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# Aspects on the European Union's WORKS DIRECTIVE 2014/24/EU

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 **DISCLAIMER:**

This paper is not intended to be a substitute for, and does not constitute, legal or professional advice. Its purpose is purely to ventilate initial personal views and opinions on what may be in store in relation to Works Directive 2014/24/EU with summary references to some related decisions of the Irish courts and the CJEU. In doing so I do not purport to speak for, or represent, any professional institution or organisation of which I am currently a member nor does any expressed view or opinion commit me to a particular future course, view or opinion in relation to the Directive or otherwise. I do not accept responsibility for any errors or omissions in this paper and I would stress that, when it was drafted, the awaited Regulations for the transposition of the Directive into Irish law were not available to me nor were the deliberations of 'stakeholders' in response to the OGP's October 2014 call for consultations and/or views concerning the non-mandatory provisions of the Directive. My views and opinions are provided for purposes of general reference and discussion and, in instances where one is preparing a tender, no reliance should be placed thereon as an alternative to the obtaining of appropriate legal or professional advice suited to the needs of any particular public works or related competition. I do not accept liability to anyone of any kind in contract, tort, or otherwise, or at all, arising out of any matter or statement or view expressed in this paper.

### (iii) PREFACE:

This paper considers Works Directive 2014/24/EU. Whilst two other directives, 2014/25/EU (Utilities) and 2014/23/EU (Concessions) are also required to be transposed into Irish law by the same EU deadline, 18<sup>th</sup> April 2016, neither are considered in this paper. In October 2014, the OGP issued a consultation document concerning all three directives with submissions to be made by 12<sup>th</sup> December 2014. Since then there has been official silence, the so-called ‘stakeholders’ seemingly acting *in camera*. With barely a month left, the industry will again be left scrambling to get to grips with the new public works tendering regime. For such a major industry the lack of *glasnost* is not good enough; it further examples why the outgoing government failed to secure a majority in such stark terms.

As we know, irrespective of whether or not a public works, services or supplies competition is above or below the current threshold values (see Para. [8] herein), the general principles enshrined in the Treaties of the European Union, sometimes collectively referred to with reference to the founding treaty, the Treaty of Rome, 1957, apply to all such competitions, even for very minor contracts where the funds for such works, services or supplies drawn on public funds in excess of 50 percent. The overarching general principles – equality, non-discrimination and transparency, or ‘ENT’- are at the core in respect of which the Courts of Justice of the European Union (up to the Treaty of Lisbon known as the European Court of Justice) have played an important part, no less the Irish courts, most recently in the twin cases of *Fresenius Medical Care (Ireland) Ltd. v Health Service Executive* [2013] IEHC 414 and *Baxter Healthcare Ltd. v Health Service Executive* [2013] IEHC 413 (both Peart J.).

It is not a function of this paper to trace the development of the EEC that was to the EU or the earlier works directives, of which 2014/24/EU is the third in line. For a general understanding and insights into the most fascinating European intra-state developments in law as underpins the Works Directive and all other EU legislation and the decisions of its courts, Craig and de Burca’s *EU Law: Text, Cases, and Materials*, 5<sup>th</sup> Ed., Oxford University Press, remains a standard bearer with Craig’s *EU Administrative Law*, 2<sup>nd</sup> Ed., OUP, being a useful companion. In an attempt to reduce the length of the paper, I have also made reference to passages in my book *Public Works in Ireland: Procurement and Contracting*, Clarus Press, 2014, at various junctures.

In practical bread-and-butter terms, the Directive, when juxtaposed with the *Gaswise v Dublin Co. Co.* [2014] IEHC 56 decision, holds out the means for smaller- to middle-sized contractors to get back on the ladder. Art. 46 enables the division of competitions into lots and Art. 58.3 applies a brake to the turn-over criterion. Whilst the maximum turn-over, restricted to twice the estimated contract value, could still place winning beyond reach for many economic operators, how contracts are divided into lots is the key. With the radically altered political landscape following the recent general election, the industry should now have far more clout to demand a fairer division of public works projects to at least offer the hope of a live prospect for success in tendering. The modest cost differential between one large contract with limited competition and greater co-ordination in having more than one main contractor on the same site is a fair trade-off to having the industry beyond the Pale back at work.

To answer anyone who may criticise me for politicising this Preface; I will be offering no apology. In the eleven countries in which I have lived and worked, the link between politics and construction is inextricable. All depends upon how the link is exercised and seen to be; it must be fair and transparent – the very purpose behind the Directive and the Treaties’ objectives in having a common market.

For those to whom a complimentary e-mail copy was sent, only the first 8 pages were included. This is because the amount of data would be expensive for some, especially those having computer phones. A full copy is available at my website: [www.tomwren.ie](http://www.tomwren.ie). Please note the disclaimer.

Thanks is due to John Lyden for reading a draft and for his suggestions; any and all errors are mine.

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### A: INTRODUCTION

[1] Directive 2014/24/EU was adopted by the organs of the EU on 26<sup>th</sup> February 2014. It was published in the OJEU on 28<sup>th</sup> March 2014, pages L 94/65 to L 94/242 and is available for free at [www.europa.eu](http://www.europa.eu). It enters force on 18<sup>th</sup> April 2016, whether or not the Member States have adopted measures to transpose the Directive into domestic law. As of the latter deadline, the outgoing directive, 2004/18/EC, will be repealed.

[2] Directives are normally transposed in Ireland by means of statutory instrument. For example, 2004/18/EC was transposed by means of SI No. 329/2006, known as the European Communities (Award of Public Authorities' Contracts) Regulations, 2006 ('APAC'), which were made available in draft form in advance of the deadline for transposition. The same approach is absent with 2014/24/EU and, as of the preparation of this paper, the release of regulations in draft form remained outstanding.

[3] A feature of 2014/24/EU is that a number of the articles provide a degree of latitude to the Member States. This is not unique to the Works Directive and is no more than what is known in EU law as the principle of subsidiarity whereby decisions of principle are taken at EU level but that those which can be left to the Member States as they see fit without disturbing or impeding upon the four fundamental freedoms enshrined in the Treaty of Rome<sup>1</sup> are left to the lowest level of administration possible. Until such time as the government issues the awaited transposing regulations, the full position will not be known and matters alluded to in this paper may require to be re-considered.

[4] In the outgoing regime no correlation existed between the 2006 APAC Regulations and the articles in 2004/18/EC. One hopes that, this time, a better effort will be made.

