

HC 262/04.

THE HIGH COURT

010661

COMMERCIAL

RECORD No. 2004/323 JR

IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC AND IN THE
MATTER OF THE EUROPEAN COMMUNITIES (REVIEW PROCEDURES
FOR THE AWARD OF PUBLIC SUPPLY, PUBLIC WORKS AND PUBLIC
SERVICES CONTRACTS) (NO. 2) REGULATIONS, 1994

BETWEEN

SIAC CONSTRUCTION LIMITED

APPLICANT

and

THE NATIONAL ROADS AUTHORITY

RESPONDENT

JUDGMENT of Mr. Justice Kelly delivered the 16th day of July, 2004

INTRODUCTION

The applicant was a minority member of a consortium, called EuroLink, which failed to secure the contract for the construction of the Dundalk Western Bypass.

It complains that rights and entitlements afforded to it under Council Directive 93/37/EEC (the Works Directive) have been infringed. It brings these proceedings pursuant to Council Directive 89/665/EEC (the Remedies Directive), as applied in this jurisdiction by Statutory Instrument 309 of 1994. It seeks damages.

The applicant is not supported in its complaints by the majority member of EuroLink, a company called Cintra Concesiones de Infraestructuras de Transporte SA,

(Cintra). In fact, Cintra goes further and states that it does not agree with the applicant's complaint and has no complaints itself about the transparency or objectivity of the process in question. Cintra is not participating in any way in the applicant's complaints or these proceedings.

This judgment relates to a preliminary issue raised by the respondent to the effect that the applicant is out of time to mount this action. If the respondent is correct in that regard, the applicant seeks an extension of time within which to bring the proceedings.

It is necessary to look in some detail at the background to the application in order to understand the issues which arise.

THE PARTIES

The applicant is a limited liability company. It carries on business as a construction company at Clondalkin, Dublin.

The respondent is a statutory body created under the provisions of the Roads Act, 1993. Section 17 of that Act provides that it is under a general duty to secure the provision of a safe and sufficient network of national roads. It has been given overall responsibility for the planning and supervision of works for the construction and maintenance of national roads.

THE NATIONAL DEVELOPMENT PLAN

The National Development Plan 2000 - 2006 includes a strategy designed to improve Ireland's physical infrastructure and, in particular, the national road network. €5.59 billion, at 1999 prices, is planned for road construction and improvement works.

Public Private Partnerships are identified in the National Development Plan as being essential in helping to deliver its objectives. The Government set a target of securing €1.27 billion of private finance to supplement exchequer and EU investment in the National Roads Programme. If this is not achieved, large sections of the national road network will not be delivered as planned.

Nine road projects were identified by the respondent as being suitable for development by means of Public Private Partnerships. One of these is the Dundalk Western Bypass.

THE DUNDALK WESTERN BYPASS

The object of the Dundalk Western Bypass project is to complete the motorway between North Dundalk, County Louth and Gormanstown, County Meath, and to operate and maintain the existing section of the road network. It is being carried out on the basis of a design, build, finance and operate contract, having a term of approximately 30 years. The way in which this is done is that a special company, called a Public Private Partnership Company (PPP Co.), is set up for the purposes of contracting with the respondent for the project. That company is obliged *inter alia* to carry out the works and operations. The respondent acts as the contracting body and has responsibility for the planning of the project. The PPP Co. is responsible for the design, building, financing and operation of the road for the 30 year contract term. The revenue for the PPP Co. is derived from tolls on the road. At the expiration of the 30 year term, the management of the road and the entitlement to the toll revenue will revert to the respondent.

In accordance with the Works Directive, which governs the provision of awards of public contracts worth in excess of €5 million, the contract in question was put out to tender.

THE APPLICANT'S COMPLAINTS

Three possible procedures are envisaged in the Works Directive. They are an open procedure, a restricted procedure and a negotiated procedure. The respondent chose to use the negotiated procedure. That decision is the first ground of complaint made by the applicant. The respondent notified potential tenderers of its decision to use the negotiated procedure by means of publication in the Official Journal on 10th August, 2001.

Notwithstanding the complaint which it now makes concerning the decision to use the negotiated procedure, the applicant participated fully in the negotiated procedure tendering process.

By December, 2001 four candidates had been selected to proceed to the invitation to negotiate stage of the procedure.

Thereafter extensive consultation and evaluation took place between the respondent and the four shortlisted candidates. That resulted in a decision by the respondent in April, 2003 to the effect that two consortia, namely EuroLink and an entity called Celtic Roads Group (CRG), which was ultimately successful, were to be shortlisted to proceed to the next stage of the tender competition.

