Neutral Citation no. [2007] NIQB 116 | *Ref:* **COG7018**

Judgment: approved by the Court for handing down | *Delivered:* **21/12/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

_____

Between:

HENRY BROTHERS (MAGHERAFELT) LIMITED,
F B McKEE AND COMPANY LIMITED and
DESMOND SCOTT and PHILIP EWING
TRADING AS WOODVALE CONSTRUCTION COMPANY LIMITED

Plaintiffs;

and

DEPARTMENT OF EDUCATION FOR NORTHERN IRELAND

Defendant

_____

COGHLIN J

[1] This is an application on behalf of Henry Brothers (Magherafelt) Limited, F B McKee and Company Limited and Desmond Scott and Philip Ewing trading as Woodvale Construction Company Limited ("the plaintiffs") for interim relief in accordance with the provisions of Section 91 of the Judicature (Northern Ireland) Act 1978 and Article 47(8) of the Public Contracts Regulations 2006 ("the regulations"). Inter alia, the plaintiffs seek an interim injunction restraining the Department of Education for Northern Ireland ("the department") from concluding the Northern Ireland Schools Modernisation Framework Agreement (the "framework agreement") for the provision of major construction works and suspending the present procedure pending the conclusion of proceedings commenced by the plaintiffs by writ of summons dated 12 November 2007.

[2] For the purposes of the present application the plaintiffs were represented by Mr Michael Bowsher QC and Mr Peter Girvan while Mr Stephen Shaw QC and Mr McMillen appeared on behalf of the department. I wish to acknowledge my

gratitude for the carefully prepared, well reasoned and constructive oral and written submissions advanced by counsel on behalf of both parties.

The background facts

[3] The Northern Ireland Schools Modernisation Programme ("NISMP") was instituted by the department as part of a policy aimed at reversing the historical under-investment in the schools infrastructure in Northern Ireland. The department estimates that only 25% to 30% of the schools within the present schools estate meet the department's Building Handbook standards and that an even smaller percentage could be considered to constitute modern 21st century education facilities. The Investment Strategy for Northern Ireland 2005-2015 ("ISNI"), published on 14 December 2005, set out ambitious plans for new investment in the schools estate with a view to the creation of modern infrastructure for schools and youth facilities. On 25 October 2007 a further draft Investment Strategy was published for consultation allocating some £714.5 million to Schools and Youth Services over the period 2008/9 to 20010/11. This strategy is expected to be finalised early in 2008.

[4] The Central Procurement Directorate ("CPD") is concerned with the development of policy and best practice in relation to procurement for the benefit of the public sector in Northern Ireland. The CPD also serves as a central purchasing body and provides the public sector with policy advice and construction related support services including professional, advisory and project management expertise. It has also been closely involved in developing standards and practices to be applied in procurement competitions. Amongst its other functions, CPD has been active in advising the government as to the best procurement strategy to adopt in order to obtain best value for money. In doing so it has been instrumental in promoting the department's contract strategy based on the establishment of framework agreements provided for under the regulations. Once established, such framework agreements are intended to facilitate the appointment of teams of designers and contractors to undertake projects, as the need arises, by means of a secondary competition between those appointed in accordance with the framework agreement. This allows the preliminary work in procurement to be carried out in one exercise which then provides the contracting authority with a pool of contractors who have been assessed as best qualified to carry out individual contracts that are put out to tender. In the context of this litigation CPD acted as the agent of the department in relation to the NISMP and was responsible for the issue and receipt of all correspondence with the candidates relating to the framework agreement. The department was advised with regard to the structure and implementation of the competition to identify those who would come within the framework agreement by Messrs E C Harris at the Pre-Qualification Questionnaire ("PQQ") stage and by Chandler KBS as sub consultants to E C Harris thereafter.