### B: HEADLINE PROVISIONS: OVERVIEW

[5] Unlike 2004/18/EC, public works to be awarded in competition is to be by means of the **most economically advantageous tender** ('MEAT') yet Art. 67.1 gives Member States a derogation to use price as the sole criterion; see [163] below. The Directive goes on to provide a **choice for public works competitions** to be conducted and awarded by:

- (i) published MEAT criteria with 'Open' or 'Restricted' admission largely as before (Arts. 26, 27, 28, 58, 67), or
- (ii) a competitive procedure with negotiation or a competitive dialogue for certain situations (Arts. 29 and 30), or
- (iii) innovation partnerships with one or more partners (Art. 31), or
- (iv) framework agreements similar to the old directive (Art. 33).

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<sup>1</sup> As includes all other treaties since 1957 including the Treaty of the Functioning of the European Union ('Lisbon').

[6] Each of the above procurement methods have particular requirements which must be observed and are discussed in detail in the main under **E** below.

[7] Other headline features included in the Directive are:

- (i) **Two or more contracting authorities** may agree to undertake specific procurement on a **joint basis** (Art. 38), including contracting authorities **from different Member States** (Art. 39).
- (ii) A **contracting authority may consult economic operators for advice** in connection preparing the procurement procedure provided such consultations does not distort the competition (Arts. 40 and 41).
- (iii) Awarding authorities may specify a particular **'label'** (defined in Art. 2 at (23) and (24)) in the technical specifications, award criteria or contract performance conditions subject to the observance of stated safeguards to prevent discrimination against other equivalent **'labels'** (Art. 43).
- (iv) An awarding authority can require tenderers to submit **variants**, if stated in the notice, in effect two bites of the cherry (Art. 45).
- (v) **Division of contracts into lots or combining lots** provided tenderers are advised in advance and so long as the process is transparent has potential to redress the divide between big and small main contractors (Art. 46).
- (vi) **Flexible time limits** for the publication of notices or requests to participate and receipt of tenders and are subject to minimum time limits depending on the procedure concerned and if the receipt of tenders is by electronic means or not. (Art. 47). The minimum periods must be longer where a site visit or inspection is required prior to the submission of a tender (Art. 47). There is also a new procedure where tenders are said to be urgent with shorter time periods for tendering under the open procedure (Art. 27.3) and the restricted procedure (Art. 28.6). What is **'urgent'** is open to abuse and is poorly defined. This is not to be confused with the urgent procedure for making changes to the Directive by **"delegated acts"** as defied (Art. 88).
- (vii) **Electronic only dynamic purchasing systems** for commonly used purchases using the restricted procedure remains more or less as it was in the outgoing Directive (Art. 34).
- (viii) **Electronic auctions** can be held in certain circumstances, such as when technical specifications can be established with precision, but not for contracts for intellectual performances such as design of works, after an initial full evaluation and ranking of tenders by automatic evaluation methods. This means can be combined with open, restricted, competitive procedures or on the re-opening of competition to a framework agreement (Art. 35).
- (ix) Awarding authorities may require tenders to be presented by means of **electronic catalogue** where electronic communication is required and which may be combined with a dynamic purchasing system (Art. 36).
- (x) **Centralised purchasing** may be used for supplies or services by a centralised purchasing body using dynamic purchasing systems (Art. 37).

- (xi) **Grounds for exclusion of economic operators** are expressly provided for in the Directive. The first plank of grounds are those following conviction for a criminal offence the subject of a final judgment. The second plank, where a Member State so requires, concerns non-criminal matters such as bankruptcy, “grave professional misconduct<sup>2</sup>”, distortion of competition, conflict of interest and “deficiencies” in a previous contract, public or private. Including the two planks in the one article may prove to be an area ripe for disputes and challenges (Art. 57).
- (xii) **Environmental, social and labour law aspects.** Annex X to the Directive includes International Labour Organisation Convention No. 98 (1949) which recognises the right to organise and bargain collectively. The Directive takes precedence over the Supreme Court’s decision in *McGowan v Labour Court Ireland* [2013] IESC 21 but it leaves the uncomfortable result, as has the potential to cause considerable labour unrest, that on all public works not subject to the Directive and on all private works, collective bargaining does not have the force of law as was handed down in *McGowan*.
- (xiii) **Life-cycle costing and green-house gas emissions** may be included by awarding authorities in award criteria provided the methodology by which such criteria shall be assessed and determined is clearly stated, objectively verifiable and non-discriminatory having regard to Annex XIII and Directive 2009/33/EC (Art. 68).
- (xiv) **Abnormally-low tenders.** Contracting authorities may now require economic operators to explain prices or costs which appear to be abnormally low and to reject a tender if satisfied where the evidence provided does not satisfactorily account for the low level (Art. 69). The provision has a cross-link to the labour law provisions of Art. 18.2.
- (xv) **Turn-over.** As part of the selection criteria, awarding authorities may not require an economic operator to have a turn over more than twice the estimated contract value, save in exceptional circumstances (Art. 58.3). This has interesting aspects relative to the decision in *Gaswise v Dublin City Council* [2014] IEHC 56 summarised below at I.
- (xvi) **Separate rules governing design contests.** Chapter II to the Directive prescribes the rules and procedures relating to design contests as part of a procedure leading to the award of a public service contract or a design contest having a prizes or payments to the contestants (Arts. 78 to 82).
- (xvii) **Direct payments to sub-contractors.** Subject to what the as yet unpublished transposition Regulations may prescribe, a sub-contractor may request the awarding authority to make direct payment, where the nature of the main contract so allows, and with a mechanism for a main contractor to object (Art. 71). This area is the subject of the Construction Contracts Act, 2013; see [173] below.
- (xviii) **Urgency procedure.** Under this procedure, the Commission may adopt delegated acts as could result in modifications being made to the Directive; such as provided in Art. 68.3 (Arts. 87 and 88).

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<sup>2</sup> In need of judicial interpretation re. *Geoghegan v Institute of Chartered Accountants* [1995] 3 IR 86 line of cases.

[8] **Contract value thresholds** beyond which competitions must be held pursuant to the Directive remain at €5.186m. for works and €134,000 for supplies and services<sup>3</sup>; both are net of VAT. The thresholds are due for review by 30<sup>th</sup> June 2017 (Arts. 4, 6 and 92).

[9] **The standstill period remains.** This is treated under the Remedies Directive 89/665 as amended by Directive 2007/66/EC, which remain in force as transposed into Irish domestic law under the EC (Public Authorities' Contracts) (Review Procedures) Regulations, 2010; S.I. No. 130/2010 ('PACR' Regulations') and the recent amending secondary legislation, the EC (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations, 2015; S.I. No. 192/2015, as were prompted by the decisions of the High Court and the Supreme Court in *One Complete Solution Ltd. v Dublin Airport Authority* [2014] IEHC 306 and [2014] IESC 51, respectively. The 2015 amending Regulations and related matters were tested in *BAM v National Treasury Management Agency* [2015] IEHC 765 discussed further at **H** below.