Thereafter, intensive negotiation involving meetings dealing with financial, technical, legal and insurance issues took place between the respondent and the two remaining tenderers.

On the 8th August, 2003, the respondent issued an invitation to both remaining candidates to submit a Best and Final Offer (BAFO). The invitation contained a model form of Funder Support Letter (FSL). It also contained a notice which stated *inter alia* that the respondent reserved the right to change the basis of, or the procedures relating to, the offer process or to furnish a BAFO tenderer with additional information.

On 27th August, 2003, EuroLink was informed at a meeting that changes to the FSL were being considered. Concerns were raised by EuroLink at that time. Two days later on 29th August, 2003, the tenderers were formally notified of alterations to the FSL. It is these changes, notified on the 29th August, 2003, that form the subject of the second head of complaint made by the applicant. It is said that as a result of that revised FSL, the respondent was unable to apply and did not apply the relevant award criterion of financial robustness.

On 1st September, 2003, the respondent granted an extension of time for BAFO submissions to both tenderers from the 8th to the 15th September, 2003.

On 14th October, 2003, EuroLink was informed that the respondent had decided to appoint CRG as preferred tenderer. The letter pointed out that that was not a rejection of the offer submitted by EuroLink. It was stated that the respondent would proceed with discussions with the preferred tenderer, potentially leading to the award of the contract for the project. However, if such discussions were to terminate without a contract being awarded, the respondent reserved the right to invite EuroLink to enter into discussions with the respondent in place of the preferred tenderer. The letter concluded by thanking EuroLink for its participation in the competition and the work and commitment of the members of the consortium and advisors was acknowledged and appreciated.

On 9th December, 2003, the respondent decided to award the contract to CRG.

On 22nd December, 2003, the applicant wrote to the respondent complaining of the change to the FSL and of a second issue, which can be called the Traffic Data Issue, to which I will return in a moment.

On 30th December, 2003, the respondent inquired whether the complaint was being made by the applicant or EuroLink. On 7th January, 2004, a letter emanated from the applicant reiterating its complaints and this was responded to by the respondent on 13th January, 2004. The complaints were rejected.

On 5th February, 2004, the contract was signed with CRG.

On 7th April, 2004, the applicant's solicitors wrote the opening letter of complaint setting out the nature of the alleged infringements concerning both the FSL and the Traffic Data Issue. The following day there was a further letter from the applicant's solicitors alleging breach of the Works Directive by reason of the use of the negotiated procedure. On the same day, the instant proceedings were instituted and were received by the respondent on 21st April, 2004.

The essence of the applicant's complaint concerning traffic data runs as follows. It is suggested that the respondent failed to ensure the integrity of the procurement process by reason of the fact that it did not ensure that traffic data relevant to the development of each bidders BAFO was correct and comprehensively audited in circumstances where the provider of that data was a subsidiary of a member of the CRG consortium. It is said that the applicant was disadvantaged by this on the basis that it was denied access to information available to CRG and that that information was superior in terms of both quality and quantity to that made available to the applicant.

Traffic data began to be supplied to EuroLink by the respondent in June 2003. It must have ceased by 15th September, 2003, when the BAFOs were submitted.

RELEVANT DATES

The respondent originally mooted a series of different dates from which time the commencement of these proceedings fell to be reckoned. At the hearing, however, it opted to rely on just two dates.

It contends that insofar as the applicant complains of the use of the negotiated procedure, time began to run on 10th August, 2001, being the date upon which tenderers were informed by publication in the Official Journal that the negotiated procedure would be used.

Insofar as the other two issues, namely the FSL and Traffic Data, the respondent contends that whilst earlier dates may well be applicable, time certainly began to run as of 14th October, 2003, being the date upon which EuroLink was informed that the respondent had appointed CRG as the preferred tenderer. By then all aspects of the complaints in respect of the FSL and Traffic Data were known to the applicant.

The applicant's case is that time began to run on the date when the contract was awarded, namely 5th February, 2004. It contends that the applicant instituted the proceedings within a little over two months from the date of the award and four days after the contract award notice was published in the Official Journal. It argues that the proceedings are not out of time.

Before turning to the applicable law, it is appropriate that I should deal with some factual matters.

THE NEGOTIATED PROCEDURE

There cannot be the slightest doubt but that the applicant was fully aware of the decision on the part of the respondent to use the negotiated procedure from 10th August, 2001. Not merely did it know of that decision, but it fully participated as part of the EuroLink consortium in all of the negotiations and procedures which flowed from it up to the time when it was notified that CRG was the preferred tenderer.

