

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

JOHN SISK & SON HOLDINGS LIMITED

Plaintiff:

v

WESTERN HEALTH AND SOCIAL CARE TRUST and  
THE DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

Defendants:

STEPHENS J

**Introduction**

[1] I delivered an ex tempore judgment which has been transcribed.

[2] This is an application by the Western Health and Social Care Trust and the Department of Health, Social Services and Public Safety, the applicants, for an order pursuant to Regulation 47H of the Public Contract Regulations 2006 ("the 2006 Regulations") to bring to an end the requirement on the Trust to refrain from entering into a performance related partnering framework agreement for construction works ("the framework agreement") with McLaughlin and Harvey Limited.

[3] The obligation to refrain from entering into the framework agreement arose under Regulation 47G of the 2006 Regulations when John Sisk & Son Holdings Ltd, as plaintiff issued a Writ of Summons on 27 November 2013 against the Trust and the Department of Health, Social Services and Public Safety as defendants. In that action the plaintiff seeks an order setting aside the decision of, in effect, the applicant not to appoint the plaintiff as preferred bidder in respect of the framework agreement on the basis that the public procurement process was unlawful, in breach of the 2006 Regulations, in breach of general principles of EU law and/or in breach of the implied tendering contract between the plaintiff and the defendant.

[4] The framework agreement includes a construction contract for the construction of the Omagh enhanced local hospital (“the initial project”).

[5] Mr David Dunlop appears on behalf of the applicants, Mr Humphreys QC and Mr Coghlin appear on behalf of the plaintiff. I am grateful to Counsel for their industry and for their assistance.

### **Factual Background**

[6] On 24 September 2012 a notice was placed in the Official Journal of the European Union in relation to the framework agreement. The public procurement procedure to be adopted was the restricted procedure. The notice stated that the framework agreement was to be of four years duration. The initial contract under the framework agreement was stated to be for the construction of an enhanced local hospital approximately 30,089 square metres on an existing hospital site. This new hospital was to be constructed at Donaghanie Road, Omagh. The notice also referred to what is termed:

“Subsequent health related projects”

which

“may be at the same location or elsewhere within the Western Health and Social Care Trust’s catchment area.”

[7] The estimated value of the framework agreement was in the range £50m-£100m. So it could be seen from that notice that what was envisaged was the construction of the new Omagh hospital together with some further unspecified construction works either at the hospital site in Omagh or just generally in the Western Health and Social Care Trust’s catchment area. The construction of the new Omagh hospital was the initial project. I will refer to the subsequent unspecified potential projects as call off projects.

[8] A pre-qualification questionnaire package was provided to the plaintiff. The plaintiff was successful at that stage as were a number of other economic operators. The plaintiff and those other economic operators were invited to submit tenders to the Trust.

[9] On 22 April 2013 the Trust published a document entitled Memorandum of Information (the “MOI”). The purpose of the MOI was to enable economic operators including the plaintiff to prepare their tenders. The document identified the client as the Trust, it contained the Trust’s requirements in connection with the award of the framework agreement and the appointment of a contractor as preferred bidder in relation to the initial project. The MOI gave a description of the initial project in paragraph 4 which I set out as it is important to an appreciation of the public interest in the construction of the new Omagh hospital.

“Phase 1 of Omagh Enhanced Local Hospital will provide a range of leading edge hospital services to the community. This will cover a range of primary, secondary and community health care services appropriate for local delivery to the people of Omagh and surrounding district. In addition it will also provide state of the art diagnostic services together with modern GP facilities. Key components will include operating theatres, in-patient beds, cardiac assessment, GP practices, renal dialysis, outpatient consulting, endoscopy, imaging, urgent care, treatment rooms, therapy rooms and specialist care. The services will operate as part of a clinical network closely aligned with consultants and other staff in Altnagelvin and the South West acute hospital utilising similar room layouts and equipment.”

[10] As can be seen there is an obvious major public interest in securing these facilities for the benefit of, for instance, those members of the community who are afflicted by illness or who sustain injuries. The public interest extends of course to their extended family members so that those family members can be assured that their relatives are in receipt of modern, reliable and effective health care. Indeed, the interest goes way beyond those who need medical treatment and their immediate or extended family members but also encompasses the community as a whole. A new hospital, such as this, lies at the heart of the community. It is a reassurance to all that if a tragedy befell them or any member of their family medical assistance would be provided. It is also a symbol of the priority that we all place on providing good medical care for others. There is a public interest in having a new hospital built. That public interest includes the hospital being built in an appropriate timescale and it also extends to it being built with all the facilities that are presently planned. I would add that Mr Humphreys on behalf of the plaintiff, John Sisk & Son Holdings Ltd, readily recognised the public interest in the timely construction of the new Omagh Hospital. He mentioned the countervailing public interests that is the public interest in the proper award of public procurement contracts and the public interest in not having to pay for the construction of the new hospital which would include an element of profit to one contractor and then having to pay a second time an amount by way of damages representing profit to for instance the plaintiff. I wish to make it clear so that the attitude of the plaintiff is not misconstrued that Mr Humphreys did not attempt a comparison of those competing public interests, nor did he seek to demonstrate how it was that the public interest in having a hospital was outweighed, on the facts of this particular case, by the other public interests.

[11] The MOI set out the procurement methodologies and under the heading performance related partnership and at paragraph 5.1 it stated:

“It is the intention of the Client to use Performance Related Partnering (PRP) as the methodology for procuring the Initial Project and potential subsequent ‘call off’ projects. Under this process the selected Contractor will be appointed as preferred bidder for the Initial Project. The Design Team have completed detailed design to RIBA Stage E, F & G/NHS Stage 2 which includes detailed drawings and specifications for all aspects of the Initial Project. A draft Preferred Bidder Letter is contained under Appendix E for reference purposes. The Contractor and Key Members of the Contractor supply chain will then be required to assist the Design Team in the review of the detailed design solutions with the objective of ensuring that the specified client requirements in relation to the content, cost and quality of design are achieved.”