[10] The Directive contains provisions which may not be used in public works tendering in Ireland based on the practice of awarding authorities to date. This includes Art. 34 dynamic purchasing systems (with the possible exception of framework agreements). Art. 35 electronic auctions, for construction work, are too close to a 'Dutch auction' (see Art. 35.7) and would be difficult for an awarding authority to properly and transparently consider MEAT criteria although Art. 35.3 provides for such a facility. Electronic auctions should prove far easier to administer where a contract is to be awarded on the basis of price only, as envisaged at Art. 35.3(a).

#### C: OVERALL STRUCTURE OF THE DIRECTIVE

[11] Akin to the outgoing Directive, the structure is somewhat obtuse and one needs to become familiar with it. A useful comparison of the provisions of the Directive with that of the articles to the outgoing Directive 2004/18/EC is provided at Annex XV. Following its predecessor, the principal divisions are 'titles', followed by 'chapters', 'sections' and then the articles, of which there are 94, followed by fifteen annexures.

Title I: Chpts. I-II, incl.	Scope and Definitions	Arts. 1-17, incl.
Title II: Chpts. I-IV, incl.	Rules on Public Contracts	Arts. 25-73, incl.
Title III: Chpts. I-II, incl.	Particular Procurement Regimes	Arts. 74-82, incl.
Title IV: No chapters	Governance	Arts. 83-86, incl.
Title V: No chapters	Delegated and Implementing Powers	Arts. 87-94, incl.

[12] Users of the Directive will for the greater part be concerned with the contents of Titles I to IV, inclusive. The various articles frequently cross-refer to each other and some are expressed very broadly and do not address detail. A period for familiarisation, inclusive of the definitions in Art. 2, will be necessary. In many instances, matters have been left to individual Member States to determine e.g. Art. 57.3: "Member States may provide for a derogation from the mandatory exclusion provided for in paragraphs 1 and 2, on an exceptional basis..." which is why the transposition Regulations are urgently needed. In other instances, the Directive is more proscriptive e.g. Art. 39.2: "A Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State."<sup>4</sup>

<sup>3</sup> A different value threshold exists for educational, health and social services but these are not dealt with in this paper.

<sup>4</sup> Hence there is nothing in theory to stop a local authority or more than one adjoining Northern Ireland authorities from using a centralised purchasing system in that jurisdiction, or *vice versa*, although currency differences would have to be properly and transparently accounted for.



[13] The sections which follow broadly follow the structure of the Directive and do not purport to be exhaustive or determinative. Subjects or topics which appear in more than one article are discussed at the point of greatest relevance in an effort to reduce repetition to a minimum. It is stressed that, when the Irish Regulations are published, the treatment of the subject matter could be in a different order to that of the Directive.

**D: THE DIRECTIVE: TITLE I: SCOPE, DEFINITIONS AND GENERAL PRINCIPLES**

Title I, Section 1: Subject-Matter, Definitions and Mixed Procurement

[14] Art. 1.2 defines ‘**procurement**’ thus:

“Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.”

[15] As the last line quoted above suggests, a public purpose for the works is not necessary. This surfaced in the *Roanne*<sup>5</sup> decision. As I mentioned in my book<sup>6</sup>, Roanne and another contracting authority entered into contract for the construction of a mixed retail development whereby the public spaces and car park were to be retained by Roanne but the commercial units were sold on the open market. The ECJ held that the majority of the development was to be sold on was not determinative and that the scheme fell within the then directive. As Rotolo<sup>7</sup> observed, for EU procurement rules to apply, a contracting authority need only specify its requirements and that the work must be capable of fulfilling an economic or technical function; ownership is not the issue.

[16] At what point a development falling under the Directive can be sold on is going to give rise to interest vis-à-vis Clause 6 of the PWC v2.0 release, Sub-Clause 6.4.1 in particular<sup>8</sup>. Hence the potential exists that, at some point, a public works project could be funded, at least in part, by a ‘fund’ under the Irish Collective Asset-management Vehicles Act, 2015<sup>9</sup>, which funds are special purpose vehicles under a regime entirely separate to that of the Companies Act, 2014, with scope for ‘roulette construction’.

[17] In Art. 1 the references to Articles 14 and 346, TFEU, and to Protocol No. 26 to TFEU are not considered in this paper. Same may be of relevance in any particular case.

[18] Art. 1.4 underpins the latitude given under the Directive and under EU law to Member States to define what they consider “...to be services of general economic interest, how those services should be organised and financed, in compliance with State aid rules, and what specific obligations they should be subject to.”

[19] Art. 3, when read together with parts of Art. 16 (if and to the extent relevant in any particular case), provides for **mixed contracts having different types of procurement** covered under the Directive. Art. 3 also covers mixed contracts in the sense that a part of the subject-matter of the contract is covered under the Directive whilst other parts are under other legal regimes. The second paragraph to Art. 3.2 states:

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<sup>5</sup> Case C-220/05 *Jean Auroux v Commune de Roanne* [2007] ECR I-385, [2007] All ER (D) 100.

<sup>6</sup> *Public Works in Ireland: Procurement and Contracting*, Clarus Press, 2014, at 2-12.

<sup>7</sup> Rotolo, *The EU Procurement Regime and S106 Agreements Providing for Affordable Housing*, Society of Construction Law, Paper No. 174, May 2012.

<sup>8</sup> Sub-Clause 6.4.1 was not modified in the v2.0 release (22/01/2016). Refer also my book, *op. cit.*, at 10-53.

<sup>9</sup> The IACV Act, 2015, includes two very strange sections concerning ‘sub-funds’. Entities or persons whose paymaster is an IACV need to take care to ensure that their source of payment does not evaporate; see s.36 and s.37 of the Act.

“In the case of mixed contracts consisting partly of services within the meaning of Chapter I of Title III and partly of services and partly of supplies, the main subject shall be determined in accordance with which of the estimated values of the respective services or supplies is the highest.”

[20] Art. 3 continues with a display of the complexity the Directive has to offer as the following extracts taken from its sub-provisions reveal:

“3. Where the different parts of a given contract are objectively separable, paragraph 4 shall apply. Where the different parts of a given contract are objectively not separable, paragraph 6 shall apply.

Where part of a given contract is covered by Article 346 TFEU or Directive 2009/81/EC, Article 16 of this Directive shall apply.

4. (First paragraph) In the case of contracts which have as their subject-matter procurement covered by this Directive as well as procurement not covered by this Directive, contracting authorities may choose to award separate contracts or to award a single contract. Where contracting authorities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned. [Second and third paragraphs not quoted]

....

6. Where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject-matter of that contract.”

[21] The above article raises issues wider than the remit of this paper, such as whether or not the recent PWCv2.0 release of the public works contracts are fit for purpose in relation to the Directive, mixed procurement in particular such as so-called off-balance sheet capital works finance alluded to at [16] above.

