in that last six day period, and the Instructions to Tenderers do not appear to contain any mechanism for dealing with errors or ambiguities to which clause 27 applies in that six day period. That being so it would appear to me that in the failing to have notified the respondents of the error in question, there was no breach by the applicants of the tender documents and hence they cannot be faulted for having failed to notify the respondents of this error.

I am satisfied that the respondents are correct in their submissions in regard to the interaction between clause 13 (a) and 14 (a) (iv) of the Instructions to Tenderers. Manifestly, in my view the failure to insert a rate in the Bill of Quantities where a rate was properly required, amounts to "zero rating". Clause 14 explicitly prohibits zero

rating and necessarily in my view incorporates into that prohibition zero rating as a result of the operation of clause 13 (a). It could very well be argued that the last sentence of 14 (a) (iv) is superfluous in that the first sentence of 14 (a) (iv) appears to comfortably include zero rating as a result of the operation of 13 (a). However, the express inclusion of zero rating as a result of the operation of 13 (a) in the last sentence of 14 (a) (iv) eliminates any possibility of doubt as to the connection between these two provisions.

Clause 13 (a) would offer no comfort to the applicant because it only comes to the aid of a tenderer where there is an error in the extension column. It is therefore necessary for the operation of 13 (a) for the benefit of a tenderer that a rate be included in the rate column.

In my view clause 13 (c) of the Instructions to Tenderers has no application to the circumstances of this case. There is not in my opinion any discrepancy between the Bill of Quantities and the contract specification. The important inconsistency that has occurred in this case is between the Bill of Quantities and the Method of Measurement. Hence the priority or precedence of documents provided for in 13 (c) does not arise in this case. Clause 13 (c) applies to discrepancies that occur because of an error in the computation of quantities in the Bill of Quantities. This does not arise in this case.

I am satisfied that the applicants' submissions to the effect that if there had been an error on the part of the applicant in not putting in a rate in respect of items 20 and 21 in the Bill of Quantities, that was an error which the applicants were entitled to have corrected under clause 13 of the Instructions to Tenderers is incorrect. Because such error, if it was an error, is not one which is catered for in clause 13 (a) or (c) it was not capable of correction under these provisions and there was no obligation on

the part of the respondents to have effected such a correction and sought the agreement of the applicants to any such correction.

It was argued by the applicant that if there was an error and if it was not one which ought *to* have been corrected under clause 13, that none the less because of the very small magnitude of the amount involved, having regard to the *de minimis* principle, that the respondent should have exercised a discretion to overlook any such error and that in the first instance they had such a discretion and should have exercised it in favour of the applicants. Against this the respondents argue that only a strict application of the prohibition on zero rating contained in clause 14 of the Instructions to Tenderers would properly respect the principles of transparency, objectivity and fairness.

Without deciding whether or not the respondents did have any discretion as argued by the applicant I am quite satisfied that if they had such a discretion they were entitled to exercise it in the manner in which they did and the applicants have wholly failed to demonstrate that in approaching the matter on the basis of a strict application of the "zero rating" prohibition, that there was any error let alone "clearly established" or "manifest" error in so doing on the part of the respondents. I am quite satisfied that if the respondents did have the discretion contended for by the applicants they were clearly entitled to exercise it by enforcing a strict prohibition on "zero rating" and it has not been demonstrated to my satisfaction by the applicant that respondents were in breach of the principle of proportionality in strictly enforcing this prohibition. It would seem to me that the entirely legitimate objective of eliminating the practice of "zero rating" would not be attained if in certain circumstances the prohibition was seen to be relaxed. If that were the case it would be likely to encourage a continuance to some degree at least of the practice. In my view only a

strict application of the prohibition would successfully achieve the objective of eliminating this practice.

It was submitted by the respondent that even if they were not entitled to eliminate the applicants tender, it does not follow that the applicants would have been entitled to the award of the contract and therefore it was submitted that it did not follow that there would be a liability on the respondents in damages.

I am satisfied that the contract having been awarded to Frank Harrington Ltd., and the tender of the applicant having been unlawfully eliminated, and it being common case that the applicants tender price was substantially below that of Frank Harrington Limited, it in my view necessarily follows, that but for the unlawful elimination of its tender, the applicants would have been successful in winning the contract and hence it follows in my view that the respondents are liable to them in damages for whatever recoverable losses having suffered by the applicants.

Awarded 9/7/04