[5] The procedures followed by the department and its consultants appear to have been as follows:

(i) On 13 March 2007 CPD published a Contract Notice in the Official Journal of the European Communities which referred to the NISMP and invited contractor-led teams to apply for appointment to the framework agreement for the design and construction, or construction only, of schools or other projects as might be required by an educational body in Northern Ireland. The Notice stated that the framework agreement would last for a period of 48 months and that the estimated total value of projects to be awarded under the framework was £550 million to £650 million pounds. The Notice also specified that the envisaged number of operators who would be invited to tender would be a minimum of 12 and a maximum of 16 and that the maximum number of envisaged participants in the framework would be 8.

(ii) Each contractor who requested information was supplied with a copy of the Memorandum of Information and Instructions to Tenders together with a copy of the PQQ.

(iii) A market information day was held on 23 March 2007 at which interested parties were informed that any specific projects would be based on the NEC 3 form of contract and that a two-stage strategy would be adopted involving a primary competition for the purpose of selecting contractors to be included within the framework agreement and, subsequently, a secondary competition for the purpose of identifying a contractor to carry out a specific project.

(iv) Throughout the PQQ stage CPD dealt with all requests for clarification and, in all, 8 PPQ Clarification Notes were issued.

(v) Contractors were required to return the completed PQQs to CPD by 3.00 pm on 4 May 2007 and they were opened on 8 May 2007. After assessment the consultants recommended to the department that all 12 contractors had met the criteria stipulated in the PQQ and should be invited to tender.

(vi) On 19 June 2007 CPD Contracts Branch issued Invitation To Tender ("ITT") documents to all 12 contractors by way of e-mail. These consisted of four volumes comprising Invitation to Tender, Framework Agreement, Works and Site Information and Tender Submissions.

(vii) Contractors were required to return their completed ITT submissions to CPD by 3.00 pm on 7 August 2007. During this stage CPD issued 11 ITT Clarification Notes. In particular, Clarification Note 4 indicated that tenders would be evaluated in accordance with the weighting specified in the ITT documents, namely, 80% qualitative and 20% commercial. The Note confirmed that the commercial section would be based on a submission of direct fee percentages, sub contracted fee percentages and indicative fee percentages for design services. The qualitative section was based on the response to 26 questions across 7 weighted sections.

(viii) The ITT submissions were assessed by the department consultants who forwarded any request for clarification to CPD for issue to the particular contractor. The consultants forwarded a report to the department on 8 October 2007 identifying the 8 highest ranking contractors who should be appointed to the framework. It was at this point that the plaintiffs were excluded. On 6 August 2007 the plaintiffs had submitted a Supplier Satisfaction Report on CPD performance in which they had expressed contentment with the adequacy of the information supplied, the quality and clarity of the documents, the timescale and the adequacy of support and communication observed by CPD staff.

(ix) Following receipt of the assessment decision from the department CPD's contract branch issued letters to successful and unsuccessful contractors on 17 October 2007 and all 4 unsuccessful contractors were afforded a debriefing session.

[6] Following the debriefing meeting correspondence ensued between the plaintiffs and the department consultants via the offices of CPD. This took place during a standstill period between the plaintiffs' debrief on 29 October 2007 and 5.00 pm on 5 November 2007. On 2 November 2007 the plaintiffs wrote to CPD requesting that the department should not conclude the framework agreement until the plaintiff had been provided with information regarding non-price criteria, and an assessment of the price criteria had been carried out on a "rational and lawful basis" with any "additional criteria" being excluded from consideration. The plaintiffs confirmed that this letter should be treated as a notice in accordance with Regulation 47(7) (*a*) of the Regulations indicating their intention to bring proceedings in the High Court. After some further correspondence the plaintiff wrote to the department on 9 November 2007 confirming their intention to institute a legal challenge to the decision excluding them from the framework agreement.