#### Title I, Section 2: Thresholds

[22] Art. 4, the **threshold values**, has already been mentioned at [8] above. Note Art. 32.5, second para., when negotiated procedure without prior publication is being used.

[23] Art. 5 concerns the **methods for calculating the estimated value of procurement** with sub-articles for each procurement means. In the ordinary case, this should not prove to be problematic. The calculation must include any form of option (a priced option) and any envisaged renewals of the contracts to be set out in the procurement documents. In a simple case, whether the lowest tender *simpliciter* or by means of MEAT criteria, if the award value is less than the applicable threshold, the article remains silent as to the implications i.e. whether the contract should be awarded or not. It behoves the OGP to ensure that the matter is made express in the awaited Regulations, if the same is within the competence of the Member States.

[24] The position is explicit with regard to framework agreements and dynamic purchasing systems:

“5. With regard to framework agreements [Art. 33] and dynamic purchasing systems [Art. 34], the value to be taken into consideration shall be the maximum estimated value net of VAT for all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.” [Insertions added]

[25] The position is also clearer for public works contracts which requires the inclusion of all reserved sums, whether named or to be novated, as recently introduced in the PWCv2.0 release thus:

“7. With regard to public works contracts, the calculation of the estimated value shall take account of both the cost of the works and total estimated value of the supplies and services that are made available to the contractor by the contracting authority provided that they are necessary for executing the works.”

[26] Art. 6 empowers the Commission by way of delegated acts as provided in Art. 87, to amend the means for revising the **thresholds** in the event of a change in methodology by the **World Trade Organisation** Agreement on Government Procurement (Art. 6.5).

Title I, Section 3: Exclusions (i.e. Outside of the Directive)

[27] Art. 7, concerning contracts in the **water, energy, transport and postal services** sectors and certain financial services, excludes from the remit of the Directive contracts and design contests under Directive 2014/25/EU of which are excluded from the scope of the latter directive as concerns public services.

[28] Arts. 8 to 12, inclusive, exclude contracts and design contests concerning public **electronic communications, those organised pursuant to international rules**, those relating to **land, existing buildings** or other immovable property and associated rights, **arbitration and conciliation services**, a wide range of **legal services**, financial services, loans, employment contracts, civil defence and danger prevention services<sup>10</sup> provided by non-profit organisations, public passenger services by rail or metro, political campaign services and various inter public authority contracts.

Title I, Section 4: Specific Situations

Title I, Section 4, Sub-Section 1: Subsidised Contracts, R&D Services

[29] Art. 13 provides that the Directive applies to **works contracts directly subsidised by contracting authorities in excess of 50 percent**. of the applicable threshold based on the estimated award value. In particular, civil engineering activities listed in Annex II; hospitals; sports, leisure and recreational facilities; and, service contracts. A noted absence is any reference to public housing<sup>11</sup>. Art. 14 concerns R&D services.

[30] Art. 15 provides that the Directive applies to public contracts and design contests concerning **defence and security** except for those falling within Directive 2009/81/EC with a double negative for those contracts to which the latter directive does not apply. Art. 15.2 further provides that the Directive does not apply “...to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of the information...”. The latter would suggest that the Directive should be applicable to all such contracts save and except in instances of an exceptionally well-grounded fear that the Official Secrets Act, 1963, expressly provided for in the PWC suite of contracts<sup>12</sup>, would not provide an adequate level of security as should be rare, if ever, or the said Act has lost its potency with the passage of time.

<sup>10</sup> Presumably, no “way around” the Directive exists in relation to works heretofore under the remit of the OPW.

<sup>11</sup> As again calls into question the *standi* of the Housing Acts, 1966-1997, in respect of which every local authority would have been in breach of the Parent Act before its amendment but in respect of which, *per* Costello J. in *O’Reilly v Limerick Corporation* [1989] ILRM 181, was non-justiciable. See Hogan & Morgan, *Administrative Law in Ireland*, 3<sup>rd</sup> Ed., Roundhall Sweet & Maxwell, 1998, pps. 200, and 242 *et seq.*

<sup>12</sup> Refer Clause 4.16.1 and my book, *op. cit.*, at 8-210.

[31] Art. 16, concerning mixed procurement, has been treated above at [19].

[32] Art. 17 further addresses contracts and design **contests but awarded or organised pursuant to international rules** involving treaties between a Member State and one or more third countries, or involving an international organisation, or concerning an international arrangement relating to the stationing of troops. In an Irish setting, this could only but refer to NATO or the UN. As the State has no links to NATO, at least formally<sup>13</sup>, the remaining application for this article could concern arrangements for the stationing of Irish military outside of the jurisdiction, or if for some future reason foreign troops were to be billeted within it, disregarding the Shannon ‘stop-over’.

Title I, Chapter 2: General Rules

[33] Art. 18.1 sets out **general principles of procurement**, in effect a re-statement of the Treaty ‘NET’ objectives of non-discrimination, equal treatment and transparency<sup>14</sup>. Most useful is the express statement that procurement shall not be designed so as to exclude it from the scope of the Directive<sup>15</sup> or of artificially narrowing competition.

[34] Art. 18.2 is new to this Directive and is referred to in a number of other articles. It copper-fastens a social dimension by requiring Member States to ensure that economic operators observe **environmental, social and labour law obligations**, including collective agreements, under EU and ‘international’ law listed in Annex X. In turn, Annex X, having regard to Arts. 56.4 and 87, can easily be modified by virtue of the delegated authority vested in the Commission (“delegated acts”). Annex X imports into EU law International Labour Convention No. 98 (1949) which recognises the right to organise and bargain collectively. See also Art. 69.5 for Ireland’s intra-EU obligations.

[35] There was no equivalent of Annex X in outgoing Directive 2004/18/EC. The impact of this insertion is that the Directive, as regards public works and services subject to the Directive, restores the *status quo ante* as regards *John Grace Fried Chicken v Catering JLC* [2011] IEHC 277 and *McGowan v Labour Court Ireland* [2013] IESC 21 and, on a wider EU level, the decision in Case C-341/05 *Laval und Partneri* [2007] ECR I-0000 at least to the extent that the latter’s application would interfere with a **collective bargaining agreement**, notwithstanding the pillar principles in the Treaty of freedom of movement of workers and freedom of establishment<sup>16</sup>.

[36] Whilst **Annex X** presents a counter-balance to the Supreme Court’s decision in *McGowan*, which has its difficulties in terms of Art. 28 of the Charter of Fundamental Rights of the European Union<sup>17</sup>, it leaves a serious lacuna in terms of industrial relations in that the *McGowan* decision, and hence *Laval*, still applies to all public works or design competitions below the thresholds or other works and services not subject to the Directive and all private works. Consider a main contractor having two work sites adjacent to each other; one subject to the Directive where collective bargaining applies, the other outside of the Directive where collective bargaining does not have the force of law. How can the industry reasonably be expected to explain such a stark divide to labour unions? Correction in terms of an EU labour law directive is pressing.

