Quigg Golden

Guide to Procurement Obligations

Short Guide to the Legal Obligations on those Procuring Works in the Construction Industry and Available Remedies

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The Guide attempts to state the law as it was on 1 March 2010

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SECTION 1 – INTRODUCTION

The rules which govern what can and cannot be done in relation to tendering and procurement can be split into:

- rules which are imposed; and
- rules which apply by agreement.

However it should be noted that the distinction is not a clean one and there are areas of overlap.

Rules which apply by agreement come from what the parties expressly agree to. For example, a seller may agree to sell to the highest bidder. This is different from the normal situation in construction tendering where the employer expressly states that he is not bound to accept the lowest or any tender. These will be considered in section 2.

Section 3 examines the rules which are imposed which come from legislation, either from domestic Parliaments or EU Treaties and Directives. Sections 4 and 5 consider the implication of international agreements and internal guidelines.

Lastly, Section 6 looks at the remedies available for a breach of the duties.

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SECTION 2 – RULES BY AGREEMENT

This section examines the rules on an employer which it agrees to by seeking tenders.

Put simply, the courts will recognise the existence of a contract in relation to the tender. This is sometimes referred to as the Two Contract Theory, *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1991] 1 WLR 1195 CA. The theory is that when an employer invites a bid and a tenderer submits a valid bid, which if accepted would form the primary contract, there is created a second contract, or a tendering contract. It is the terms of this second contract that imposes obligations on the employer.

The terms may be that in consideration for submitting a valid bid, the employer shall consider the bid. As will be seen, this is a developing area of law and the terms imposed on the employer, in the absence of express terms, are still not clear.

Set out below is a review of the authorities on this point and then a summary that sets out the current state of the law.

The Existence of the Second Contract

The basic requirements for a contract are an intention to create legal relations, capacity, certainty, consideration and agreement. The agreement will often come from the acceptance by one party of an offer from the other party.

A shop advertising goods for sale at a particular price is not making an offer but an invitation to treat. That is a statement that the shop is prepared to receive offers for the purchase of the goods at the price stated, *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.* [1953] 1 QB 410. This distinction is of importance when considering the rules in relation to procurement.

For most building and civil engineering works, the employer will issue an invitation to tender. Contractors then submit their tenders and the employer may accept one of these tenders.

When this process is fitted into the legal definition of offer and acceptance, the invitation to tender is an invitation to treat, the tender is the offer and the acceptance of a tender is the acceptance. However, the courts have held that the invitation to tender can, in certain situations, be classed as an offer, which is accepted by submitting a tender. This creates the second, or tendering, contract:

Document	For Main Contract	For Tender Contract
Invitation to Tender	Invitation to treat	Offer
Tender	Offer	Acceptance
Acceptance	Acceptance	--

It is only relatively recently that the courts have been willing to adopt this theory of the second contract.

The first case on point was *Blackpool and Flyde Aero Club v Blackpool Borough Council* [1991] 1 WLR 1195 CA but the proposition has been followed in many cases since that time (for examples see the cases cited below when looking at the implied terms).

The situation is not quite as clear in the Republic of Ireland. Only one case has come before the Irish Courts namely, *Howberry Lane v Telecom Éireann* [1999] 2 ILRM 232 in which the Two Contract Theory was advanced. It is unfortunate that in that case the plaintiff argued that the Two Contract Theory went so far as to require an employer to enter into a contract with the lowest tender. This argument went significantly further than any of the Courts in Canada, Australia or the UK, and, it is submitted, went beyond the limits of the theory. Unsurprisingly the argument was rejected by the Court. Therefore there is as yet no case before the Irish Courts where the existence of the second contract has been successfully argued.

The leading text on contract law in Ireland suggests that the Two Contract Theory is correct in principle and argues that an Irish Court would accept the theory if ever it is put in argument before it, *McDermott, 2001, p.19-30.*

The Terms of the Tendering Contract

Express Terms

Firstly there may be express terms as to how the tender is to be considered. An obvious example is the incorporation of a set of rules. Clauses like this are very common, for example *"Tenders shall be evaluated in accordance with the NJCC Code of Practice for Single Stage Selective Tendering."*

If such a clause exists then part of the duty on the employer is to follow that procedure. If the procedure is not followed, then that is a breach of the tendering contract. An example of how the NJCC Code may

be breached is if an employer receives tenders which are in excess of his budget and then asks the two lowest tenderers to price a Bill of Reductions. The code states that this should not be done. The procedure that should be followed is to hold negotiations with the lowest tenderer only, and only if he is then rejected does the discussion move on to the second lowest and so on. This was the situation in *J&A Developments Ltd v Edina Manufacturing Ltd & Ors* [2006] NIQB 85.