The Framework Agreement competition

[7] As noted above, the primary competition, at the conclusion of which the plaintiff was excluded, consisted of a series of questions weighted 80% qualitative and 20% commercial. In fact, as Mr Neil Taylor, the relevant partner in Chandler KBS, explained in his initial affidavit the key financial distinction between contractors during the primary competition was the fee percentage. According to Mr Taylor it was a "matter of record" that contractor A and contractor B would source their material and labour force from the same market and that therefore, by way of example, contractor B would pay the same for a cube of concrete or a quantity of bricks as contractor B. In such circumstances the basic "cost of the work" should not greatly vary as between contractors. Each of the competing contractors was given a hypothetical range of contract values and required to specify their respective fee percentages for each range. The ITT documents explained that any NEC3 contracts contain two financial elements, namely, Defined Costs calculated by reference to the Schedules of Cost Components and the fee which is normally the

contractors overhead and profit recovery calculated by applying the fee percentages to the defined cost. Mr Taylor emphasised that there was neither any requirement nor any need to attempt a calculation of actual cost at this stage and, indeed, such a calculation would not have been possible since the vast majority of schemes to be constructed within the context of the framework agreement would not yet have been identified or designed. He explained how the construction industry was seeking to move away from traditional forms of procurement in accordance with which a contractor would be selected by an employer in accordance with the lowest priced tender to carry out the work. In his experience, under such a regime, Final Accounts for schemes bore little resemblance to Tender Prices and the difference between the Tender figure and Final Account figure was often thought to be a measure of the contractor's success in submitting claims. The defects of the traditional approach were also recognised in paragraph 2.4 of the report of the N.I. Audit Office on "Modernising Construction Procurement in Northern Ireland" published on 1st March 2005. It seems to me that there is considerable substance to such a view and it is the type of problem to which I referred to Higgins v. Homefirst Community Trust and Heron Limited (NI QB.comm – 7 April 2006). Mr Taylor accepted that the definition of Defined Cost differed as between NEC 3 Option A and NEC 3 Option C, reflecting the difference in the financial administration of the two contracts, but he went on to set out at paragraph 25 of his initial affidavit his firm view that:

> "This does not alter the fact universally recognised in the construction industry that the cost to build the scheme will always be the same whether NEC 3 Option A or NEC 3 Option C is used. Therefore the fee percentages when calculating the Contract Price will be applied to the same cost to build by every contractor. "

[8] Once the primary competition has been concluded and 8 potential contractors identified it appears that a secondary competition will be held for the purpose of determining which contractor should be awarded a particular school or other project. At this stage each of the 8 contractors will be asked to focus on the Scheme Specific Details of the relevant school project. The contractors will be furnished with a target budget fixed by the department's experts who are familiar with the site but the emphasis will again be on the "qualitative" assessment of the competitors. Indeed, it would appear that, even at this stage, the only really objective commercial assessment will be the application of the percentage fees fixed during the primary competition to the target budget. Once an individual contractor has been identified by this competition that contractor will then discuss and negotiate quantities and rates for the specific project in consultation with the employers' professional advisers in order to determine the actual Defined Cost.

The legal framework

[9] Article 32 of the Public Sector Procurement Directive 2004/18/EC ("the directive"), which came into force on 31 January 2006, dealt with framework

agreements and was implemented by regulation 19 of the regulations. The Commission explanatory note relating to framework agreements recorded that the development of effective competition in the public procurement sector was one of the objectives of this type of directive and noted that such directives do not operate in a legal vacuum but are subject to both community and national competition rules. The Office of Government Commerce ("OGC"), guidance published on framework agreements in January 2006 advised contracting authorities that it would be important to consider whether a framework agreement would be the right approach in terms of a value for money judgment. At paragraph 4.7 the OGC emphasised that, at the award stage, the providers to be included in the framework agreement should be chosen by applying the award criteria to establish the most economically advantageous tender or tenders in the normal way. Paragraph 5.1 of the same guidance advised that, in relation to the "call-off" of specific contracts, authorities required to be careful to ensure that nothing was done which was discriminatory, improper or which distorted competition. It also provided confirmation that a framework should be awarded to the prime contractors on "the most economically advantageous tender" basis.

[10] The term framework agreement is defined in regulation 2(1) of the regulations as follows:

> "'Framework Agreement' means an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the Framework Agreement applies."