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<sup>13</sup> The 1982 INLA incident at the Mount Gabriel “dual-purpose” radar installation, west Cork.

<sup>14</sup> See Craig & de Burca, *EU Law*, 5<sup>th</sup> Ed., Oxford University Press, 2011, at chap 24.

<sup>15</sup> Such as placing an artificial construction on the words of Footnote 10 above.

<sup>16</sup> For discussion on the three cases, see my book, *op. cit.*, at 9-50, 9-34, 9-19 and 9-35, respectively. For the four pillar principles in the Treaty of Rome (including all amending treaties), see Craig & de Burca, *op. cit.*, at chaps.21 and 22.

<sup>17</sup> Done in Nice on 7<sup>th</sup> December 2000; the difficulty with *McGowan* is alluded to in my book, *op. cit.*, at 18-09.

[37] Art. 19 defines ‘**economic operators**’ in terms of legal form in the widest of terms and that economic operators may combine in procurement procedures, catered for in the PWCv2.0 contracts at Clause 1.7. See Art. 58.3 regarding turn-over at [141] below.

[38] Art. 20 entails more social engineering in providing for protection to economic operators whose main aim is the **social and professional integration of disabled or disadvantaged persons**. It enables Member States to reserve to such organisations the right to participate in public procurement under the Directive provided that at least 30 per cent. of those ‘workshop’ economic operators or programmes are made up of disabled or disadvantaged workers. The article is lacking in detail which would need to be addressed in the awaited Regulations.

[39] Art. 21 obliges awarding authorities to have regard to, or impose, **confidentiality regarding documents** submitted or received by economic operators, commercial or otherwise, subject to Member States’ freedom of information legislation and, by implication, data protection legislation, or otherwise subject to what the Directive or domestic law provides.

[40] Art. 22.1 concerns **communication rules** and is possibly the longest article in the Directive. It mandates that, subject to stated exceptions in specific situations, or for security considerations where a high level of protection is required, all communication and information exchange shall be by electronic means but that the tools to do so shall be non-discriminatory, generally available and shall not restrict economic operators’ access to procurement procedures. Where communications other than by electronic means in the submission process is decided upon, the awarding authority must state why in its Art. 84 report.

[41] Art. 22.2 addresses the extent to which oral communications may be used and how same are to be recorded. Art. 22.4 enables use of BIEM (**building information electronic modelling**), but with alternative means of access when and to the extent specific electronic tools are not generally available. This latter may lead to challenges having regard to the over-arching equality obligations under the Treaty and the Directive and what “generally available” means in terms of the cost of purchasing specialist electronic tools as could unfairly advantage large organisations.

[42] Art. 23 concerns references to **nomenclatures** in public procurement, meaning the use of the CPV (Common Procurement Vocabulary) as Regulation (EC) 2195/2002.

[43] Art. 24 obliges contracting authorities to take measures to prevent, identify and remedy **conflicts of interest** so that competition is not distorted and to ensure equal treatment as between economic operators.

## E: THE DIRECTIVE: TITLE II: RULES ON PUBLIC CONTRACTS

### Title II, Chapt. 1: Procedures

[44] Art. 25 first concerns itself with the Union’s obligations in terms of the **World Trade Organisation’s GPA** (Agreement on Government Procurement) “...and other international agreements by which the Union is bound...” before going on to require Member States’ contracting authorities to accord to “...economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.” It begs the question why belong to the Union if one can obtain equal treatment under the Directive but not have to observe other EU law i.e. it lends credence to the case for ‘Brexit’.

[45] Art. 26 Choice of procedures open to awarding authorities has been expanded under the Directive. The open procedure is considered at Art. 27, the restricted procedure is the subject of Art. 28, competitive procedure with negotiation at Art. 29, competitive dialogue at Art. 30 and innovation partnership at Art. 31. Each are considered below under the articles to which they relate.

[46] As regards the two situations for works, supplies or services under which competitive procedure with negotiation or a competitive dialogue may be conducted, Art. 26.4 sets forth the criteria for each thus:

- (i) Case (a) is where the contracting authority's needs cannot be met without adaptation of the other provided standard procedures, including design or innovative solutions, or where a contract cannot be awarded without prior negotiations due to specific circumstances going to complexity of the subject-matter, or legal and financial make-up or because of the peculiar nature of the risks, or where the technical specifications cannot be precisely established by the contracting authority with reference standards in Annex VII at points 2 to 5, or any combination thereof.
- (ii) Case (b) may be used where only irregular or unacceptable tenders are received in response to an open or restricted competition. This will require great care as it will be challenge-prone given that when it is used contracting authorities are not obliged to publish a further contract notice:

“...where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in Articles 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.”

The above quoted extract does not sit well with the concept of a received tender being irregular or unacceptable. Indeed, if all received tenders are so adjudged, it strongly suggests that the fault lies with the awarding authority in that either the competitive procedure with negotiation or the competitive dialogue procedure should have been chosen. The second paragraph to Case (b) in Art. 26.4 goes on to define ‘irregular’ and ‘unacceptable’ thus:

“In particular, tenders which do not comply with the procurement documents, which were received late<sup>18</sup>, where there is evidence of collusion or corruption<sup>19</sup>, or which have been found by the contracting authority to be abnormally low, shall be considered as irregular. In particular tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget<sup>20</sup> as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable.”

[47] Art. 26.5 deals with calls for competitions of which there are two means: an Art. 49 contract notice; or, an Art. 48(2) prior information notice. An exception is provided in Art. 32 which provides for use of the negotiated procedure without prior publication of a call for competition in particular circumstances.

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<sup>18</sup> Where all tenders are received late, one question will be how late is late i.e. opportunity for a back-door entry?

<sup>19</sup> If collusion or corruption was to force the awarding authority into a Case (b) scenario, Art. 26.4(b) is unsafe.

<sup>20</sup> If COE1v2f (18/02/2011) is observed this will always be the case with penalties for the ‘design team’ concerned.

[48] Art. 27 deals with the **Open procedure** which is more or less the same as in the outgoing directive. Any interested economic operator is at liberty to respond to a call for competition, for which the minimum time limit for the receipt of tenders is 35 days “from the date on which the contract notice was sent.<sup>21</sup>”. Where tenders may be submitted by electronic means, the period may be reduced to 30 days. The total period may be less than 35 or 30 days i.e. ‘sent’, not ‘published’. Where an Art. 48 prior information notice is published, but was not used as a means of calling a competition, the minimum time limit may be shortened to 15 days if the prior notice included all required information for the contract notice as in Annex V and the prior notice was sent for publication between 35 days and 12 months before the date of the contract notice. The need for the embellishment is not apparent, other than necessitating further vigilance on economic operators or adding to tendering costs in having to pay for a monitoring service.