I am satisfied that the applicant's challenge to the use of the negotiated procedure is not dependent upon any other aspect of its case. It is said that it was the respondent's conduct in relation to the changes in the FSL that caused the applicant to focus on the procedures used. I do not find that proposition in any way persuasive.

The complaint which is made in respect of the negotiated procedure is that the contract did not come within the provisions of Article 7 (2) (c) of the Works Directive because the project was not one which, by reason of the nature of the works or the risks attaching thereto, was incapable of being priced by participants. That proposition has nothing whatsoever to do with the case which the applicant makes concerning the FSL or, indeed, Traffic Data.

I am therefore satisfied that, on the facts, the applicant was fully aware of the decision to use the negotiated procedure as of 10th August, 2001, and that its complaints in that regard were not dependent upon either of the other two issues which it raises in these proceedings. The attempt to interlink them and to suggest that one is in some way dependant on the other is not credible. In my view, as of August, 2001 the applicant was fully apprised of all facts necessary to enable it to mount a challenge to the decision to use the negotiated procedure if such were legally possible and it desired to do so.

The grounds for this complaint first arose on 10th August, 2001.

THE FSL AND TRAFFIC DATA COMPLAINTS

The alleged unlawful change brought about to the FSL was notified to the applicant on 29th August, 2003. In the notice of opposition the respondent contended that that was the date upon which the grounds for this complaint first arose.

The traffic data began to be supplied in June, 2003 and ceased by 15th September of that year. In the statement of opposition the respondent contended that either of those dates would be appropriate as being the ones upon which the grounds for this complaint first arose.

As I have already mentioned, however, at the hearing a more generous approach was adopted by the respondent when it contended that the 14th October, 2003, was the very latest date from which time ought to be reckoned for the purposes of these complaints. That, of course, was the date upon which EuroLink was notified that CRG had been appointed preferred tenderer.

In the eighth exhibit to his affidavit of 7th April, 2004, Mr. Finian Lyden, the managing director of the applicant, exhibited correspondence which passed between him and the respondent. It commenced on 22nd December, 2003, and terminated on 11th February, 2004. That correspondence sets forth the applicant's complaints under the two headings which I am now considering. In my view, having regard to those letters there can be no doubt but that the applicant was fully aware of the complaints which it had in respect of both the FSL and traffic data complaints for months prior to the commencement of these proceedings.

LEGISLATION

The Remedies Directive deals with the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

Article 1 (1) provides *inter alia* as follows:-

“The Member States shall take the measures necessary to ensure that, as regard contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEU, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2 (7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.”

(Directive 71/305/EEC was the precursor to the Works Directive).

Article 2 provides *inter alia*

“1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

- (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;*

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement."

Statutory Instrument No. 309 of 1994 was made pursuant to s. 3 of the European Communities Act, 1972, for the purpose of giving effect to the Remedies Directive.

Article 3 of the Statutory Instrument provides that as regards contract award procedures falling within the scope of the Works Directive, decisions taken by the contracting authority shall be reviewed in accordance with the conditions set out in the Remedies Directive.

Article 4 provides that the review procedures referred to in the Remedies Directive and the powers provided for in Article 2 (1) (a) to (c) of that directive shall be carried out and exercised by the High Court. When considering whether or not to order interim measures, the High Court is entitled to take into account the probable

consequences referred to in Article 2(4) of the Remedies Directive and may decide not to grant such measures where their negative consequences could exceed their benefits.

The Rules of Court which are applicable to a challenge to decisions in respect of contract award procedures are contained in Order 84A. That order provides that an application pursuant to the regulations for the review of a decision to award or the award of a public contract within the scope of the directives shall be made to the courts in accordance with the provisions of the order.

Order 84A (4) provides:

“An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period.”

The application has to be made by originating motion on notice, grounded upon a statement. Amongst the items which are required to form part of the statement is the date of the award of a contract/decision to award a contract.

Order 84A (9) provides:

“At any time after the issue of the originating notice of motion an applicant for review may make any interim or interlocutory application to the Court for the taking of interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the

contracting authority. In this rule interlocutory application includes an application for an order, under Order 31 or Order 39, rule 1."

Order 84A also provides that words and expressions contained in the order are to have the same meaning as in the directives or the regulations as the case may be.

The argument of the applicant on the question of when time begins to run has the merit of simplicity. It is to the effect that O. 84A is applicable to an application of the type in suit. Time begins to run from the decision to award of the contract (O. 84A, r. 4). In this case the contract was awarded on 5th February, 2004 and, therefore, time only falls to be reckoned from that date. It follows on this approach that it is not possible to commence proceedings of the type in suit prior to the decision to award, or the award of, the public contract.

Unfortunately that approach throws up questions on the wording of O. 84A itself and, indeed, its progenitors S.I. 309 of 1994 and the Remedies Directive.