Regulation 19 lays down the procedure to be observed by contracting authorities when seeking to conclude a framework agreement and, in doing so, regulation 19(2)(*b*) requires the contracting authority to select an economic operator to be a party to a framework agreement by applying the award criteria set in accordance with regulation 30. Regulation 30(1) implements Article 55 of the directive by providing that a contracting authority shall award a public contract on the basis of the offer which is either most economically advantageous from the point of view of the contracting authority or offers the lowest price. Regulation 30(2) requires the contracting authority to use criteria linked to the subject matter of the contract when determining that an offer is the most economically advantageous including quality, price, technical merit, aesthetics and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion. Regulation 19(7) provides that where a contracting authority concludes a framework agreement with more than one economic operator, a specific contract may be awarded either by application of the terms laid down in the framework agreement without re-opening

competition or, where all the terms of the proposed contract are not laid down in the framework agreement, by re-opening competition between the economic operators which are parties to that framework agreement and which are capable of performing the proposed contract in accordance with that regulation.

[11] Regulation 47 provides that the obligation on a contracting authority to comply with the provisions of the regulations, with certain exceptions, and with any enforceable community obligation in respect of a public contract or framework agreement is a duty owed by the relevant authority to an economic operator. Regulation 47(6) provides that a breach of such a duty is actionable by an economic operator which suffers or risks suffering loss or damage and regulation 47(8) provides that such an operator may apply for interim relief in the form of a suspension of the procedure leading to the award of the contract. Regulation 47(9) provides that:

> "(9) In proceedings under this regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into."

[12] Enforceable community obligations include the need to afford equal treatment to all tenderers, transparency, objectivity and verifiability, proportionality and non discrimination. In particular, regulation 19(12) provides that:

> "19(12) The contracting authority shall not use a Framework Agreement improperly or in such a way as to prevent, restrict or distort competition."

[13] In the case of Lion Apparel Systems v. Firebuy Limited [2007] EWHC 2179 (Ch) Morgan J helpfully outlined the principally relevant enforceable community obligations that he extracted from the decision of the Supreme Court of Ireland in SIAC Construction v. Mayo County Council [2003] EuLR 1 and the decision of the court of first instance in Evropaiki Dynamiki v. The Commission (12 July 2007) in the following terms:

> "27. The principally relevant enforceable community obligations are obligations on the part of the Authority to treat bidders equally and in a non-discriminatory way and to act in a transparent way.
>
> 28. The purpose of the Directive (92/50/EEC) and the regulations (Public Services Contracts Regulations 1993) is to ensure that the authority is guided only by economic considerations.

29. The criteria used by the authority must be transparent, objective and related to the proposed contract.

30. When the authority publishes its criteria, which conform to the above requirements, it must then apply those criteria. The published criteria may contain express provision for their amendment. If those provisions are complied with, then the criteria may be amended and the authority may, and must, then comply with the amended criteria. In relation to equality of treatment, speaking generally, this involves treating equal cases equally and different cases differently.

32. Council Directive 89/655/EEC (the Remedies Directive) requires Member States to take measures necessary to ensure that decisions taken by an authority in this context may be reviewed effectively and as rapidly as possible on the grounds that such a decision may have infringed Community law in the field of public procurement or national rules implementing that law.

33. Regulation 32 of the 1993 Regulations gives effect to the Remedies Directive.

34. When the court is asked to review a decision taken, or a step taken, in the procurement process, it will apply the above principles.

35. The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the authority are correct and that there is no manifest error of assessment or misuse of power.

36. If the authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the authority to have a 'margin of appreciation' as to the extent to which it will, or will not, comply with its obligations.

37. In relation to matters of judgment, or assessment, the authority does have a margin of appreciation so that the court should only disturb the authority's decision where it has committed a 'manifest error'.

> 38. When referring to 'manifest' error, the word 'manifest' does not require any exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made."