[49] Art. 27.3 enables an awarding authority to further reduce the time limit to 15 days where a “state of urgency” exists. This is open to abuse in that what is perceived to be urgent may be no more than a figment to recoup time lost due to an internal failing. In terms of public works, 20 days makes no difference except to place economic operators under further unnecessary pressure. Of questionable value-add, it should be used sparingly for works urgencies e.g. the storm damage to the Kilkee famine wall in 2014.

[50] Art. 28 **Restricted procedure** is open to all-comers initially who may respond to a call for competition containing Annex V information, parts B or C, by providing the requested information for qualitative selection. The minimum time limit for responding to a request is 30 days measured from the date the contract notice was sent or, where a prior information notice is used, from the date the invitation to confirm interest was sent. As with the outgoing directive, only those economic operators invited to submit a tender following qualitative assessment may do so. The number of candidates may be limited pursuant to Art. 65 (the minimum is 5; Art. 65.2).

[51] At the second stage, the minimum time limit for the receipt of tenders is 30 days measured from the date the invitation to tender was sent. Under Art. 28.5, this period can be reduced to 25 days where tenders may be submitted by electronic means. Where an Art. 48 prior information notice is published, but was not used as a means of calling a competition, the minimum time limit for the submission of tenders may be shortened to 10 days if the prior notice included all required information for the contract notice as in Annex V and the prior notice was sent for publication between 35 days and 12 months before the date of the contract notice.

[52] Where a substantiated state of urgency exists and the fixed time limits as above are impracticable, the awarding authority may fix time limits for both the receipt of requests to participate and for the receipt of tenders which shall not be less than 15 and 10 days from the date of sending of the contract notice and invitation to tender, respectively.

[53] A new procedure at Art. 28.4 enables Member States to provide that all or specific sub-central contracting authorities may set the **time limit** for the receipt of tenders **by mutual agreement** with the candidates provided all have the same time to prepare and submit their tenders, failing which the time limit shall be a minimum of 10 days from the date on which the invitation to tender was set. This would also appear to be an embellishment of questionable value but it is worth waiting to see if it provides a value-add in practice, dependent upon whether or not it is included in the awaited Regulations.

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<sup>21</sup> As effectively follows the *Adams v Lindsell* (1818) 1 B & Ald 681 rule.

[54] **Art. 29 Competitive procedure with negotiation** is open to all economic operators after a call for competition containing qualitative selection information as Annex V, parts B and C is sent. Contracting authorities must identify in the procurement documents with precision the subject-matter, their needs, the characteristics of the works, supplies or services, the contract award criteria and the minimum requirements to be satisfied so that economic operators can ascertain the nature and scope of the procurement and whether or not they wish to participate in the competition. Candidates may be limited as Art. 65 provides. The minimum time limit for the receipt of initial tenders is 30 days from the date the invitation was sent after which the time limits repeat the restrictive procedure as Arts. 28.3 to 28.6, inclusive.

[55] Candidates' initial tenders are to be the basis for subsequent negotiations. Neither the award criteria nor the minimum requirements may be negotiated. If a contracting authority reserves the right to do so in the contract notice, or in the invitation to confirm interest, an award may follow on the basis of the initial tender without negotiation.

[56] Art. 29.3 provides that, unless awarded without negotiation, contracting authorities shall negotiate the tenderers' initial and all subsequent tenders "...to improve the content thereof.", except the final tender pursuant to Art. 29.7.

[57] Art. 29.5 enjoins contracting authorities to ensure equal treatment of all tenderers during the negotiations and it obliges contracting authorities not to provide information in a discriminatory manner so as to give one tenderer or more than one an advantage over the others. The provision is likely to give rise to difficulty in practice. Detailed notes will have to be kept and disappointed tenderers are certain to demand discovery having regard to the decision in *BAM v National Treasury Management Agency* [2015] ICEA 246.<sup>22</sup> The need for detailed notes is underpinned with reference to the second paragraph supported by a letter counter-signed in instances where a tenderer consents to the release of specific confidential information to the other participants. The second paragraph to Art. 29.5 states:

"In accordance with Article 21, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate or a tenderer participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information."

[58] Art. 29.6 provides an option to the contracting authority provided the right to exercise the option is indicated in the contract notice, or in the invitation to confirm interest, or in another procurement document<sup>23</sup>. The option is that the procedure "...may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified...". How this is to be applied in practice remains to be seen. Critical will be the application of Art. 29.7 which provides:

"Where the contracting authority intends to conclude the negotiations, it shall inform the remaining tenderers and set a common deadline to submit any new or revised tenders. It shall verify that the final tenders are in conformity with the minimum requirements and comply with Article 56(1), assess the final tenders on the basis of the award criteria and award the contract in accordance with Articles 66 to 69."

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<sup>22</sup> Another decision exists concerning the same parties in connection with the same competition; see **I** below.

<sup>23</sup> If in the latter, awarding authorities will need to observe the 'red hand' rule; *Carroll v An Post National Lottery* [1996] IEHC 50, [1996] 1 IR 443; see my book, *op. cit.*, at 3-12n.



[59] Unless Art. 29.6 is treated with erudition by awarding authorities, it is a procedure which will be prone to challenges. The *locus classicus* of how not to conduct such negotiations remains the decision in *Harmon v House of Commons*<sup>24</sup>.

[60] **Art. 30 Competitive dialogue** is open to all economic operators to respond to a contract notice for qualitative selection pursuant to Arts. 56 to 66, inclusive, with a minimum time limit of 30 days. The second stage repeats that of Art. 28.2 inclusive of the limitation of suitable candidates to be invited to participate. The sole basis of the contract award shall be on the best price-quality ratio as Art. 67.2, as would appear to rule out lowest price *simpliciter*. Awarding authorities needs and requirements must be set out in the contract notice as must the award criteria and indicative timeframe.

[61] A dialogue shall be opened by the awarding authority with all selected participants to identify and define the means best suited to its needs but ensuring equality of treatment and non-discrimination in the provision of information to participants, including not revealing a candidate's proposed solutions to other participants as Art. 21 mandates without the agreement of the candidate concerned, a process which will require careful record-keeping as discussed at [57] above.

[62] Arts. 30.4 and 30.5 in essence repeat the same procedure as Art. 29.6 but with the aim of reducing the number of solutions rather than the number of tenders. How this can be achieved where a candidate does not consent to its process or solution being revealed to others is open to question, as proved to be fatal in *Harmon*. A candidate with a proprietary process as gives it a commercial advantage would be right to be wary of consenting<sup>25</sup> as the provision permits and it may be that an awarding authority could be left with trying to compare apples and oranges; howsoever choice of solution(s) is achieved the decision must be seen to have been objectively reached.