Order 84A, rule 9, for example, provides that at anytime after the issue of the originating notice of motion, an applicant for review may make any interim or interlocutory application to the court for the taking of interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority. That is in complete conformity with Article 2 (1) (a) of the Directive. The reference to "the originating notice of motion" in r. 9 must refer to the originating notice of motion provided for in rule 3. Such a notice of motion, on the applicant's argument, can only come into being after the award of, or the decision to award, a contract. If such be so, then how can an application for an

interim or interlocutory application to suspend the procedure for the award of the contract ever be made?

If one were to adopt the literal interpretation of r. 4 as the applicant submits, it would, in effect, mean that O. 84A could only deal with challenges mounted after the award of, or the decision to award, a contract, thereby rendering nugatory the provisions of r. 9 and providing no mechanism within the provisions of O. 84A which can effectively deal with interim measures to suspend the procedure for the award of a public contract.

Whilst the Rules of Court may not be models of legal lucidity, it cannot have been the intention of the Superior Courts Rules Committee to produce the result which logically follows from the applicant's approach, particularly where such would have the effect of failing to conform to the provisions of Article 2 (1) (a) of the Remedies Directive.

The respondent contends that the Rules of Court must be read in a manner which is in harmony with the directives which gave rise to them and with the case law, both domestic and European, which has developed on the topic. Thus interpreted, it says, O. 84A applies not merely to a decision to award a contract or the award of a contract, but also to decisions taken by contracting authorities regarding contract award procedures. Where complaints of that sort are made, it is said time begins to run from the date when the grounds for such complaint first arose, regardless of whether the contract has been awarded or not.

HARMONIOUS INTERPRETATION

A series of decisions of the European Court of Justice have made it clear that where a national court is applying national law, whether adopted before or after a

community directive relevant to the dispute before it, the national court must, as far as possible, in the light of the wording and purpose of that directive, do so in order to achieve the result pursued by the directive.

That principle has been applied in this jurisdiction, most notably perhaps in the decision of the Supreme Court in *Nathan v. Bailey Gibson Limited* [1998] 2 I.R. 162.

In the course of his judgment Hamilton C.J. said:

"It is also well established that national or domestic courts in interpreting a provision of national law designed to implement the provisions of a directive, should interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result envisaged by the directive.

The European Court of Justice stated, in the case of Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] E.C.R. 1891, at para. 26:-

'However the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows, that in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive 76/207 national courts are required to interpret their national law in the light

of the wording and the purpose of the directive in order to achieve the results referred to in the third paragraph of Article 189'.

The European court came to a similar conclusion in the more recent case of Marleasing SA v. La Comercial Internacional de Alimentacion SA [1990] E.C.R. 4135, where the Court stated at para. 8 of its judgment:-

'In order to reply to that question, it should be observed that as the Court pointed out in its judgment in Case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] E.C.R. 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty'."

Although, therefore, rr. 2 and 4 of O. 84A make express reference to the review of a decision to award, or the award of, a public contract, r. 9 refers to the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority. That refers to a wider group of decisions than purely decisions to award or the award of public contracts. That, in my

view, reflects the provisions of the Remedies Directive. National authorities are obliged to ensure that the Remedies Directive is implemented, not merely in respect of a decision to award a contract, or the award of a contract, but also to other decisions taken in respect of contract award procedures. Applying this principle of harmonious interpretation, therefore, I am satisfied that O. 84A applies, not merely to the decision to award a contract or an award of a contract, but also to decisions taken by contracting authorities regarding contract award procedures.

If I were to accept the argument advanced by the applicant, it would mean that procurement challenges in Ireland would be postponed to the decision to award a contract or the award of a contract and a prospective tenderer who considered at some point in the tender procedure that an awarding authority had breached the provisions of the directive would be precluded from challenging that decision. Rather, he would have to wait until the ultimate award of the contract or decision in respect of it. That extraordinary state of affairs would mean that a contracting authority would have to continue with a process in circumstances where a prospective tenderer objected to the process, but with no ability on the part of the prospective tenderer to obtain a judicial determination on the issue under O. 84A. Would such a result be in conformity with the Remedies Directive, and indeed, the case law which has been built up on it?

Before answering this question, I should observe that regardless of European law issues, such an approach runs entirely counter to the position in domestic law enunciated by Keane C.J. in *In re Article 26 of the Constitution and in the matter of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360 and 392, where he said that:

“There is a well established public policy objective that administrative decisions, particularly those taken pursuant to detailed procedures

laid down by law, should be capable of being applied or implemented with certainty at as early a date as possible and that any issue as to their validity should accordingly be determined as soon as possible."