Implied Terms

An implied term is a term of a contract which is not expressly agreed by the parties in words but regarded by the Courts as necessary to give effect to the presumed intentions of the parties. This might be an overly simplistic explanation for contract lawyers but will suffice for the purposes of this guide. The Courts over the years have made various decisions as to the extent of any implied terms of a tendering contract.

Starting with *Blackpool and Flyde Aero Club v Blackpool Borough Council* [1991] 1 WLR 1195 CA the Court of Appeal held that the duty was to consider a tender and that the decision has to be *bona fide* and honest.

Two years later in *Fairclough Building v Borough Council of Port Talbot* [1992] 62 BLR 82 CA the Court of Appeal referred to and quoted the Judge at first instance who stated that the duty was to act in good faith and to act reasonably.

In *Harmon CFEM Facades (UK) v Corporate Officer for the House of Commons* [1999] 67 ConLR 1 QBD in an extraordinary long judgment, a number of cases from the UK and other commonwealth countries were considered. The Judge concluded that it was clear that where competitive tenderers are sought, and responded to, a contract comes into existence which requires the employer to consider all tenders fairly and equally, paragraphs 214-218:

> *"… I consider that it is now clear in English law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly: see Blackpool and Fairclough.*
>
> *... In my judgment it also broke the implied duty to treat all tenderers fairly and equally by considering an alternative design without giving any other tenderer the opportunity of competing with it on its terms."*

Attention then turns to a case which came to the Privy Council in 2004, *Pratt Contractors Ltd v Transit New Zealand* (2004) BLR 143 PC. In that case Privy Council reviewed the various authorities from the Commonwealth countries. It held that the duty of good faith and fair dealing required that the evaluation ought to express the view honestly held by the members of the tender evaluation team and that all tenders had to be treated equally. However, the Court made clear that the obligation of good faith and fair dealing did not mean that the tender evaluation team had to act judicially.

The journey now travels over to Belfast for two significant cases, both in 2007.

In the first, *Gerard Martin Scott v Belfast Education & Library Board* [2006] NICh 4, the Court held that the concept of fairness applies to:

- the application of specified procedures;
- the assessment of tenderers according to any stated criteria; and
- the evaluation of tenders in a uniform manner.

The Court also held that there was an implied term of fairness and good faith which required the absence of any material ambiguity in the tender documents which would significantly affect the tender.

In the second case, *Natural World Products v ARC 21* [2007] NIQB 19 a separate Judge at the High Court in Belfast reviewed the cases in relation to the tendering contract and again confirmed that an Employer had a duty to act in a way that is *"fair and reasonable and in good faith".*

In conclusion it can be said that in the UK:

- a secondary contract will be implied in relation to the tender process;
- this contract may contain express terms agreed between the parties;
- the contract may also contain implied terms including:
  - a duty to act reasonably, as viewed from the employer's eyes;

- a duty to consider all tenders equally;
- the duty will extend to good faith and fair dealing; and
- the implied terms will not go so far as to require the employer to act judicially.

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SECTION 3 – LEGISLATION

This section examines the rules imposed on employers seeking tenders for construction works imposed by legislation. Before looking at the various rules in detail, it is necessary to set out where the rules come from and where they can be found.

Unlike the obligations arising out of the tendering contract, they are not expressly or impliedly agreed between the parties. These rules are imposed on the parties whether they like it or not.

Much of the driving force behind these rules is the European Union. However, there are also rules which are purely of a domestic nature. The European rules will be considered first and then the domestic rules.

A fundamental objective of the original EC Treaty is the integration of an internal market throughout the member states. To achieve this, the Treaty eliminates quantitative restrictions on the import and export of goods and obstacles to the free movement of persons and services. There is also a general principle of non-discrimination. The *Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C179/02)* sets out that public authorities must follow certain basic standards when awarding contracts that may be relevant to the internal market. Those basic standards, arising from the EC Treaty, include;

- Article 43 – free movement of goods;
- Article 43 – right of establishment;
- Article 49 – freedom to provide services;
- Non-discrimination and equal treatment;
- Transparency;
- Proportionality; and
- Mutual recognition.