[12] I refer to another part of paragraph 5.1 as follows:

“The Client may at its absolute discretion and at any time elect to discontinue the PRP procurement process and/or withdraw Preferred Bidder status and/or decide not to enter into any contract in respect of the Initial Project and any potential subsequent ‘call off’ projects. It is acknowledged that the Preferred Bidder has the discretion to withdraw from the PRP procurement process at any stage prior to acceptance by the Client of a formal offer that relates to the Initial Project and any potential subsequent ‘call off’ projects.”

[13] It can be seen that the tender does not result in the award of the initial contract but rather results in an appointment as the preferred bidder for the initial project. Neither the Trust nor the preferred bidder is obliged to enter into any contract in respect of the initial project or any potential subsequent call off projects.

[14] As part of the tendering procedure under the MOI the economic operators were invited to submit proposals for delivering the Trust’s requirements in a more efficient and cost effective manner by what were termed “contractor instigated cost efficiencies.” These costs efficiencies would be assessed and either “not approved” or “approved in principle”.

[15] In the MOI the works costs limit for the new Omagh hospital was set at £65,750,000. On the basis of the range of spend specified in the notice in the official journal of the EU of up to £100m this meant that the call off projects could amount to further construction works with a maximum total value of £34,250,000 over the total period of four years of the framework agreement. However, at no stage in the MOI,

or indeed in any other document made available to me, has any definition been brought to any call off project nor is there any evidence of the degree of likelihood of there ever being a call off project during the four year life of framework agreement. Further definition is brought to call off projects in the draft framework agreement attached to the MOI. All that one can conclude is that some further projects must have been in mind at some stage for the Trust to have included this provision in the framework agreement.

[16] The MOI specified that the contractor's price is based on the provisional bills of quantities inclusive of approved in principle contractor instigated costs efficiencies as contained in the contractor's proposal document. On appointment of the preferred bidder the contractor's price will be referred to as 'the adjusted works cost limit'. There then follows the stage between the appointment as the preferred bidder and the award of the framework agreement. During this stage the adjusted works costs limit may be adjusted to take account of the following matters namely unforeseen ground conditions, client changes, changes in building control, DOE planning or other statutory requirements, changes to approximate quantities, adjustments for the pricing of provisional sums, design team instigated costs efficiencies (omissions), client instigated cost efficiencies. Furthermore, it is stated that the client at its absolute discretion might introduce client instigated cost efficiencies during the preferred bidder stage by way of revised drawings and specifications and an associated bill of reductions. Any bill of reductions will be priced by the design team quantity surveyor using the relevant prices and rates contained in the preferred bidder's provisional bills of quantities upon which the contractor's price is based.

[17] After the preferred bidder stage is the formal offer and award of construction contract to undertake the initial project.

[18] The MOI set out the award criteria applicable to all the economic operators. These included quality for which the overall weighting was 20 per cent and price for which the weighting was 80 per cent. The quality criteria include whole life cycle costs benefits. As part of its bid the plaintiff put forward a proposal that terrazzo floor covering be considered as an alternative to ceramic tiling in the general circulation and GP areas. It was stated by the plaintiff that grout, tile and joints are areas which attract dirt and are always hard to clean and keep in good condition. Additional time and effort is needed to clean tiles to the required standard thus holding up cleaning and maintenance staff for longer periods. The time saving for cleaning terrazzo is significantly less than a tiled finish. Seamless terrazzo flooring with a coved skirting has an outstanding record for durability and performance with correct care and maintenance a floor will typically last or even outlast the life time of the structure in which it resides.

[19] The quality criteria also included the personnel assigned by the contractor to the initial project. In its response the plaintiff identified its contract manager, Ken Aherne, setting out his relevant experience as including the Mater Campus hospital

development in Dublin, a €160m contract, the Phoenix Care Centre, a €15.4m contract, the Crumlin Children's Hospital, a €4.8m contract, Blackrock clinic, a €28m contract, St Michael's, Dun Laoghaire, Accident and Emergency, a €2m contract, and a new operating theatre in the National Maternity Hospital, a €1m contract.

[20] The lead foreman was identified as Pat Tierney and his skills and experience were set out. The Building Services Co-ordinator was identified as Kevin Walsh and his skills and experience were set out.

[21] The original timescale envisaged in the MOI altered as immediately prior to the closing date for the submission of the contractor's proposals, it became clear to both the Trust and the plaintiff that the works cost limit could not be delivered given the specification. When it became clear the works costs limit could not be delivered given the specification, the Health Estates Investment Group (HEIG) conducted a value engineering exercise whereby the Design Team proposed a series of "savings" which could be implemented to allow valid tenders to be returned. It was the carrying out of this exercise which therefore caused the timescale to alter and the contractors were asked to find further costs efficiencies.

[22] The plaintiff submitted its tender on or about 12 August 2013 on a document entitled Client's Requirement Document. The plaintiff's bid and the bids of the other economic operators were assessed by a panel of individuals and scored. By letter dated 28 October 2013 Mr A Thompson, Programme Director of the Department of Health, Social Services and Public Safety, wrote to the plaintiff informing it that its submission had not been successful and that a decision had been made to appoint McLaughlin and Harvey Ltd as preferred bidder.