That principle could not be observed if the applicant's interpretation were accepted.

RELEVANT CASE LAW

I have already reproduced the relevant portions of the Remedies Directive. It is to be noted that the obligation is placed upon member states to take measures necessary to ensure that contract award procedures (falling within the scope of the Works Directive) decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible.

In *Dekra Éireann Teoranta v. Minister for the Environment and Local Government* [2003] 2 I.L.R.M. 210, the Supreme Court had to consider the issue of an extension of time pursuant to O. 84A, in circumstances where an application for damages for breach of Directive 92/50, the Services Directive, had been brought outside the three month time limit laid down.

The Supreme Court decided that time should not be extended.

In the course of her judgment, Denham J. said:

"At issue in this case is a specialist area of judicial review and the construction of the relevant rules as to time limits. Judicial review litigation has expanded rapidly over the last twenty years. With the growth in public authority decisions has come an expansion of review of such decisions. Further, there has been a growth in specialist legislation and rules as to judicial review. In this case the relevant law and practice is that of public procurement contracts. An essential

feature of both European law and the consequent Superior Court Rules is a policy of urgency and rapidity which is required in such judicial reviews. Thus, the Council Directive 89/665/EEC of 21st December, 1989, Article 1 requires that 'decisions taken by the contracting authorities be reviewed effectively, and, in particular, as rapidly as possible'. In national law, an application under Order 84, rule 4, to review a decision to award, or the award of, a public contract

- (a) shall be made at the earliest opportunity,*
- (b) and in any event within three months from the date when grounds for the application first arise,*
- (c) unless the Court considers that there is good reason for extending such period.*

This rule applies to a decision to award, or the award of, a public contract and is a specialist area of judicial review. The rules reflect the policy that such reviews be taken effectively and as rapidly as possible."

At page 222 of the report she went on:

"Under Order 84A somewhat similar principles are applied to public service contracts. However, additional factors are added. Instead of a policy of requiring that the judicial review be brought 'promptly', Order 84A, rule 4, specifically requires that the application be made 'at the earliest opportunity'. This is in accordance with European Union law, that decisions may be reviewed effectively and, in particular, as rapidly as possible. There is a degree of urgency required in applications of this type."

Dealing with the second part of O. 84A, r. 4, which requires that an application for judicial review of a public contract be made, in any event, within three months from the date when grounds for the decision arose, she said:

“This three month period is enabling. It enables an application within three months. However, in all the circumstances of a case a court may determine in its discretion that the prejudice to the public or a party could be such that, as in Cussen, the application should be refused. Since urgency and rapidity is an underpinning policy of applications regarding public contracts, the test requires that such applications be made rapidly and an applicant must explain reasonably any delay.”

In dealing with the exercise of the discretion of the court to extend time, she said:

“...the court retains its duty to protect the right of access to the courts. However, there are special weightings which must be given. Thus the requirement under European and Irish law that such applications be brought rapidly is important. So too is the nature of the contract under review. This public contract calls into play the special importance of time and thus the nature of the prejudice to the parties if they are delayed. The court may also consider any prejudice to the public, the common good.”

Fennelly J. also delivered a judgment and concurred in the conclusion reached by Denham J. In the course of his judgment, he indicated that time may commence to run within the three month period. That arose as a result of the need to move at “the earliest opportunity”.

In respect of a claim brought within the three month period he held:

“a claim cannot normally be defeated for delay if it is commenced within the period. There would need to be some quite special factor such as prejudice to third parties... Thus, different levels of importance may be attached to time falling within and without the period. The fact of delay within the period may affect the approach of the court to time falling without. The court must always have regard to the circumstances of the particular case and the fact that the power to extend the time is there in the interests of permitting the courts to do justice between the parties.”

He pointed out that the strictness with which the courts approached the question of an extension of time varies with circumstances but, that,

“...public procurement decisions are peculiarly appropriate subject-matter for a comparatively strict approach to time limits. They relate to decisions in a commercial field, where there should be very little excuse for delay.”

In the final paragraph of his judgment, he concurs with the view expressed by Buxton L.J. in the case of *Matra Communication SAS v. Home Office* [1999] 1 W.L.R. 1646, to the effect that a continuing damages claim is capable of having an unsettling and disruptive effect on the contractual relations established by the awarding decision.

The decision of the Court of Appeal in *Matra* is relevant, not merely for the observation of Buxton L.J. which was concurred in by Fennelly J. in *Dekra*, but also because of its treatment of another point. The Court of Appeal found that the “review” required by Article 1, and elsewhere in the directive, is the whole scheme of remedies that the member state is required to make available. As Buxton L.J. said:

“It is therefore that whole range of remedies, including damages, that are required by Article 1 to be provided ‘effectively and, in particular, as rapidly as possible’.”