The European Commission are able to take member states to the European Court of Justice, ("ECJ"), for breach of the Treaty provisions and have done so on many occasions in relation to procurement.

Based on the original EC Treaty, and the other Treaties, the EU has made various Directives dealing specifically with procurement. It is the Commission's view, as expressed in *Communication* 2006/C179/02*,* that the Directives do nothing more than provide a set of procedures that will ensure compliance with the basic standards.

The current Directives dealing with procurement are set out below:

- 2004/17 – Utilities Contracts;
- 2004/18 – Public Contracts; and
- 2007/66 – Remedies Directive.

These Directives are aimed at the member states, which then have to implement them by way of domestic legislation. In England, Wales and Northern Ireland this has been done by way of:

- The Public Contracts Regulations 2006 (SI2006/5);The Public Contracts (Amendment) Regulations 2009 (SI2009/2992)
- The Utilities Contracts Regulations 2006 (SI2006/6);
- The Utilities Contracts (Amendment) Regulations 2009 (SI2009/3100); and
- The Public Contracts and Utilities Contracts (Amendment) Regulations 2007 (SI2007/3542).

For an individual person or company, the primary source of law is the domestic implementing legislation. However, it is essential to also refer back to the Directives because:

- when interpreting the domestic legislation, the courts must do so in accordance with the Directives;
- if the Directive has been incorrectly implemented, in other words the domestic legislation does not achieve the objects of the Directive, then recourse may be available against the member state;

- if the Directive has not been implemented then it may have direct effect, that is to say it can be read as if it was domestic legislation;

- the courts will adopt a different method on interpretation than traditionally used when interpreting domestic legislation which implements EU Directives. The UK Courts generally interpret legislation in a literal way, even where this produces strange results. However it is now well established that when interpreting legislation driven from Europe, the Courts will adopt a purposive interpretation.

- when researching what a provision in the domestic legislation means, it may be possible to get help from cases decided by the ECJ on the Directives.

Apart from domestic legislation which implements Directives, there is other legislation which sets out obligations on the public sector when procuring works, such as Local Government Act 1998 and the Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001 (SI2001/909).

The Commission and the UK's Office of Government Commerce publish various guides and communications to help set the framework of the legislation. Although these can be helpful, it is not unknown for them not to be in accordance with the legislation and therefore should be treated with caution.

When considering procurement of building and civil engineering works, the relevant domestic legislation is the Public Contracts Regulations 2006 ("*PCR 06*"), which implements Directive 2004/18.

Key Aspects of the PCR 06

The purpose of this section is to set out some key aspects that must be borne in mind when awarding a contract. Please also see the QG Step-by-Step Guide to the PCR 06 that summarises the Regulations, which is available at www.QGProcurement.com

The Contracts Covered

The PCR '06 covers public service contracts, public supply contracts and public works contracts between an employer, referred to as the contracting authority, and a contractor, referred to as an economic operator.

Contracting authorities are set out at Reg.3 and Sch.1 of the Regulations and in effect refer to Government Departments and Local Authorities and other bodies exercising a public function. Reg.3(1)(w) provides that a contracting authority would include a corporation established for meeting the needs of general interest, not having industrial or commercial character, and financed by a contracting authority and subject to the management and supervision of a contracting authority. Generally speaking it will be quite clear whether or not a body is a contracting authority as defined by the Regulations.

Once it is established that the contract is one for services, supply or works with a contracting authority, the general rule is that the Regulations will apply unless the Regulations provide otherwise.

The most significant exclusion relates to the contracts not meeting the financial thresholds. Reg.8 provides that the Regulations do not apply where the estimated value of the contract is less than the relevant threshold. Different thresholds are set out in relation to different types of contracts, however, the most significant thresholds are:

- For works €4.845m;
- For services €193k; and
- For goods €193k.

It should be noted that different thresholds do apply for different contracting authorities at different stages and the above is merely an indication.

Where there is single requirement for goods or services or for the carrying out of a work or works and a number of contracts are to be entered into to fulfil that requirement, the estimated value of each of the contracts is the expected aggregate value of all of the contracts. Therefore, it may be that the Regulations apply to contracts where the individual value is much less than the threshold value.

The estimated value is not the per annum value but the total value of the expected contract. Therefore, if the contract is to last four years then the estimated value is the total compensation or payment that will be made over the four year period, at net present value. It should also be noted that any possible extensions to that period must be added. Therefore, if a contract is to last two years with a possible

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extension of a further two years then the total payment estimated over the four year period is the estimated value, Reg.8.