[23] The letter stated that the plaintiff's score was 92.69 compared with the preferred bidder's score of 92.70 and that the plaintiff's submission was ranked second out of seven. Attached to the letter was a schedule setting out the score in relation to the plaintiff's bid together with the evaluation panel comments and the scores in relation to McLaughlin and Harvey's bid together with the evaluation panel's comments. So for instance in relation to the plaintiff's proposed change to a terrazzo floor finish it could be seen that the plaintiff achieved a score of 4 out of 5 and the comment was "good response well supported by technical details and due to durability and reduced maintenance demonstrates the potential to contribute positively to the whole life cycle costs benefits." By way of contrast it could be seen that McLaughlin and Harvey Ltd had suggested using intelligent power over Ethernet LED lighting system. This was marked as scoring 2 out of 5 and the comment was "reasonable response supported by technical details, however the extent of the application is limited by the fact that this system is already specified for the majority of the scheme which makes it difficult to determine the potential to contribute positively to the whole life cycle cost benefits."

[24] The overall outcome was that McLaughlin and Harvey Ltd was the preferred bidder by the most slender of margins. In practical terms any increase in the

plaintiff's score would have resulted in the appointment of the plaintiff as the preferred bidder.

[25] By letter dated 14 November 2013 the plaintiff questioned the validity of the appointment of McLaughlin and Harvey as the preferred bidder. In that letter the plaintiff set out what it described as a number of significant concerns about the tendering process and the subsequent evaluation which took place.

[26] The plaintiff's Writ of Summons was issued on 27 November 2013.

[27] By letter dated 13 December 2013 the Department of Health, Social Services and Public Safety provided further information to the plaintiff. It was stated that tender documents were sent to seven shortlisted contractors on 22 April 2013. Valid tenders were received from only five of the shortlisted contractors with the other two being unable to meet the works cost limit of £65,750,000. The five were assessed against the published price/quality criteria. However, during the process of clarifying the submitted bills of quantity of the contractor which had submitted the most economically advantageous tender, the contractor confirmed that it was unable to maintain the price quoted in its tender and withdrew. This withdrawal meant that McLaughlin and Harvey's tender was the most economically advantageous tender and clarifications to their Bills of Quantity were sought and concluded successfully allowing the Department on behalf of the Trust to notify tenderers of the Trust's intention to appoint McLaughlin and Harvey as the preferred bidder.

[28] On 30 January 2014 the plaintiff's issued a Notice of Motion seeking an Order for Discovery against the defendants. The application for discovery was heard by Mr Justice Burgess who gave judgment on 18 February 2014 granting an Order for Discovery of a number of documents.

[29] Meanwhile, by summons dated 17 January 2014 the applicants brought this application to bring to an end the requirement imposed by Regulation 47G of the 2006 Regulations requiring the Trust to refrain from entering into the framework agreement with McLaughlin and Harvey Ltd. The application was grounded on the affidavit sworn on 17 January 2014 of Alan Moore, the Director of Strategic Capital Development in the Western Health and Social Care Trust. Mr Ken Aherne, the plaintiff's Regional Director for Northern Ireland swore a replying affidavit on 11 March 2014. In his affidavit he set out the claims which are made by the plaintiff in relation to the public procurement process and also dealt with the balance of convenience. On the same date, 11 March 2014, the plaintiff's Statement of Claim was served. Mr Moore swore a second affidavit on 21 March 2014 dealing with a number of issues including the balance of convenience and Mr Aherne swore a further short affidavit on 25 March 2014 which exhibited the audited accounts of the plaintiff for the period ended 31 December 2012 and a Dunn and Bradstreet Report on the plaintiff dated 24 March 2014. The affidavit stated that the plaintiff was willing to provide an undertaking in damages. Mr Humphreys during his submissions stated orally the precise terms of the undertaking which the plaintiff

was willing to give. It was also stated by him that he had no instructions either one way or the other as to whether the plaintiff was prepared to provide security for its undertaking. It is preferable that any proposed undertaking is reduced to writing so that its precise terms can be analysed. This was done by letter dated 1 April 2014 and that letter contains the following:

“The plaintiff confirms that if the court later finds that the continuation of the requirement that the defendant refrain from entering into the contract pursuant to Regulation 47G of the Public Contract Regulations 2006 has caused loss to the defendants, or either of them, and decides that the defendants, or either of them, should be compensated for that loss the plaintiff will comply with any order the court may make.”

[30] The application entered my list on Wednesday 26 March 2014, it came on for hearing on Thursday 27 March 2014 and on Friday 28 March 2014. On the morning of Friday 28 March 2014, a further affidavit was filed by the applicants, that is an affidavit sworn by Alexander Henry Thompson, Programme Director, for Health Estates Investment Group in the Department of Health, Social Services and Public Safety. In addition the plaintiff handed into court without objection an analysis of the completed projects of Ken Aherne, an official report from Hansard for Tuesday 11 March 2014 together with a short bundle of newspaper articles.

[31] Another part of the factual background which emerges from, for instance, the newspaper articles is that there has already been considerable expenditure on site works in anticipation of the construction of the new Omagh hospital. For instance, in one article, the road associated bridge costs of £3.7m are recorded as having been spent and this was said to be a very tangible demonstration of the Trust’s commitment. There was also the announcement of £5.43m on contracts to prepare the site.

### **Legal Principles**

[32] This application is to be determined by the application of the principles in *American Cyanamid v Ethicon* [1973] AC 396. Mr Justice McCloskey observed in *First4skills Ltd v Department for Employment and Learning* [2011] NIQB 59 that the correct approach in principle was expressed by Mr Justice Akenhead 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."

Those are principles which I seek to apply.

[33] As can be seen from that quotation reference was made to the decision of Mr Justice Vos in *Alstom Transport v Eurostar International Ltd and another*, in that case Mr Justice Vos stated:

"[76] It is accepted on all sides that, with one significant exception, the normal principles apply in this case to the grant of an interim injunction. Those principles were laid down by Lord Diplock in *American Cyanamid v Ethicon* [1975] AC 396, [1975] 1 All ER 504, [1975] RPC 513, where it was established that three questions need to be asked:

- (i) Is there a serious question to be tried?
- (ii) If so, would damages be an adequate remedy for a party injured by the court's grant, or its failure to grant, an injunction?
- (iii) If not, where does the balance of convenience lie?"