[14] In the SIAC case Advocate-General Jacobs and the court placed considerable emphasis upon establishing an objective evaluation of the cost of a contract in the course of assessing the most economically advantageous tender. While such evaluation may involve expert assessment, at paragraph A55 of his opinion, the Advocate-General advised that such an opinion could be regarded as objective "provided that it is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment to be made." In this case the qualitative questions do appear to have been designed to probe relevant topics such as capacity, experience, technical expertise and resources but, as Mr Shaw QC conceded the responses obtained would be generally subjective rather than objective. At paragraph 33 of his opinion the Advocate-General observed:

> "The main purpose of regulating the award of public contracts in general is to ensure that public funds are spent honestly and efficiently on the basis of a serious assessment and without any kind of favouritism or quid pro quo whether financial or political."

[15] In SIAC the European Court of Justice ("ECJ") while confirming that contracting authorities were free to choose criteria upon which they proposed to base their award of the contract emphasised that this was not an unrestricted choice but one which must relate to criteria aimed at identifying the offer that was most economically advantageous. However, at paragraph 37 of its judgment the ECJ said:

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

The ECJ confirmed that the principle of equal treatment implied an obligation of transparency in order to enable compliance to be verified and that, in such a context, the award criteria had to be formulated in the contract documents or the contract notice in such a way as to allow reasonably well-informed and normally diligent tenderers to interpret them in the same way. During the course of assessment such criteria has to be applied objectively and uniformally to all tenderers.

The application for an interim injunction

[16] The granting of interim relief under Section 91 of the Judicature (Northern Ireland) Act 1978 and Regulation 47(8) is discretionary and I remain of the view

expressed in Partenaire Limited v. Department of Finance and Personnel [N.I. Q.B. 23/11/07] that the court's discretion should be exercised in accordance with the guidelines set out by the Court of Appeal in American Cyanamid Company v. Ethicon Limited [1975] AC 396 as supplemented, in appropriate cases, by a consideration of the analysis provided by Laddie J in Series Five Software v. Clarke [1996] 1 All E. R. 853 at page 865.

Has the applicant established that there is a serious question to be tried?

[17] While a number of issues were canvassed on behalf of the plaintiffs during the course of the hearing, ultimately, counsel focused upon their submission that to rely upon the fee percentage as the determinative commercial criteria to the exclusion of any other objectively verifiable element of cost was manifestly wrong within the meaning explained by Morgan J in the Firebuy case. While they accepted that the more traditional lowest price tender criterion had shortcomings, they argued that to move from such a criterion to the approach adopted in the present case was manifestly wrong.

[18] In support of their submissions the plaintiffs tendered a report from David Kyte of Hill International (UK) Ltd an expert in contract tendering and procurement. In compiling this document Mr Kyte rejected the proposition that costs did not significantly vary between contractors pointing out that levels of efficiency varied as would the prices that a particular contractor would be able to negotiate in respect of subcontractors, labour and materials as well as the levels of site establishment overheads. In his view a more accurate comparison of the relative commercial bids of competing contractors could be gained by requiring bidders to price an example project. A previous historic project carried out for the relevant authority might be used as such an example. Any divergence in cost elements might then serve to represent the discounts and bargaining power that a particular contractor could bring to the framework. With regard to Mr Taylor's assertion that the percentage fee was the key financial differentiator between contractors Mr Kyte said:

> "For the assumption to even stand a remote chance of being correct each contractor would need to use exactly the same subcontractors, material suppliers and labour on each of the projects and to secure the same commercial terms with each. This just does not happen in the industry."

While he conceded that he did not have enough available information, Mr Kyte expressed the view that that the impact of such factors might be sufficient to bring the plaintiffs within the framework agreement.

[19] I remind myself of the cautionary words of Lord Diplock in the American Cyanamid case at page 407 when he emphasised that it was no part of the court's function at this stage of the litigation to decide difficult questions of law which call for

detailed argument and mature consideration. I also take into account the fact that both the Directive and the regulations refer to the lowest price and the most economically advantageous offer as apparent alternatives. Nevertheless, in a field of law in which Community and national competition rules apply, in which the adjudicating authorities are required to choose criteria upon which to base the award of the contract that relate to identifying the offer which is economically the most advantageous it seems to me that the following factors are of significance:

(i) It is clear from the affidavits sworn on behalf of the department that, during the primary competition, the determinative objective commercial criteria was that of the percentage fees which were simply applied to hypothetical assumed bands of costs. No exercise, hypothetical or otherwise, was carried out for the purpose of determining the extent to which, if at all, the tendering contractors might be able to compete in terms of specific cost elements. This appears to have been the result of a quite deliberate decision by Mr Taylor of Chandler KBS, the department's consultants, based on the view expressed in his first affidavit that it was a "universally recognised" fact in the construction industry that the cost to build a scheme will always be the same for every contractor. I note that despite this assertion, in a series of notes that he subsequently compiled in relation to Mr Kyte's report, Mr Taylor acknowledged that directly owned plant would be likely to be cheaper than hired plant but emphasised that this was "irrelevant" to the primary competition.

(ii) At no stage was any evidence submitted on behalf of the department to challenge the simple calculation set out at paragraph 135 of Mr Kyte's report for the purpose of illustrating how it might be possible for contractor A to offer a lower overall price for a contract than contractor B as a consequence of savings on elements of costs despite the former charging a higher percentage fee than the latter.

(iii) Apart from the percentage fees as applied to a hypothetical range of assumed costs, it would appear that the competitive procedures adopted by the department do not involve any requirement to cost either a worked example or a specific project until after a particular contract has been "called-off" or awarded to a successful tenderer. For example, no references were taken up by the Department as a means of obtaining objectively verifiable evidence as to how cost effective the competing tenderers might have been in completing comparable contracts in the past. Under the present procedure a specific contract is awarded to a particular contractor and it is only at that stage that detailed costings of the project are examined and become the subject of discussion/negotiation between the representatives of the successful contractor and the experts engaged by the department. While the department retains the power to terminate the contract if these negotiations are not productive, it is not particularly easy to reconcile such a direct negotiation of specific prices, quantities, costs, etc between a single contractor and the employer with the most economically advantageous proposal arrived at in accordance with the

principles of domestic and European competition law. In some ways it is this part of the procedure that lies at the heart of the differences between the parties to this litigation. For Mr Taylor this is essential to the new "collaborative" approach to costing construction contracts whereas Mr Kyte has expressed the view that to negotiate costs after entering into a particular contract or appointing a single contractor would mean that the "…client entity would have lost all its bargaining power gained through the Secondary Competition." In the circumstances, after careful consideration, I am quite satisfied that the plaintiffs' claim is neither frivolous nor vexatious and that there is a serious question to be tried.

Would damages by an adequate remedy?

[19] The framework agreement from which the plaintiffs have been excluded is a very substantial undertaking involving some 12 or 13 schools' projects totalling in all some £54.5 million. The framework is to run for a period of some 4 years. Since the plaintiffs have been excluded at the primary competition stage any claim for damages would have to be based upon the loss of a chance to participate in the secondary competition and ultimately to secure one or more of the specific projects over such a period. In such circumstances, while I am not persuaded that it would be impossible, calculation of damages might well produce a number of rather difficult problems. It is not entirely clear at this stage whether confirmation of the result of the primary competition would constitute entering into a contract such as to exclude the plaintiff from obtaining interim relief as a consequence of the application of Regulation 47(9). As I indicated in the Partenaire case, open and transparent competition is not only in the interest of the plaintiffs but also in that of the general public and it seems to me that it might well be argued that the European jurisprudence reflected in the Remedies Directive as interpreted by decisions such as Alcatel [1999] ECR 1-7671 gives rise to the inference that injunctive relief to be the primary remedy. In the circumstances, I am not persuaded that damages would be an adequate remedy in this particular case.