Reg.6 excludes services concession contracts, exclusive right service contracts, land transactions, employment contracts, research and development, telecommunications, broadcasting, arbitration and conciliation services, financial instruments and central banking. Reg.6 also provides that certain contracts in connection with secrecy, national security, defence and the implementation of certain international agreements are not covered by the Regulations.

In relation to public service contracts, Sch. 2 sets out services which may be provided under such a contract under Part A and Part B. If the service is a Part A Service, then all of the Regulations apply; whereas if the service is a Part B Service, the only requirement on the contracting authority is to advertise and to send a notice after the award to the Commission.

Where a contract is for both Part A and Part B services, if the majority of services are Part B, then it will be classed as a Part B service contract; whereas if the majority of the services are Part A it will be classed as a Part A service contract.

Part B Services include the provision of legal services, transport by rail or water, health and social services.

The Procedures

Assuming that the contract is a public contract which is covered by the Regulations, it is then necessary to decide which procedure is to be followed.

Reg.12 provides that the contracting authority must use either the open or the restricted procedure except where it is permitted by the Regulations to use the negotiated or the competitive dialogue procedure. The situations and the procedure to be followed under the negotiated or the competitive dialogue procedure are beyond the scope of this work; suffice to say that competitive dialogue procedure is to be used where the contracting authority is:

> *"…not able to objectively define a technical means capable of satisfying its needs or specify the legal or financial makeup of a project." (Reg 18 PCR 06)*

A typical situation where competitive dialogue will be used would be in relation to PPP or PPI Contracts.

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The negotiated procedure can only be used:

- with prior publication;
    - where an open restricted or competitive dialogue procedure was discontinued because of irregular tenders or unacceptable tenders;
    - the nature of the contract is such that it does not permit prior overall pricing;
    - in relation to certain services contracts where specifications cannot be established with sufficient precision;
    - for works contracts where the purpose is solely for research or testing or development;
- without prior publication of a notice;
    - where no acceptable tenders were received under an open or restricted procedure;
    - for reasons connected with protection of exclusive rights; and
    - in situations of extreme urgency where it is strictly necessary.

The open procedure allows anyone to submit a tender, with no pre-qualification stage. As such it is most suitable to situations where the thing to be supplied is precisely defined and the cost to economic operators in supplying tenders is not significant. The most common procedure for procurement of construction works is the restricted procedure. Under this system only those economic operators who have pre-qualified may be entitled to submit a tender.

The Selection and Award under the Restricted Procedure

The selection of an economic operator to be awarded the contract under the restricted procedure can best be described as a three stage process.

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Stage One

Stage one is to reject, from the economic operators who have expressed an interest in tendering for the works, those which:

- may be treated as ineligible under Reg.23;
- do not meet the minimum level of economic and financial standing; or
- do not meet the minimum level of technical and professional ability.

Reg.23 provides that a contracting authority can treat economic operators as ineligible on a number of grounds. These grounds would include an economic operator who has been convicted of any of several offences including conspiracy, fraud or money laundering. An economic operator may also be treated as ineligible if he is a bankrupt or, if a firm, is subject to an order for winding up, has committed an act of grave misconduct in the course of his business, such as not paying social security contributions or taxes, or is guilty of serious misrepresentation in providing information required under the Regulations.

Reg.16(7)(b) provides that economic operators may be excluded on the grounds that they fail to meet the minimum standards required in relation to:

- economic and financial standing; or
- technical and professional ability.

Reg.16(12) provides that any such minimum levels or standards must be specified in the Contract Notice and must be related to and proportionate to the subject matter of the contract. A common pitfall of contracting authorities is to set minimum levels which are either unrelated to the subject matter of the contract or are not proportionate. Regulations 23 to 27 provide what information can be requested by a contracting authority to determine whether or not an economic operator meets the minimum levels.

A group of economic operators may rely on the capacities of other entities or members in the group regardless of the legal nature of the link between the economic operators so long as the economic operators provide proof to the contracting authority that the resources necessary to perform the contract will be made available, Reg.24(3).

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Reg.25 sets out the information which can be requested in relation to technical or professional ability and the list set out at Reg.25 is an exhaustive list. Of course a contracting authority does not have to request all of the information set out at Reg.25 but must set out in the Contract Notice or the Invitation to Tender the information which it does require, (Reg.25(5)).