[34] In *Fellows & Sons v Fisher* Lord Justice Brown helpfully summarised the principles as to the exercise of discretion that Lord Diplock had laid down in *American Cyanamid* as follows:

- "1. As to that, [i.e. the balance of convenience], the governing principle is that the court should first consider" whether, if the plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. "If damages... would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage":

2. "If, on the other hand" damages would not be an adequate remedy, the court should then consider whether, if the injunction were granted, the defendant would be adequately compensated under the plaintiff's undertaking as to damages. "If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction":
3. "It is where there is doubt as to the adequacy of the respective remedies in damages... that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case":
4. "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo":
5. "The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies;...":
6. "... if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party":
7. "... in addition to [the factors] to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases"

[35] In *Resource NI Ltd v University of Ulster* [2013] NIQB 64 Mr Justice Gillen recognised that contrasting views had been expressed in certain cases in England as to the adequacy of a damages remedy for a claimant tenderer in procurement cases see paragraph 52. He referred to the views of Mr Justice Akenhead expressed in both *Exel Europe Ltd v University Hospital Coventry and Warwickshire* and also in *Halo Trust v Secretary of State for International Development*. There were also contrasting views expressed in *Lettings International Ltd v London Borough of Newham* [2007] EWCA Civ 1522 at 33-39. The difficulties of assessment of damage relate not only to the issue of what was the plaintiff's loss but also whether that loss should be discounted, and if so, by how much on the basis that the plaintiff's claim was for the loss of a chance. Mr Justice Gillen concluded and I respectively agree that each case must turn on its own facts and accordingly, I must form an assessment of the difficulties in calculating damages if the requirement to refrain from entering into the contract with McLaughlin and Harvey was removed but at trial the plaintiff succeeded.

[36] I also refer to and follow the principle set out by Mr Justice Coulson at paragraphs 41 of his judgment in *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922:

“The cases following *American Cyanamid* make clear that it will normally be the case that, if damages are an adequate remedy, the claim for an interim injunction will fail. However, such an outcome is not guaranteed and there are cases where, in the exercise of the court's discretion, an interim injunction has been granted even though damages might be capable of being an adequate remedy. That is particularly true in cases where the assessment of damages might be difficult, or where the assessment is by reference to the loss of a chance.”

### **Triable Issue**

[37] Mr Humphreys conceded purely for the purposes of this application, only and not otherwise, and based on the current state of authorities in England and Wales that those parts of the plaintiff's claim which related to the structure of the public procurement process have not been commenced in time. Accordingly, that there is no triable issue in relation to the claims contained in paragraphs 52-59 of the Statement of Claim. I consider that the plaintiff has established a triable issue in relation to the majority of the remaining claims and I now set out those claims to demonstrate the nature of those issues and to give consideration as to whether a speedy trial is possible in June 2014. It is the plaintiff's contention that all the issues are of relatively short compass and could be heard and determined over a period of five days. Whether that is so impacts on a number of other matters such as whether there is any realistic prospect of funding for the project being lost or being revised downwards. The shorter the delay the less likely, it is argued, is the proposition that

funding will be at risk. The other aspect of the significance of assessing the likely length of delay is the degree of impact on the public of not having modern hospital facilities. The plaintiff's claim is set out in both the Statement of Claim and in the affidavit of Mr Ahern sworn on 11 March 2014. I will briefly summarise each of the claims.

### **Claim One**

[38] This relates to the Trust's call to find further cost efficiencies. The plaintiff contends that this failed to comply with the principle of transparency since for instance the call for value engineering was ambiguous and/or did not result in bids being submitted on a like for like basis. Mr Moore in his second affidavit states that:

"At paragraph 40 of the affidavit Mr Aherne refers to the call for value engineering. I find this complaint surprising. At an early stage in the tendering process it was considered that cost efficiencies could be achieved through a general across the board Value Engineering exercise. The design team therefore proposed a series of "savings" which could be implemented to allow valid tenders to be returned and ensure effective competition. I would refer to the series of communications issued to all tenderers to this effect which are exhibited hereto in the bundle of documents marked "AM2". The value engineering items were provided to all tenderers equally. They had nothing to do with the Contractor Instigated Cost Efficiencies ("CICE'S") and were not the subject of clarification from any of the tenderers let alone the Plaintiff. The Plaintiff chose not to issue any challenge concerning the issue of value engineering items within 30 days or indeed within 3 months of the communication to all tenderers. I am informed and believe that the plaintiff's complaint in this regard is likely to be outside the time limits specified in the Public Contracts Regulations (2006.) as amended"

[39] In essence the resolution of this issue will depend on an analysis to determine the proper construction of a number of documents together with a consideration of the time limit point raised by the defendant. This claim was not one of the claims which Mr Humphreys conceded did not raise a triable issue on the basis of time. However, no material was placed before me by the plaintiff in relation to the time issue which would lead me to the conclusion that there was a triable issue. The claim is outside the period of three months. I agree with the views expressed in the case of *Mermec UK Ltd v Network Rail Infrastructure Ltd* [2011] EWHC 1847 by Mr Justice Akenhead:

“It is said that the delay was only some six or seven days and that there should be an extension for such an insignificant period because it is a relatively short delay. However, there is no point in having a three-month period if what it means is three months plus a further relatively random short period.”