It had been argued in that case that the damages claim had to be viewed separately from the other relief provided by the regulations.

Such an argument was held to be inconsistent both with the normal English practice and with the scheme of the directive.

Buxton L.J. said:

“As to the former, questions of limitation are determined as regulation 32 (4) says, according to when the proceedings are brought; it is unheard of to have a single limitation period which however commences at different dates according to the nature of the remedy sought. As to Directive 89/665, I have pointed out above that the whole range of remedies envisaged by Directive 89/665 is required to be provided rapidly, and no distinction is made in that respect between damages and other remedies.”

I agree with that proposition. Accordingly, it follows that because the only claim which is made here is one of damages, it is not to be treated differently from a time limitation point of view to any of the other remedies that are provided for in the directive.

A number of other decisions also have a relevance to the issue before me. In *Grossmann Air Service v. Austria* (12th February, 2004), the European Court of Justice had to deal with a case involving a tender competition for air services. The first tender competition in which Grossmann participated had been terminated and a new competition began. Grossmann did not submit a tender in the second

competition because it was unable to provide all the services required pursuant to the conditions of the second competition. It brought proceedings after the award of the contract alleging that the conditions of the second competition had been discriminatory in favour of a company called Lauda Air.

In the course of its ruling, the court felt that it was appropriate to take into account that Grossmann had not participated in the tender procedure, nor did it appeal against the invitation to tender before the contract was awarded, (see para. 24 of the judgment).

At para. 30 of the judgment, the court went on to say,

“On the other hand, it is clear from the words of Article 2 (1) (b) of Directive 89/665 that the review procedures to be organised by the Member States in accordance with the Directive must, in particular, set aside decisions taken unlawfully, including the removal of discriminatory technical, economical or financial specifications.... It must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated.”

Later in the judgment, at para. 36, the court said:

“... it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community level, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1 (1) of that directive requires Member States to guarantee that unlawful decisions

of contracting authorities can be subjected to effective review which is as swift as possible.”

Paragraphs 37 and 38 read as follows:-

37. *“It must be pointed out that the fact that a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his view discriminate against him, insofar as they effectively disqualify him from participating in the award procedure for the contract at issue, but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the grounds specifically that those specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665.*

38. *Such conduct, in so far as it may delay, without any objective reason, the commencement of the review procedures which Member States were required to institute by Directive 89/665 impairs the effective implementation of the Community directives on the award of the public contracts.”*

Paragraph 40 of the judgment reads:-

40. *“Having regard to the foregoing, the answer to the first and third questions must be that Articles 1 (3) and 2 (1) (b) of Directive 89/665 must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that*

contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but did not seek review of those specifications before the contract was awarded."

In *Jobsin Co. UK Plc v. The Department of Health* [2002] 1 CMLR 44 at 1258, the Court of Appeal in England dealt with the situation where the applicant submitted a tender on the 3rd October, 2000. On the 17th November, 2000, it was informed that its tender was not included in the final shortlist. On the 5th March, 2001, it began proceedings claiming that the tender process had been conducted in breach of the Public Services Contract Regulations. The argument was that the service for which tenders were invited came within the meaning of part A and not part B as indicated by the relevant public authority awarding the tender. Different tendering procedures were applicable to part A and part B services. A dispute arose as to when time began to run for the purposes of the proceedings.

On Jobsin's behalf it was contended that the relevant date was when it was excluded from the contracting process, namely the 17th November, 2000. The respondent, the Department of Health, alleged that the relevant date was the 14th August, 2000, when Jobsin received the briefing document which made it clear that the services in question had been classified as part B services. Dyson L.J. (with whom Thorpe L.J. and Astill J. agreed) held that the right of action arose on the 14th August. He concluded that as soon as the briefing document was issued without identifying the criteria by which the most economically advantageous bid was to be assessed, there was a breach of the relevant regulation. He said at p. 1270:

"It is clear that, as soon as the briefing document was issued without identifying the criteria by which the most economically advantageous bid was to be assessed, there was a breach of regulation 21(3). I do not understand Mr. Lewis to dispute this. Moreover, it was a breach in consequence of which Jobsin, and indeed all other tenderers too, were then and there at risk of suffering loss and damage. It is true that it was no more than a risk at that stage, but that was enough to complete the cause of action. Without knowing what the criteria were, the bidders were to some extent having to compose their tenders in the dark. That feature of the tender process inevitably carried with it the seeds of potential unfairness and the possibility that it would damage the prospects of a successful tender.