Reg.27 provides that where an economic operator is registered or certified on the official list of approved contractors, service providers or suppliers in a relevant state then the certificate of registration must be accepted as evidence in relation to many of the matters set out in Regulation 25.

It should be noted that Reg.28 provides that in relation to consortia no consortia can be treated as ineligible on the grounds it has not formed a legal entity. However, if the consortium is to be awarded the contract, the contracting may require the consortium to form a legal entity.

Stage Two

Stage two is the selection, from those tenders remaining, of those which will be invited to submit a tender for the works. In practice, stage one and stage two are conducted at the same time. However, it must be borne in mind that they are two separate stages in the process. Reg.16(8)–(10) sets out the procedure for stage two of the process.

Where there are a sufficient number of economic operators suitable to be selected to tender, the contracting authority may limit the number which it intends to invite to tender provided that the Contract Notice specifies the objective and non-discriminatory criteria to be applied in order to limit the number of operators.

The Notice must also state the minimum number of operators, which will not be less than five, which the contracting authority intends to invite to tender. When making any selection the contracting authority must ensure that the number invited to tender is sufficient to ensure genuine competition. There is nothing to prevent a contracting authority making the selection on the basis of a lottery so long as it is non-discriminatory.

Stage Three

Stage three is the award of the contract to one or more of the economic operators who were invited to tender.

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Reg.16(8) provides that the award shall be in accordance with Reg.30. Reg.30 provides that the award is to be either on the basis of the tender which offers:

- the most economically advantageous from the point of view of the contracting authority; or
- offers the lowest price.

In relation to construction operations, the vast majority of awards are on the most economically advantageous tender ("*MEAT*") basis.
Reg.30 also provides that the contracting authority shall use criteria which are linked to the subject matter of the contract to determine which offer is the most economically advantageous including quality, price, technical merit, aesthetic and functional characteristics, and period of completion.

Where a contracting authority intends to award a public contract on MEAT, it shall state the weighting it gives to each of the criteria chosen in the contract notice or the contract documents.

Particular care must be taken by the contracting authority in selecting criteria to be taken into account at selection and award stage and also in setting out details of those criteria in the notice or contract documents.

Lianakis & Ors v Dimos Alexandroupolis & Ors C–532/06 highlighted that the only criteria which can be taken into account at award stage are criteria which are linked to determining which offer is the most economically advantageous from the point of view of the contracting authority and not criteria which are essentially linked to the evaluation of the tenderers ability to perform the contract in question. In that case criteria such as past experience, manpower and equipment and the ability to perform a project by the deadline were all held to be criteria which could be taken into account at selection stage i.e. stage one and stage two but not award stage, stage three. As a result the award of the contract was declared invalid.

In *McLaughlin & Harvey Limited – v - The Department of Finance and Personnel (No. 2)* [2008] NIQB 91 the Court held that the contracting authority did not set out the criteria to be taken into account at award stage in sufficient detail, nor did it set out the appropriate weighting as required by the Regulations. As a result of that finding, the Court went on in *McLaughlin & Harvey Limited v Department of Finance and Personnel (No. 3)* [2008] NIQB 122 to find that the award was invalid.

In *Henry Brothers (Magherafelt) Limited and Others v Department of Education for Northern Ireland (No. 2)* [2008] NIQB 105 the Court held that the contracting authority did not take into account a fundamental aspect to determine which was the most economically advantageous tender. In that case although the contracting authority asked tenderers to provide what mark-up they would apply to costs, they did not ask contractors what their base costs would be. As above, the Court then held the award procedure was unlawful.

Where a tender is received which is considered to be abnormally low, it may be rejected but only once the contracting authority has requested an explanation, taken account of the explanation and sent a report justifying the rejection to the Office of Government Commerce for onward transmission to the Commission.

Reg.30 provides that the contracting authority must send a notice to all economic operators who wished to be awarded the contract, stating that they intend to award the contract to the successful party.

In previous Directives there was no requirement for the contracting authority to provide notice to unsuccessful tenderers. The ECJ in *Alcatel Austria AG v Bundesministerium fur Wissenschaft und Verkehr* [1999] ECR I-7671 made it clear that a contracting authority must provide such a notice and a standstill period so that a dissatisfied economic operator can make an application for an injunction preventing the contracting authority entering into the contract prior to it actually doing so, and therefore giving and effective remedy other then damages. The 'Alcatel period', as it became known, was subsequently codified through Directive 2004/18 (made effective in the UK through the PCR '06).