### **Claim Two - Failure to reject McLaughlin and Harvey’s Proposal**

[40] The plaintiff’s tender was submitted on 12 August 2013. On 25 September 2013 the Trust issued a request to McLaughlin and Harvey for further information. The plaintiff contends that this demonstrates that McLaughlin and Harvey had failed to include certain information in its contractor proposal and as such its tender should have been rejected as incomplete. Mr Moore states that these clarifications were made in respect of certain matters contained with the McLaughlin and Harvey tender in order to verify those matters and enable the Trust to establish that the McLaughlin and Harvey tender was sustainable. These clarifications were sought after the evaluation of the tenders was completed and were undertaken before McLaughlin and Harvey was appointed as preferred bidder, but at a point in time when the scoring of quality and price had placed McLaughlin and Harvey in first place. The purpose of the clarification was therefore not to allow McLaughlin and Harvey to provide information which could inform the evaluation panel and thus impact on scoring but instead was to enable the Trust to establish that the tender was accurate and that McLaughlin and Harvey had provided for all the constituent items and had properly verified that price was deliverable.

[41] Mr Moore also stated that:

“As regards the proposition that McLaughlin and Harvey should have been excluded from the competition, I reject it as misconceived. In the first instance all of the tenderers had been successful at the PQQ stage of the competition and met the selection criteria imposed by the Trust. Secondly, insofar as McLaughlin and Harvey did not return certain documents at the time of the tender submission the Trust was satisfied that this was immaterial as the prices were included within the price submitted by McLaughlin and Harvey in their provisional Bill of Quantities. The Trust in the exercise of its discretion decided to accept the late submission of the documents as it did not result in any opportunity for McLaughlin and Harvey to adapt their overall price and it did not have impact on the outcome of the competition.”

[42] I also refer to and quote that part of the applicants’ skeleton argument at page 10 paragraph 27 and this is:

“The Trust noted that McLaughlin and Harvey had omitted to provide certain information when submitting its bid. The Trust became aware of this following evaluation of quality and price and was perfectly entitled to exercise its discretion to permit McLaughlin and Harvey to submit the said information. This had no impact on the outcome of the competition, did not permit McLaughlin and Harvey to adapt or change its (sic) submissions on quality or on price and could not be said to amount to unlawful negotiation.”

[43] I consider that there is a triable issue and that the issue will involve evidence from a number of witnesses and the analysis of certainly a volume of detailed documents, the exact number of documents will not necessarily be apparent until closer to the date of trial. Whether there is a need for any expert evidence will also emerge closer to the date of trial.

[44] The next claim and a number of other claims involve a challenge to the marking of the plaintiff’s bid and the bid of McLaughlin and Harvey. The principles in relation to such claims were stated by Mr Justice Morgan in *Lion Apparel Systems Ltd v Firebuy Ltd* [2008] EULR 191 as follows:

“The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the public authority are correct and that there is no manifest error of assessment or misuse of power. If the authority has not complied with its obligations as to equality, transparency or objectivity there is no scope for the authority to have a “margin of appreciation” as to the extent to which it will or will not comply with its obligations. 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”. When referring to “manifest error” the word manifest does not require any exaggerated description of obviousness. A case manifest error is a case where an error has clearly been made.”

[45] I also refer to the *Evropaiki Dynamiki v The Commission* [2007] ECR I85 and the following quotation:

“As a preliminary point it should be recalled that the Commission has broad discretion with regard to the

factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and that review by the court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers.”

### **Claim Three**

[46] This is the terrazzo floor claim. The claim here is that the plaintiff’s proposal in relation to terrazzo floors should have received a mark of 5 out of 5 rather than 4 out of 5. I refer to what Mr Aherne proposes at 1/9/47:

“In response to this sub-criterion the plaintiff proposed that terrazzo with coved skirting would be used in lieu of the ceramic tiling in the specification. Within the strictures of the word limit imposed on the response the plaintiff exhaustively detailed the advantages of terrazzo over tile flooring in terms of cleaning, maintenance and durability citing research conducted to demonstrate such advantages and examples of hospital where terrazzo has been used. The Trust awarded the plaintiff’s response 4 out of 5 on the grounds that it was a good response rather than a comprehensive response that merited 5 marks. I believe that as a matter of common sense the plaintiff’s response could not have been more comprehensive within the word limit imposed upon the response and that the Trust therefore fell into error when it failed to award the plaintiff’s response 5 out of 5. In its letter of 13 December 2013 the Department states that the reason why the plaintiff was not awarded 5 out of 5 for its response was because “the panel had reservations as to the potential risk of defect and subsequent reparability”. I am informed by the plaintiff’s technically expert members of staff that terrazzo is not subject to a meaningful risk of defect over its life cycle and that the failure to award 5 out of 5 on the basis that it represents a clear error on the defendant’s part. In Annex A the defendants commended the plaintiff’s proposal to use terrazzo as capable of providing “durability and reduced maintenance”. It is also noteworthy that in the comments section of the evaluation score sheets of individual members of the evaluation panel, none of the panel members expressed reservations as to the “potential risk of defect and subsequent reparability”. Why the Department identified

these concerns in its letter of 13 December 2013 when the panel recorded no such concerns individually or collectively at the very least calls for a cogent explanation and in my view is indicative of a confused approach to the scoring of the submissions on quality.”

[47] The plaintiff also refers to the notes made at the time by the assessment panel, for instance the note 3/598 refers to the lack of detail as to capital cost but it is argued that this is not a permissible criteria in evaluating and marking this proposal. Mr Moore in his second affidavit states at 1/11/82/18 that if a defect appears or if it suffers damage then it requires a large area, if not the entirety, to be recast. This involves the need to dig out the area and await curing of the recast area thus rendering a large area non-operational for a lengthy period. The result of this would negatively impact upon any potential life cycle cost benefits.

[48] I consider that there is a triable issue in relation to this aspect of the plaintiff’s claim. The trial will involve a consideration of the plaintiff’s documents making the proposal and consideration of the documents that contain the initial specification and evidence from the panel members as to their evaluations. It is the plaintiff’s case that the Trust cannot now advance a reason not considered and/or not recorded by members of the evaluation panel. If that be so, then issues will arise as to what was or was not in the minds of the various panel members. In addition, the plaintiff refers to technically expert members of staff and accordingly envisages expert evidence. I consider that expert evidence may well be necessary to resolve these issues.