[63] Art. 30.6 requires the contracting authority to declare the dialogue concluded and to notify the participants remaining in the competition to submit their final tenders based on the solution(s) selected from the dialogue stage. By implication, the unsuccessful participants must also be notified. In a process ripe for scrutiny by a disappointed candidate, the second paragraph to Art. 30.6 provides:

“Those tenders may be clarified, specified and optimised at the request of the contracting authority. However, such clarification, specification, optimisation, or additional information may not involve changes to the essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.”<sup>26</sup>

[64] Arts. 30.7 requires the award to be made on the basis of the award criteria in the contract notice or descriptive document having the best price-quality ratio as Art. 67 and permits the awarding authority to have further negotiations with that candidate to confirm financial commitments, or other tender terms but not to the extent of materially modifying essential aspects of the tender, or the public procurement, or the needs and requirements or as to risk distorting competition or causing discrimination. Art. 30.8 enables prizes or payments to be made to participants in the dialogue, successful or not.

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<sup>24</sup> *Harmon CEFM Facades (UK) Ltd. v Corporate Officer of the House of Commons* [1999] EWHC 199 (TCC), (1999) 67 Con LR 1 (HHJ Humphrey Lloyd QC); considered in my book, *op.cit.*, at 2.72 *et seq.*

<sup>25</sup> Such a candidate would need to consider, *inter alia*, Clause 6 of the PWC suite of contracts.

<sup>26</sup> Where does “essential aspects” end? What if a solution is a betterment beyond the needs/requirements in the notice?

[65] **Art. 31 Innovation partnership** entitles any economic operator to respond to a contract notice by providing the requested information for qualitative selection. In the procurement documents the contracting authority must justify the need for an innovative product or services or works on the basis that same is not already available in the market. The descriptive elements and minimum requirements must be stated in the contract notice and must be sufficiently precise to enable economic operators to identify the nature and scope of what is required to decide whether to participate or not. The time limit to respond is 30 days and the first stage repeats that of Art. 30 and the basis of the award shall be on the best price-quality ratio as Art. 76.

[66] The contracting authority may decide upon just one partner or several partners. How such a decision is made and when is most unclear in the Directive and would appear to make a nonsense of the ‘best’ price-quality requirement.

[67] Art. 31.2 provides that an innovation partnership must be structured in successive stages as shall allow for the development of an innovative product, service or works but remaining within the stated performance levels and maximum agreed costs (‘targets’) as may be agreed during the process, which may be terminated by the contracting authority at the end of any phase, or by terminating ‘individual contracts’ provided the same is stated in the procurement documents. The process also provides for remuneration to participating candidates at ‘appropriate instalments’, which suggests a variant on the two-contract theory<sup>27</sup> in that a candidate, if selected, apparently enters into contract with the contracting authority in order to participate.

[68] Arts. 31.3 to 31.7 provide for negotiations with the tenders on their initial and all subsequently submitted tenders except the final tender but that the minimum requirements and award criteria shall not be open to negotiation. The requirement for equal treatment, non-discrimination [and transparency] in the provision of information to candidates, but with a prohibition against revealing confidential information to other participants without prior consent as Art. 21, repeats that of the Art. 30 competitive dialogue. In addition, all tenderers not eliminated shall be informed in writing of changes to the technical specifications or other procurement documents<sup>28</sup> with sufficient time allowed for those remaining to submit amended tenders. The Art 31.5 means to reduce the number of tenders follows that of the Art. 30.4 competitive dialogue process.

[69] Unlike the Art. 30 competitive dialogue, no express provision exists for the contracting authority to declare that the final tender stage has been reached or how the competition is transparently concluded. Its use in construction should be rare.

[70] **Art. 32 Negotiated procedure without prior publication** may be used, *inter alia*:

“...for new works or services consisting of the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded pursuant to a procedure in accordance with Article 26(1). The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded.”

[71] Albeit the above was in the outgoing directive in slightly different format, its use may become more common under the new regime.

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<sup>27</sup> *Howburry Lane v RTE* [1999] 2 ILRM 232 (Morris J.); see my book, *op. cit.*, at 2.75.

<sup>28</sup> But not so far as to change the minimum requirements or award criteria as Art. 31.3, second para.

[72] The negotiated procedure without prior publication may also be used for public works contracts, public supply contracts and public service contracts although much of the article is taken up with public supply contracts:

- (i) **Where no tenders** or requests to participate, or none which are suitable, have been **received following the issue of an open or restricted contract notice**, provided the notice conditions are not substantially altered<sup>29</sup> and that a report is sent to the Commission if requested. What is not suitable is stated to be “...irrelevant to the contract, manifestly incapable, without substantial changes, of meeting the contracting authority’s needs and requirements...”, or where the economic operator is excluded under Art. 57 or fails to meet the selection criteria as Art. 58.
- (ii) Where works, supplies or services **can only be supplied by a particular economic operator** where the aim of the procurement is the creation or acquisition of a unique work of art, where competition is absent for technical reasons<sup>30</sup>, or for the protection of exclusive rights, including intellectual property rights.
- (iii) If strictly necessary by **reason of extreme urgency** caused by events unforeseeable to the contracting authority but not caused by it i.e. force majeure the time limits for the open and restricted procedures or competitive procedures with negotiation could not be complied with. For the same reason as noted at [49] above in connection with Art 27.3, this would be most rarely used for public works as the time saving would be negligible. It begs the question as to what is the difference between “a state of urgency” under the Art. 27.3 open procedure and a state of “extreme urgency” under Art. 32.2 at (c).

Title II, Chapt. 2: Techniques and instruments for electronic and aggregated procurement

[73] Art. 33 Framework agreement is defined as an agreement between one or more contracting authorities and one or more economic operators to establish terms governing contracts to be awarded during a given period, price and quantity in particular. Such agreements need to be carefully framed as, at common law, “an agreement to agree in the future” is not enforceable.<sup>31</sup> To be enforceable, the consideration would need to be couched in terms that, in return for keeping rates or prices fixed for a set period of time, the economic operators’ *quid pro quo* is the chance of receiving secondary contracts. The article provides that, other than in exceptional circumstances, framework agreements shall not exceed 4 years.

[74] Subsequent contracts entered into based on a framework agreement may not include substantial<sup>32</sup> modifications to the terms of the framework agreement and where a framework is entered into with just one economic operator, subsequent contracts under it shall be within the limits set forth in the framework.

[75] Art. 33.3 provides that where a framework is concluded with a single economic operator, the latter may be requested in writing “to supplement its tender as necessary.” The parameters of this provision are not clear.

<sup>29</sup> What is or is not ‘substantially altered’ is a point of weakness.

<sup>30</sup> As would appear to negate the need for the Art. 31 innovation partnership process.