Following recent changes to the standstill period, the obligations are now as follows:

- Debriefing of unsuccessful tenderers is compulsory (there is no longer the requirement for tenderers to request a debriefing);

- The standstill period does not commence until <u>all</u> unsuccessful tenderers have been debriefed;

- The length of the standstill period (previously 10 days) now (mainly) takes into account the means of communication used, allowing more time for slower methods of communication. Additionally, the period is extended if it does not conclude on a working day.

SECTION 4 – INTERNATIONAL AGREEMENTS

The relationship between economic operators from countries outside the EU who wish to participate in providing services within the UK is governed by specific agreements between the EU and those countries. These agreements include the World Trade Organisation Agreement on Government Procurement ("*GPA*") and other agreements entered into between the EU, or EC depending on when it was entered into, and countries such as Switzerland, Mexico, Chilli, Israel, South Korea and the United States.

Unlike the EU Directives, the definition of which contracts the agreements will apply to and what the thresholds will be, are not uniform and depend upon the negotiations between the countries involved. Therefore it is not possible to set out a simple guide to the agreements. Each will have to be looked at individually to see if it is applicable and if so what it provides.

Reg.47 of PCR 06 provides that the contracting authority's duty to comply with the provisions of the Regulations owed to an economic operator is also a duty owed to a GPA economic operator; except as regards certain contracts including Part B service contracts, subsidised public works or public services contracts and sub-contracting works carried out under a public works concession contract.

The primary duty being set out at Reg.4 is that the contracting authority:

> *"[the contracting authority] shall not treat a person who is not a national of a relevant state and established in a relevant state more favourably than one who is…*
>
> *[the contracting authority] shall treat economic operators equally and in a non-discriminatory way and act in a transparent way."*

This is in accordance with the GPA general principle that the parties to the agreement must give the economic operators no less favourable treatment as national economic operators.

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SECTION 5 – INTERNAL POLICIES

Many contracting authorities will have internal guidelines, procedures or policies which set out how they will procure construction work. If they are not followed, a question arises as to whether a tenderer has any remedy for a breach of those guidelines, procedures or policies.

In *J&A Developments – v – Edina Manufacturing Limited* [2006] NIQB 85 the tender documents stated that the tender would be assessed in accordance with the *"NJCC Code of Practice for Single Stage Selective Tendering"* and the Court found that the procedure was not followed by the employer. The Court held that compliance with the Code of Practice was an express term of the tendering contract, and as such, any breach would give rise to a claim for damages.

It is submitted that the same conclusion would be found in a situation for any internal guideline or policy which the tender documents stated would be followed.

The more difficult question is whether or not the contractor has any remedy against a contracting authority who breaches its own internal policy or guidelines which, as a matter of fact, are not incorporated into the tender document. There has been no reported case in the UK Courts considering this issue.

It is submitted that the only remedy available to a tenderer in such a situation would be an action for judicial review of the contracting authority's decision. Succeeding with such an application will be difficult for a contractor as it would be necessary to show that the contracting authority either acted *ultra vires* (beyond their powers) or in a manner that was obviously unreasonable or irrational, within the meaning of the 'Wednesbury test' (from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1).

SECTION 6 – REMEDIES

Time Limits - Generally

An important issue when considering remedies, is the time limits for applying for them.

Regulation 47D states:

> *"47D.—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.*
>
> *(2) Subject to paragraphs (3) and (4), such proceedings must be started promptly and in any event within 3 months beginning with the date when grounds for starting the proceedings first arose."*

However, in *Uniplex (UK) Ltd v NHS Business Services Authority* (C-406/08), the judgement was given that the 3 month period begins when a tenderer knew, or ought to have known, about an infringement.

The *Uniplex* case also considered the effect of the word 'promptly' in the time limit. Previously, this had the effect that although a case is bought within 3 months, it can be time barred because it was not bought promptly (this is well established in Judicial Review). However, judgement was handed down that where domestic legislation (such as the PCR '06) makes such provisions, this interpretation should be disapplied i.e. the time limit will be 3 months.

Automatic Suspension

Prior to the PCR '06, an aggrieved tenderer had to move quickly to try and obtain an interim injunction if they thought that a contract was going to be improperly awarded. In doing so, they would, invariably, have to give an onerous undertaking in damages. This meant that if their challenge was disallowed, they could suffer much greater consequences than their own expenses in challenging. Naturally, some tenderers would not risk going so far, even when their challenge was a strong one.