#### **Claim Four**

[49] This claim relates to the scoring of McLaughlin and Harvey’s proposal in relation to the use of intelligent power over Ethernet LED lighting system. Exact definition has not as yet been brought to what was involved in McLaughlin and Harvey’s proposal. The markings and the comments have to be seen in the context of the proposal and the documents available to the panel. I consider that there is a triable issue. In advance of trial there is a need for discovery and the trial will involve the consideration of documents, the evidence of the members of the evaluation panel and also perhaps expert evidence.

#### **Claim Five - Wireless electro mechanical remote access system**

[50] The claim in this respect is set out at 1/9/48/63-67:

“The plaintiff’s fourth proposal in response to question 6.2(a) was that a wireless electro mechanical remote access system should be used in the Initial Project rather than the hard wired electronic solenoid operated door locks with proximity readers in the specification. Again

with the strictures of the word limit imposed, the plaintiff identified the following whole life cycle cost advantages of the system proposed over the system specified.

- (a) The wireless system does not need a power supply;
- (b) The wireless system is cloud hosted and does not need IT support from the user;
- (c) The wireless system has a 2 year guarantee and the mechanical locks used in the system a 5 year guarantee compared with 12 month guarantee of the locks in the specification.
- (d) Problems are localized because the system has no connecting hardwiring, control boxes or proximity readers;
- (e) Preventative maintenance does not require a specialist;
- (f) Parts of the wireless system can be recycled;
- (g) Additional doors can be added to the wireless system at a much lower cost (20%) than the solenoid system specified.

The Trust awarded the plaintiff's response 3 out of 5 on the grounds that it was a reasonable response demonstrating adequate examples that contribute to whole life cycle cost benefits rather than a comprehensive response with excellent examples or even a good response with good examples. In its letter dated 13 December 2013 the Department states that 3 out of 5 was awarded to the plaintiff because the panel "had difficulty in assessing how the system is of benefit over the system specified". Again it is noteworthy that none of the evaluation score sheets of individual evaluators suggest that the panel members had such difficulty and I say that the Department's assertion that they did calls for an explanation and is evidence of an incoherent approach to scoring. The latter point is supported by the fact that the individual evaluation sheets show that some of the panel were concerned about the lack of detail about initial capital costs, a factor that was not relevant to Quality

Criteria 6.2(a). The Plaintiff's response *clearly* demonstrates the advantages of the wireless system over the system specified and I therefore say that if the Trust believed that the response did not adequately state how the wireless system is of benefit over the system specified that belief was a further manifest error and marking the plaintiff down on the basis of that belief was a manifest error."

[51] Mr Moore responded at 1/11/83/22 in the following terms:

"Whilst the proposal for a wireless electro mechanical locking system was deemed a reasonable response, I understand that the panel had difficulty in assessing how this system is of benefit over the system specified. In consequence the panel limited the score to 3 as the proposal lacked sufficient financial detail as to how the system would contribute positively to the whole life cycle cost benefits. I am satisfied that the score of 3 was appropriate and within the margin of discretion afforded to the panel."

[52] Again, I consider that there is a triable issue. I consider that issues at trial are not straightforward encompassing as they do a consideration of what was proposed and comparing, contrasting that with what was contained in the original specification together with, for instance, evidence from members of the evaluation panel and potentially expert evidence.

### **Claim Six**

[53] This claim relates to the evaluation and marking of a proposal by McLaughlin and Harvey using integrated building management system. As yet there are no details as to exactly who was involved in this proposal. The allegation is set out at 1/9/49/69-70 and I incorporate this paragraph as part of this judgment. The response is set out at 1/11/84/23 and again I incorporate that response as part of this judgment. Again, I consider that there is a triable issue and I also consider that the trial of that issue may well not be straightforward or simple.

### **Claim Seven**

[54] This claim relates to the assessment of the plaintiff's personnel, this was scored as 4 out of 5. The plaintiff's allegations are contained at 1/9/50/76 and I set out and incorporate those parts as part of this judgment and the response of Mr Moore is set out at 1/11/84 25-27 and again I incorporate that as part of this judgment. I consider that there is a triable issue. The trial of that issue will raise

some limited points which would not take a substantial period of time to identify and litigate.

### **Claim Eight**

[55] The claim here relates to sustainability measures. The plaintiff was marked on the basis that it did not address the pillar of economic sustainability in the context of the wider community. If the MOI was ambiguous and that ambiguity was known or ought to have been known to the plaintiff then the claim is time barred. If the ambiguity only became reasonably apparent once the Trust applied its evaluation methods and revealed those methods to the plaintiff then there is a triable issue. Furthermore, if the Trust has misconstrued the MOI then there is a triable issue. In short, I consider that there is a triable issue in respect of this aspect of the plaintiff's claim. The trial of the issue will initially depend on the construction of documents, it may be that the response of other economic operators apart from that of the plaintiff and McLaughlin and Harvey could have a bearing on the issue as to whether the MOI was ambiguous or whether as Mr Moore asserts at 1/11/85/28 "the economic sustainability pillar required broader consideration than simply the narrow benefit of the facility and I believe that this was something which was reasonably understood within the broad nature of the definition of the economic sustainability pillar. I am not aware of any clarification having been issued by the Plaintiff on this particular matter and do not accept that it would have any impact on the way in which the Plaintiff prepared its tender submission".

### **Claim Nine**

[56] The plaintiff alleges that McLaughlin and Harvey's proposal in relation to timber used by the project should be audited did not warrant a score of 4 out of 5. The plaintiff's assertions are set out at 1/9/53/91 and I incorporate those as part of this judgment. The response is set out in 1/11/85/29 and I incorporate that response as part of this judgment. There is a triable issue. What is involved in the trial will depend on what is actually involved in the McLaughlin and Harvey proposal. There are going to be complications around commercial sensitivity. A number of witnesses will be necessary and there may be a need for expert witnesses. McLaughlin and Harvey might wish to be a party to the proceedings in relation to this and a number of other issues with which I have dealt.