Mr. Lewis submits that neither the loss nor the risk of loss was caused by the breach of regulation 21(3) until Jobsin was excluded from the tender process on 17th November. I reject that submission for the following reasons. First, it gives no meaning to the words "risks of suffering, loss or damage" in regulation 32(2). It seems to me that those words are of crucial significance. They make it clear that it is sufficient to found a claim for breach of the regulations that there has been a breach and that the service provider may suffer damage as a result of the breach. It is implicit in this that the right of action may and usually will arise before the tender process has been completed. That brings me to the second reason. It would be strange if a complaint could not be brought until the process had been completed. It may be too late to challenge the process by then. A contract may

have been concluded with the successful bidder. Even if that has not occurred, the longer the delay, the greater the cost of re-running the process and the greater the overall cost. There is every good reason why Parliament should have intended that challenges to the lawfulness of the process should be made as soon as possible. They can be made as soon as there has occurred a breach which may cause one of the bidders to suffer loss. There was no good reason for postponing the earliest date when proceedings can begin beyond that date. Mr. Lewis suggests that there is such a reason. He points out that if, in a case such as this, the limitation period runs from the date of publication of the tender documents, it will be possible for the contracting authority to rule out any real possibility of a challenge by issuing an invitation in breach of the regulations and then not taking any further steps in relation to tenders until after the three month period has expired. I confess that I find this an unlikely state of affairs, but I concede that it might conceivably happen. If it did, a service provider who wished to bring proceedings might have a good case for an extension of time."

In the context of the extension of time which was sought but refused in *Jobsin's* case Dyson L.J. said:

"it is a fairly startling proposition that, even where a tenderer knows that he has grounds for starting proceedings, he has a good excuse for not doing so because such proceedings may imperil his relationship with the contracting authority and may jeopardise his prospects of securing the contract. It seems to me that a tenderer who finds himself in such a situation faces a stark choice. He must either make his

challenge or accept the validity of the process and take his chance on being successful, knowing that the other tenderers are in the same boat. In my view, it is unreasonable that he should sit on his rights and wait to see the results of the bidding process on the basis that, if he is successful he will remain quiet, but otherwise he will start proceedings. I do not believe that a tenderer who deliberately delays proceedings in an attempt to have his cake and eat it has good reason for an extension of time if the outcome of the process is not to his liking."

ORDER 84A

Earlier in this judgment, I have pointed out that although rr. 2 and 4 of O. 84A make express reference to the review of a decision to award, or the award of, a public contract, r. 9 refers *inter alia* to measures to suspend or ensure the suspension of the procedure for the award of a public contract or the implementation of any decisions taken by the contracting authority. Rule 9 clearly refers to a wider group of decisions than those confined to the award of public contracts.

I am of the view that O. 84A must be viewed as being reflective of the provisions of the Remedies Directive. That directive, and the jurisprudence developed on foot of it, clearly envisages challenges to decisions taken by contracting authorities regarding contract award procedures. Similar wording appears in article 3 of S.I. 309/94.

It is clear that national authorities are obliged to ensure that the Remedies Directive in full is implemented. Such implementation cannot be confined to decisions to award a contract, or the award of a contract, but must extend to other

decisions taken in respect of contract award procedures. It follows, therefore, that O. 84(A) in order to be in accord with applicable community law, must be interpreted as applying not merely to a decision to award a contract, or award of a contract, but also to decisions taken by contracting authorities regarding contract award procedures.

Such being so, it follows that complaints of the type which are sought to be advanced here concerning the procedures followed must be brought at the earliest opportunity and, in any event, within three months from the date when grounds for the complaint first arose. Proceedings cannot, and ought not to be, postponed until the decision to award, or the award of, the public contract has been made. If that were so the complaint concerning, for example, the negotiated procedure where grounds first arose in August, 2001 would not be the subject of proceedings until 2004. Such a result in the light of the authorities cited would be absurd.

ALTERNATIVE APPROACH

If I am wrong in the view which I take as to the way in which O. 84A must be interpreted, then I am of the view that national law can still be interpreted in a way that complies with the State's obligations under the Remedies Directive.

If challenges to contract award procedures are not covered by O. 84A, then I am of opinion that they are covered by the provisions of O. 84. Order 84, rule 21(1) provides that an application has to be made promptly and, in any event, within three months from the date when grounds for the application first arose. There is a difference in wording between the two provisions. Under O. 84A, the application has to be made at the 'earliest opportunity', whilst under O. 84 it has to be made

'promptly'. Little turns on this difference in wording insofar as the present case is concerned.