The PCR ’06 has, effectively, reversed this burden. Now, when a tenderer makes a challenge to a contract award decision (prior to the actual award), the CA must refrain from awarding the contract until, either a court removes the requirement under an interim order, or the proceedings are determined, discontinued or otherwise disposed of.

This requirement operates however frivolous or vexatious a challenge to a contract award decision is.

In making interim orders, the courts may require undertakings in damages; they may also restore or modify suspension requirements.

Ineffectiveness

A key addition under the PCR ’06, is that a court must, in certain circumstances, declare a contract ‘ineffective’. An example of when this would occur, is when a contract is awarded without competition, when there should have been competition.

The effect of this remedy, is that the contract will cease to exist. It should be noted that this only operates in a prospective manner. The court has the power to award restitution or compensation to remedy parties affected by the order.

Naturally, there will be circumstances where parties have entered into sub-contracts, and sub-sub-contracts, only to find that the main contract then disappears. Consequently, parties will have to be mindful of the potential for such circumstances when negotiating and drafting contracts.

If there are "overriding reasons relating to a general interest of a non-economic nature" that require that "some of the effects of the contract should be maintained", then a Court may provide that the contract can continue. In those circumstances, alternative effective penalties (fines or shorter duration of the contract) will be applied to deal with the breach or the unlawful use of the "urgency" exemption.

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Special time limits for seeking a declaration of ineffectiveness

Where an EO seeks a declaration of ineffectiveness, proceedings must be started within 30 days of either, i) a contract award notice being published in the official journal, or ii) the CA notifying the EO of the conclusion of the contract together with a summary of the reasons.

Civil Financial Penalties

In addition a court must impose, alongside a declaration of ineffectiveness, a fine (or, as it is termed, a Civil Financial Penalty) on the CA. As yet, there are no indications of what level these fines will be set at and there is no guidance on whether these will essentially be a 'slap on the wrist' or something more onerous. All we know at present is that the first Authorities to be subjected to them with be holding their breath in anticipation of how much they will be.

Injunctions

Due to the difficulties in assessing damages, which will be explored below, it is considered that injunctive relief should be considered as the primary remedy, *Partenaire Limited v Department of Finance and Personnel* [2007] NIQB 100 at 13.

When an aggrieved contractor receives notice from the contracting authority that it intends to award the contract to another, and where the contractor believes that there has been a breach of the contracting authority's duty then it may apply for an interim injunction to restrain the contracting authority from awarding the contract.

The court, when faced with such an application will apply the American Cyanamid test (*American Cyanamid Co v Ethicon Co Limited* [1975] AC 396). The criteria laid out in that case are:

- is there a serious issue to be tried?
- are damages an adequate remedy?

- does an undertaking in damages provide adequate protection?
- where does the balance of convenience lie?

It is, of course, correct that in applying these criteria each case will turn on its own of facts.

In *Pantenaire* the Court, in considering whether or not damages would be an adequate remedy, took into account that the exercise to measure the damages would be difficult, but not impossible. Nevertheless, the Court was not persuaded that damages would be an adequate remedy in that particular case. In that case the Court then went on to consider the adequacy of the qualified undertaking in damages being offered by the applicant. The Court took into account that the potential loss could be overwhelming and that if it imposed a *"full"* undertaking, it would effectively prohibit a private sector contractor seeking interlocutory injunction, and accepted the qualified undertaking offered.

In *McLaughlin & Harvey Limited v Department of Finance and Personnel* [2008] NIQB 25 the Court was not persuaded that the award of damages would be inadequate. The Court then considered the fact that the cross undertaking in damages might not fully compensate the defendant, and although not an insurmountable barrier, was a factor in the balance against the application. No injunction was granted.

In *Gerard Martin Scott* an injunction was granted and the applicant provided a full undertaking in damages. The matter is still awaiting trial and the defendant authority has made a counterclaim, on foot of the cross undertaking in damages, against Scott, in excess of £1m. This is a very significant sum when compared to the value of the contract, c. £700k per annum for up to five years. This shows the serious commercial implications that a contractor must consider in deciding whether or not to apply for an interim injunction and, if so, what undertaking in damages it is prepared to offer.

Damages

The measure of damages for breach of the tendering contract and also for breach of the PWC '09 duties is the classic measure of damages; to place the claimant in the position he would have been had the breach not have occurred**,** *Robinson v Harman* [1848] 1 Exch. 850. Any application for damages in relation to breach of procurement obligations is likely to have two separate heads.