The balance of convenience

[20] This part of the exercise has also been referred to as "the balance of the risk of doing an injustice" (per May LJ in Cayne v. Global Natural Resources plc [1984] 1 All E. R. 225 at 237) and "a balance of justice" (per Sir John Donaldson MR in Francome v. Mirror Group Newspapers Limited ([1984] 1 WLR 892). The public interest, and the interests of the public in general are factors that may be taken into account and these have been set out in detail in the affidavit of Stephen Creagh, Senior Principal Officer at the department, who has emphasised the very poor quality of the schools estate within this jurisdiction and the adverse impact that such a continuing state of affairs is likely to have upon education standards and, consequently, upon the entire social and commercial community. To some extent, the impact of the defendant's submissions in relation to this aspect of the case was reduced by the omission to recognise that the most substantial project included in the present framework, namely, Banbridge

Academy at £14 million, has been the subject of a quite separate individual tender procedure advertised in the Official Journal on 21 August 2007. Mr Creagh has referred to the increased costs likely to result as a consequence of removing further projects from the framework agreement and releasing them as individual contracts. He has also referred to the lapse of time which is likely to cause further disruption to the process and may well result in the loss of £5 million budgeted to be spent within the framework before the completion of the financial year on 31 March 2008. The loss of this sum would appear to be foreseen as a likely result of a severe restriction placed by HM Treasury on the mechanism known as "end-year flexibility" by means of which a Department can bid for its unspent resources in the subsequent year. In deciding whether to grant interim relief in circumstances in which it is satisfied that there is a serious question to be tried, it is rather difficult to see how much weight should be given by the court to what would be essentially a political decision to remove such a sum from the budget of a much needed and long awaited programme for refurbishment of the schools estate. If necessary, I would have been prepared to extend the time for initiating the claim having regard to the importance of ensuring that public funds are expended in accordance with domestic and EC legal principles and provisions.

Conclusions

[21] I have endeavoured to take into account all of the factors drawn to my attention by the parties as being relevant to establishing where the "balance of justice" might lie in the circumstances of this particular case. In my view, the most significant of these, are as follows:

(i) As I have indicated above, I am satisfied that there is a serious question to be tried with regard to whether the procedure adopted by the Department complied with the requirements of the regulations and the general principles of domestic and European competition law. Such compliance is required not only in the individual interest of the plaintiff companies but also in the public interest of ensuring that such procedures are lawfully carried out and, to quote the words of Advocate General Jacobs "…to ensure that public funds are spent honestly and efficiently on the basis of a genuine assessment…." To refuse the plaintiff interim relief at this stage may result in the plaintiff being restricted to the remedy of damages the calculation of which is unlikely to be straightforward but, as I have held above, not impossible. As I indicated in the Partenaire case there seems to me to be a respectable argument that the European jurisprudence reflected in the Remedies Directive and as interpreted by decisions such as Alcatel has the effect of promoting injunctive relief as the primary remedy.

(ii) On the other hand there can be no doubt that the public has a strong interest in ensuring that the refurbishment of the schools estate takes place as speedily and efficiently as practicable. Any further unjustified neglect of this vulnerable section of the community would be intolerable. The fundamental issue in this

case is likely to be the nature and structure of the criteria adopted by the department for the purpose of identifying the most economically advantageous offer. As Morgan J pointed out in the Firebuy case the purpose of the relevant directives and regulations is to ensure that the department is guided only by economic considerations. However, in determining the nature of such criteria the department enjoys a margin of appreciation which can only be invalidated where it is shown to have committed a manifest error being a case where, to use the words of Morgan J, "an error has clearly been made." As in Firebuy this case involved a fairly sophisticated scoring system and the personnel employed by the department appear to have been experienced. It could be argued that the use of the percentage fee as a pricing mechanism was a transparent and objective criteria aimed at identifying the most economically advantageous tender, that it was properly advertised and remained fixed after the primary competition and that it was fairly applied to each of the competing contractors without discrimination Furthermore whatever may be the strengths of the criticisms of the manner in which the secondary competition is to be conducted, it was as a result of the primary competition, rather than the secondary competition that the plaintiffs have been excluded.

While the balance is not a particularly easy one to resolve, after giving careful consideration to all the relevant factors I am not persuaded that I should exercise my discretion in favour of the plaintiffs and, accordingly, I refuse the application for interim relief. However, I am satisfied that the issue as to whether the procedure adopted by the department complies with the relevant domestic and EC law is an important one and one that needs to be authoratively determined as soon as may be convenient for the parties.