I think it appropriate to summarise what I perceive to be the logical consequences of the arguments made by the applicant to the effect that it is entitled to delay commencing its present claim until after a decision to award or the award of the public contract has been made. Such an approach means that procurement challenges in this State are limited to the decision to award a contract or the award of a contract. That would mean that a prospective tenderer who considers that the tender procedure has been breached in an unlawful manner is precluded from challenging that decision and has to wait until the ultimate award of the contract or the decision to do so. That interpretation would mean that this State had failed in its obligations under European Law. It would undermine completely the requirement of rapidity laid down not merely by the Remedies Directive, but also by the decisions of the European Court of Justice and, indeed, by the Supreme Court.

I am, therefore, satisfied that whether O. 84A or O. 84 is applicable, the obligation on the applicant in the present proceedings was to bring the proceedings at the earliest opportunity or promptly and, in any event, within three months from the date when the grounds for the application first arose.

CONSEQUENCES

Having regard to the views which I have already expressed, I am satisfied that insofar as the complaint made concerning the negotiated procedure decision is concerned, the grounds for that complaint first arose on the 10th August, 2001. Insofar as the FSL and Traffic Data complaints are concerned, at the latest grounds for those complaints arose on the 14th October, 2003.

It is clear that these proceedings were not instituted within three months of the grounds for the application first arising and I must now turn to the question of whether or not in the circumstances it would be appropriate to grant an extension of time. Such an extension of time can be granted regardless of whether O. 84A or O. 84 is applicable. It is, I think, appropriate to consider the question of an extension of time for each of the elements of the applicant's complaint separately.

The principles which the court ought to apply in public procurement cases have been set forth in the decision of the Supreme Court in *Dekra*. The applicant has to show that there are reasons which both explain the delay and offer a justifiable excuse. An applicant cannot invoke the absence of any prejudice to the opposing party as the sole basis for the suggested good reason.

In the case of the claim concerning the use of the negotiated procedure, I am quite satisfied that no reason for the delay in challenging the use of that procedure has been given. I have already found as implausible and unpersuasive the attempt to justify the delay by reference to the FSL issue.

In my view, this case is a classic example of the applicant per Dyson L.J. "attempting to have its cake and eat it". It made no complaint about the use of the negotiated procedure at the time when that issue was decided in August, 2001. It participated fully in the procedure thereafter. When it became disenchanted with the way in which events ultimately went, it mounted this claim. No acceptable reason or excuse is offered in respect of the delay in bringing the proceedings.

Having regard to the principles in *Dekra*, I refuse any extension of time in respect of this part of the applicant's claim.

Insofar as both the FSL and Traffic Data issue are concerned, whilst there may well be arguments for a date earlier than the 14th October, 2003, that is the date which has been urged as the one from which time is to be reckoned.

As of then it was clear to the applicant that a decision had been taken to award the contract. The applicant was informed that CRG had been appointed as preferred bidder. That, of necessity, meant that CRG had been chosen on the basis of the evaluation criteria and that it had fulfilled all necessary requirements to move forward to the award stage. The applicant must have been aware that the respondent was engaged in the process necessary to conclude a contract with CRG.

There is no evidence of any correspondence emanating from the applicant querying the conduct of the negotiations which followed with CRG. Indeed the thrust of the correspondence subsequent to the 14th October, 2003, appears to accept that CRG was going to be the successful tenderer and would in due course be awarded the contract. By the 14th October the applicant was quite clearly aware of the complaints which it had in respect of both FSL and Traffic Data.

An attempt is made to rely on correspondence which is contained at exhibit 8 to the affidavit of Finian Lyden sworn on the 7th April, 2004, to support an application for an extension of time. Far from assisting the applicant's case it appears to me that that correspondence demonstrates that the applicant was fully aware of the complaints which it had against the respondent for months prior to the institution of proceeding in April, 2004.

The change of solicitors at the end of March or early April, 2004 provides neither explanation nor excuse for the failure to begin proceedings timely.

Again, applying the principles identified by the Supreme Court in *Dekra*, I am of opinion that no grounds have been demonstrated for an extension of time.

The argument made by the applicant in support of an extension of time being granted for all claims because proceedings were withheld for fear of jeopardising its relationship with the respondent makes as little impression on me as did a similar argument before Dyson L.J. in *Jobsin*. He described it as a fairly startling proposition. It was an apt description.

CONCLUSION

The applicant did not commence these proceedings at the earliest opportunity, or promptly, or, in any event, within three months from the date when grounds for the application first arose. Having regard to the approach which the court must have in respect of extensions of time in public procurement cases, there are no valid grounds for granting an extension of time for the commencement of the proceedings.

The applicant's claim is dismissed.

Approved

Peter Kelly

16.vii.2004