### **Further claims made by the plaintiff in the Statement of Claim**

[57] It is stated at paragraph 49.2 that while the foregoing represents the clearest examples of errors in the defendant's scoring the plaintiffs and McLaughlin and Harvey's submissions the scoring was generally deficient and without prejudice to the foregoing that the plaintiff was given unduly low scores in respect of the following responses and then sets out a number of responses. It is also stated at paragraph 50 the plaintiff shall further rely on evidence of manifest errors in the defendant's scoring of the plaintiff's submissions on quality and on McLaughlin and

Harvey's submissions on quality known to the defendant's witnesses and appearing from documents in the defendant's possession upon the trial of this action. These generalised allegations indicate that exact definition has not as yet been brought to all the plaintiff's claims and that there may well be a need for particulars and also amendment after discovery. The fluid nature of the plaintiff's claims was not counteracted by the indication given by the plaintiff that if the requirement to refrain remained in place it would serve a Notice of Discontinuance in relation to some of the claims, it was stated to me that the claims that would be discontinued in such circumstances are those contained in paragraphs 52-59 in the Statement of Claim. The general allegations in paragraphs 49, 50 and 51 would remain. So in conclusion in relation to the issue as to whether the plaintiff has established a triable issue I consider that it has done so in relation to claims 2-9.

[58] In relation to the submission this is a case which can be heard and determined over 5 days and that it would be ready for trial in June 2014, I have come to conclusion that that is too optimistic. Many of the issues have not as yet been clearly defined. There may well be a need for expert evidence, there is a need for discovery, there will be a number of witnesses and also consideration of a considerable volume of documents. The Traffic Signs case in Northern Ireland lasted some 20 days. The issues in this case are complex, I consider that 5 days is a considerable underestimate and insofar as it is possible to provide a preliminary assessment at this stage as to the length of the trial I consider that a period of some 3 weeks should be set aside. I also consider that the time taken to prepare for trial has been underestimated, even with court directions and timetables being imposed I do not consider it possible to achieve a trial date prior to September 2014.

### **Balance of Convenience**

#### **Are damages an adequate remedy for the plaintiff?**

[59] There are a number of features in this case in relation to the adequacy of damages for the plaintiff.

[60] First, in some public procurement cases, the plaintiff is an incumbent supplier of services so that bringing to an end the requirement on the public body to refrain from entering into a contract with a different supplier has a significant impact on the plaintiff's business with loss of staff, loss of market share, loss of standing and loss of reputation. The plaintiff in this case is not an incumbent supplier, those losses which on occasion are difficult or impossible to quantify by an award of damages are not present in this case, either at all or to that degree. The context is entirely different.

[61] Second the difference between the marks awarded to the plaintiff and the marks awarded to McLaughlin and Harvey was extremely small. This led Mr Humphreys to submit that in relation to those parts of the plaintiff's claim that related to evaluation and marking, that any change in the marks of the plaintiff or any diminution in the marks awarded to McLaughlin and Harvey would inevitably

lead to the conclusion that the plaintiff ought to have been appointed as the preferred bidder. There was discussion as to the precise process that should be followed in such circumstances if there was a manifest error in the marking and the framework agreement had not been awarded to McLaughlin and Harvey then the court would set aside the appointment of McLaughlin and Harvey as the preferred bidder. This would leave the Trust able to remark the bids with a different evaluation panel. The plaintiffs would then have a chance of being appointed as the preferred bidder but it would not be a guarantee that they would be appointed. A different evaluation panel within its margin of appreciation might still mark McLaughlin and Harvey as the top tenderer. If the plaintiff was confined to an award of damages and there was found to be a manifest error in the marks awarded to either the plaintiff or to McLaughlin and Harvey then either Mr Humphreys is correct and the court should find that the plaintiff would have won the contract or alternatively the court should envisage what would have happened on a remarking exercise. It may be on the facts of this case that that is a distinction without any substantial difference. The significance of the difference is that if the court has to assess what would have happened on a remarking exercise there is the added complication of assessing the amount of damages appropriate to the loss of a chance. However, I consider on the facts of this case as presently known that the loss of a chance would be virtually indistinguishable from the proposition that the plaintiff ought to have been appointed as the preferred bidder. That means that in relation to claims 3-9 the court would measure a loss of profit as opposed to loss of profit as discounted by any element of chance. I do not consider there to be a triable issue in relation to Claim 1. Claim 2, if the plaintiff succeeded, would lead to the court concluding that the plaintiff ought to have been appointed as the preferred bidder and therefore the difficulties of assessing the loss of a chance would not be present in respect of Claim 2. On the facts of this case the difficulties of assessing loss of a chance is not a difficulty of any major substance.

[62] Third, I consider that a calculation of loss of profits in relation to the construction of the new Omagh hospital could be made, I echo the sentiments expressed by Mr Justice Gillen at paragraph 62 of *Resource NI Ltd* by concluding that a suitable expert could calculate the profits the plaintiff would have made if awarded the contract. There will be information available to assist in that exercise such as the plaintiff's own calculation of its profit levels when forming its tender. Its historic profit levels established by its own accounts, the details as to what in fact occurred during the construction of the new hospital including what has taken place at the preferred bidder stage. That does not mean that the plaintiffs would be confined to what McLaughlin and Harvey Ltd did or will do at the preferred bidder stage or during the course of the construction works. But rather there is or would be a template as to how another economic operator reacted in the particular circumstances.