The first is the cost of tendering. For a contractor to submit a tender, he has to spend time analysing the contract documents, seeking quotations and pricing the works. Further, it is likely he will have to provide

detailed statements as to how he intends to carry out his work, what quality systems he will employ, what health and safety systems he will employ, etc. These tendering costs can be significant. If a contracting authority breaches its obligations, then it may well be possible for a contractor to show that his costs of tendering have been wasted. If he has to re-tender, the measure of the damages is likely to be the cost of re-tendering, as that is the expense he will incur which he would not otherwise have incurred.

The more significant amount will be in relation to the loss of the chance to earn overhead and profit contribution from the works.

In order for this claim to proceed it will be necessary to show that had the tender contract or the Regulations not been breached, the contractor had a chance, or a better chance, of winning the work and therefore earning a contribution towards its head office overheads and profit. The leading case in relation to claiming loss of chance is *Chaplin v Hicks* [1911] 2 KB 786 CA which concerned a claimant who lost a chance of winning a beauty contest. The ratio in this case has been applied in some of the recent tendering cases.

In some cases the chance that the contractor would have won the work would be very high. In *J&A Developments* the Claimant was the lowest tenderer and the Court was persuaded that had the employer complied with its duties the Claimant would have been awarded the works. The Court awarded the Claimant the full amount of its overheads and profit which it would have earned on the work, therefore assessing the chance of winning the work at 100%, and making a reduction of 20% to allow for the potential availability of other work which the Claimant may win in the future and therefore mitigate its loss.

In other situations the chance may be much less. For example, if the breach prevented the contractor from being one of four who would be invited to tender for the works then the loss of chance must be 1 in 4 or 25%.

As stated above the Courts in both *Partenaire* and in *McLaughlin & Harvey* expressed the view that damages may be very difficult but not impossible to assess.

APPENDIX 1 - TABLE OF CASES

Alcatel Austria AG v Bundesministerium fur Wissenschaft und Verkehr [1999] ECR I-7671 ECJ

American Cyanamid Co v Ethicon Co Limited [1975] AC 396 HL

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1

Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council [1991] 1 WLR 1195 CA

Chaplin v Hicks [1911] 2 KB 786 CA

Fairclough Building Ltd v Borough Council of Port Talbot (1992) 62 BLR 82 CA

Gerard Martin Scott & Ors v Belfast Education & Library Board [2006] NICh 4

Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons (1999) 67 ConLR 1 QBD

Henry Brothers (Magherafelt) Ltd and Ors v Department of Education for Northern Ireland (No 2) [2008] NIQB 105

Howberry Lane v Telecom Éireann [1999] 2 ILRM 232

J&A Developments Ltd v Edina Manufacturing Ltd & Ors [2006] NIQB 85

Lianakis & Ors v Dimos Alexandroupolis & Ors C-532/06 ECJ

McLaughlin and Harvey Ltd v Department of Finance and Personnel [2008] NIQB 25

McLaughlin and Harvey Ltd v Department of Finance and Personnel (No 2) [2008] NIQB 91

McLaughlin and Harvey Ltd v Department of Finance and Personnel (No 3) [2008] NIQB 122

Natural World Products Ltd v ARC 21 [2007] NIQB 19

Partenaire Ltd v Department of Finance and Personnel [2007] NIQB 100

Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd [1953] 1 QB 410

Pratt Contractors Ltd v Transit New Zealand [2004] BLR 143 PC

Robinson v Harman (1848) 1 Exch. 850

Uniplex (UK) Ltd v NHS Business Services Authority (C-406/08),

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APPENDIX 2 - LEGISLATION

European Union

EC Treaty

Directive 2004/17 Utilities Contracts

Directive 2004/18 Public Contracts

Directive 2007/66 Public Contracts

United Kingdom

Local Government Act 1988

Local Government Best Value (Exclusion of Non-Commercial Considerations) Order 2001 (SI2001/909)

Public Contracts Regulations 2006 (SI2006/5)

The Utilities Contracts Regulations 2006 (SI2006/6)

Public Contracts (Amendments) Regulations 2009 (SI2009/2992)

The Utilities Contracts (Amendments) Regulations 2006 (SI2009/3100)

The Public Contracts and Utilities Contracts (Amendment) Regulations 2007 (SI2007/3542).

APPENDIX 3 – BIBLIOGRAPHY

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World Trade Organisation Agreement on Government Procurement 1996

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