[63] Furthermore, if there are any negotiations or if there are any call off contracts awarded during the 4 year period all the documents in relation to those negotiations and those call off contracts will be available. There will undoubtedly be an element

of chance in relation to any damages claimed in respect of a call off contract and that element of chance creates difficulties in relation to the assessment of damages. However, there is no evidence before me of any plans for a call off contract and I consider on balance that those difficulties are unlikely to emerge over the 4 years of the framework agreement. If they do then I consider that they can be addressed.

[64] Fourth, the plaintiff alleges that there will be damage to its reputation in that it will not have the current experience and skills that it would otherwise have if it had been appointed as the preferred bidder and then awarded the framework agreement and had constructed the new Omagh hospital. Knowledge, experience and skills are aspects in the award of future contracts. In this contract the marking was weighted 80% in relation to price and 20% quality. Half of quality, that is 10% of the total weighting related to personnel assigned by the contractor to the initial project 2/16/151. The plaintiff asserts that the loss of an opportunity to contract for the new Omagh hospital project and other significant health related projects will have a significant impact on the plaintiff's ability to qualify for subsequent major health projects. However, the information now available is that the Mater Hospital contract completed in October 2013 and that the plaintiff has submitted bids in relation to a circa £100m contract at Altnagelvin and has applied for the first stage of a circa £100m contract at the Royal Victoria Hospital, Belfast. So the plaintiff has current experience and has the opportunity of obtaining further experience. The plaintiff has not brought forward sufficient evidence for me to conclude at this interlocutory stage that there will be major difficulties in assessing damages, if any, under this heading.

[65] Fifth, the plaintiff alleges that those members of the plaintiff's staff who have experience in healthcare projects have an interest in and an entitlement to develop that experience. The plaintiff goes on to say that if the plaintiff cannot provide continuing experience in healthcare projects it will be difficult for it to retain its staff. There is not the necessary detailed evidence to demonstrate substance to this allegation. The staff concerned were identified at the hearing as being Mr Aherne, Mr Tierney and Mr Walsh. There is no evidence that any of them have indicated that they wish to leave because the plaintiff was not the preferred bidder for the new Omagh hospital. The plaintiff no doubt pays appropriate and proper remuneration to its employees.

[66] Sixth, the plaintiff asserts that the loss of the new Omagh hospital contract and any call off contracts deprives the plaintiff of opportunities to develop economies of scale and market share that are critical. Again, there is insufficient evidence to establish at this interlocutory stage that there is any substance in this allegation. What are the additional economies of scale that have not been achieved with an €800m turnover? What is the plaintiff's present market share? What was the plaintiff's past market share? None of these questions have been addressed.

[67] In conclusion, I consider that damages are an adequate remedy for the plaintiff, the difficulties in assessment are overstated. That finding concludes this application in favour of the Trust.

[68] However, if I am incorrect in that conclusion then I make it clear that any difficulties in the assessment of damages would only be of such a nature that I should then balance in the exercise of my discretion other factors, such as the adequacy of damages for the Trust and the public interest.

### **Are damages an adequate remedy for the Trust?**

[69] The plaintiff has offered an undertaking. It has a turnover of €814.4m for the 11 months to 31 December 2012. It made a profit of €4m in the same period. In the previous year it made a loss of €77.7m. As at 31 December 2012 it had net assets of €37.4m. There are no up to date accounts and the financial position of the plaintiff might be either better or worse. The Dunn and Bradstreet Report was not opened to me. I have considered its contents, I do not repeat the entire contents of that Report but rather refer to the positive risk information score which was in the Band of:

“Confidence – Low Risk Potential.”

Furthermore, there appears to be a suggested credit limit of €3m and a contract limit of €100m. There also appears to be one mortgage in favour of National Asset Loan Management Ltd, Treasury Building, Grand Canal Street, Dublin 2. I will proceed on the basis that the plaintiff's undertaking in damages has resources behind it sufficient to meet a claim by the Trust of a number of millions of pounds.

[70] The losses incurred by the plaintiff of having to run an out of date hospital can be assessed and have been assessed at some £470,000 per annum. Mr Humphreys accepted that the Trust also has a reputational claim if it is unable to provide modern facilities to the public and to its employees. I consider that there are substantial difficulties in assessing damages in respect of that claim. The Trust also asserts that there is a risk of loss of funding for the project or in the alternative a loss of some of the funding. Mr Humphreys criticised the evidence in relation to that aspect of the case and whilst some of those criticisms are valid I consider that the Trust has established a real risk to a part of its funding. I am less convinced by risk to the entire funding. I consider that if the monies are not spent as presently envisaged that the amount of funding could well be reduced with a loss of facilities at the new Omagh hospital. A claim on foot of the undertaking may be of the order of some millions of pounds sterling.

[71] There is another risk and that is the withdrawal of McLaughlin and Harvey from the process, see 1/11/91/49. There is no guarantee that the plaintiff would then conclude the preferred bidder stage so that the contract could be awarded to it. This would lead to the collapse of the tender process. A court would then have to analyse what had occurred to determine whether the loss of the process was due to

the delay whilst the undertaking was in force or whether it was attributable to a number of other factors.

[72] In conclusion I consider that damages are an inadequate remedy for the Trust.

[73] Again, if I am incorrect on that conclusion and there are only difficulties in the assessment of damages then I will express my conclusion in relation to the public interest.

### **Public Interest**

[74] The balance comes down firmly in favour of the public interest in the construction, in an appropriate timescale, of a new hospital. There are competing public interests but any assessment is that, on the facts of this particular case, the overriding interest is that which involves the new hospital being constructed in an appropriate timescale.

### **Conclusion**

[75] I make an Order bringing to an end the requirement on the Trust to refrain from entering into the framework agreement. I will hear counsel in relation to:

- (a) whether to impose a stay on that order, and if so, for how long to enable the plaintiff to consider the question of an appeal;
- (b) whether to impose terms shortening the time within which an appeal may be commenced; and
- (c) costs of this application.