<sup>31</sup> Being an attack against the freedom of contract doctrine as *Walford v Miles* [1992] 2 AC 128 (H.L.); see my book, *op.cit.* at 2-140. The civil law jurisdictions, by far the majority in the EU, may not be so concerned with this doctrine.

<sup>32</sup> As to what is ‘substantial’ is another weak point open to abuse.

[76] Art. 33.4 concerns **framework agreements concluded with more than one economic operator** shall be performed under one of three ways:

- (i) Way (a): Pursuant to the terms and conditions of the framework agreement without re-opening competition. Where this way is used, the subsequent agreement may be little more than the application of a schedule of rates to known quantities.
- (ii) Way (b): This again utilises the terms and conditions of the framework agreement partly without re-opening competition as Way (a) and partly by re-opening competition as per Way (c) but provided Way (b) was stipulated in the procurement documents for the framework agreement. The choice as to the 'mix' of ways must be set out in the framework agreement based on objective criteria to be stated in the procurement documents for the framework agreement.
- (iii) Way (c): If not all terms governing the provision of the works, services or supplies are stated in the framework agreement, competition may be re-opened amongst the successful economic operators to the framework agreement, sometimes called a mini-competition, but based on the same terms provided in the framework agreement or in the procurement documents for the procurement agreement. For example see PW-CF 9<sup>33</sup>.

[77] For every contract awarded by means of Ways (b) and (c), the economic operators shall be contacted in writing by the contracting authority who shall fix a time limit appropriate to allow the framework contractors time to submit a bid which time period shall take into account all relevant factors.

[78] Art. 34 Dynamic purchasing system, which was also in the outgoing directive, is available to contracting authorities for purchases the characteristics of which are that the desired product or services is generally available in the market. When it is used the process shall be completely electronic but using the Art. 28 restricted procedure rules. As it is unsuited to public works *per se* it is not considered in this paper. An example where its use would be likely is in managed print services as gave rise to the decision in *Copymore v Commissioners of Public Works in Ireland*<sup>34</sup>.

[79] Art. 35 Electronic auctions is available for contracting authorities where new prices alone, revised downwards, or new values concerning certain elements of tenders, or both, are required from economic tenderers not excluded after evaluation. When used, the process shall be structured for so that, after an initial evaluation and ranking of tenders by means of automatic evaluation methods, it can be used repetitively. Although Art. 35.2 states that it is available for competitive as well as open and restricted procedures, it is not extant how it could be reliably deployed with procedures as require negotiation, such as Arts. 29 and Art. 30. Its use in combination with Ways (b) and (c) to the framework agreement procedure is more apparent. Much will depend upon the standard of the software employed and which, in the event of challenge, would need to be more transparent a process than the ill-fated 'e-voting machines' allegedly were before the latter were sold off at considerable expense to the State<sup>35</sup>.

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<sup>33</sup> PW-CF9v1.0 (15/04/2010) at Clause 1 and Framework Rule 3 – Call-off by competition.

<sup>34</sup> My book, *op. cit.*, at 2-63; *Copymore v Commissioners of Public Works in Ireland* [2014] IEHC 63 (Charlton J.) which was a landmark decision in terms of the Remedies Regulations, 2010; see also below at I.

<sup>35</sup> A 2002 public procurement fiasco costing €55m., excluding storage costs, before sold-off in 2010 for €70,000.

[80] The potential complexity of the electronic auctions process is extant with reference to Art. 35.6 at the second and third paragraphs thus:

“The invitation shall also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices and/or new values submitted. Except where the most economically advantageous offer is identified on the basis of price alone, that formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement forms. For that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.”

[81] Tenderers must be instantaneously advised of their rankings at each phase of the electronic auction and, after the auction is closed in accordance the competition rules, the award shall be made pursuant to Art. 67.

[82] **Art. 36 Electronic catalogues** is a variant to the electronic auctions process and, if so required, the catalogue shall be stated in technical specifications and in a format prescribed by a contracting authority in the contract notice having regard to Art. 22.6. For framework agreements with more than one economic operator, the catalogue shall be revised subject to adaptation rules as shall be notified to the framework contractors, whether in the framework contract notice or subsequently and with stated time periods.

[83] **Art. 37 Centralised purchasing activities and central purchasing bodies.** This enables Member States to procure works, supplies or services through a central purchasing body using electronic means of communication. An example would be supplies for groups of hospitals in the U.K. under the NHS trust in which dynamic purchasing systems may be used with or without using the framework agreement procedure. The *Copymore* decision concerned a centralised purchase of photocopying services for numerous state authorities. Of note is that the procedure does not apply where an award for public services is made to a central purchasing body.

[84] **Art. 38 Occasional joint procurement** enables two or more contracting authorities to perform procurements jointly with joint responsibility for Directive observance. When a competition would come under this article as against Art. 37 is not clear.

[85] **Art. 39 Procurement involving contracting authorities from different Member States.** For purposes of this paper it is sufficient to state that procurement by such means is possible. In an Irish setting, it has obvious potential for border region authorities currency difficulties apart and assuming ‘Brexit’ does not become a reality.

Title II, Chapt. 3: Conduct of the Procedure

Title II, Chapt. 3, Sect. I: Preparation

[86] **Art. 40 Preliminary market consultations** enables a contracting authority to enter into prior consultations with independent experts, authorities or market participants provided no distortion to competition occurs. Unless a unique product is involved, in which case Arts. 31 or 32 should be used, no reason exists not to use an independent expert. Perceptions can mean all, especially in relation to bias<sup>36</sup>.

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<sup>36</sup>See Hogan and Morgan, *Administrative Law*, 4<sup>th</sup> Ed., Roundhall, 2012, Chap. 13.

[87] **Art. 41 Prior involvement of candidates or tenderers** is an extension of Art 40. In terms of Irish jurisprudence and perceived bias<sup>37</sup>, it is difficult to envisage how a contracting authority shall take “appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer”, unless especially transparent and seen to be so. It is not unlike some firms of solicitors who have advised both sides in public interest matters, *inter alia* NAMA-related affairs, who contend that they have internal barriers in that the two internal sides do not and may not speak to each other<sup>38</sup>.

[88] At the second paragraph, the word “relevant” opens a door to potential abuse. To reduce the scope for charges of apparent bias to a minimum, the word would the better have been replaced by the word “all”. The wording of the second paragraph thereto is somewhat obtuse and a line in the sand must exist; judicial guidance will be necessary. An omission is that, just as the participant under threat of expulsion has to be given the opportunity to prove its involvement is not capable of distorting competition, so also should the other participants have an opposite entitlement. The article also remains silent as to when such a decision has to be reached; Art. 84 does not supply the answer.

[89] **Art. 42 Technical specifications** again highlights the importance of the annexes to the Directive, in this instance the definitions in Annex VII. It is in the details of any particular competition that the technical specifications may give rise to much inquiry. Technical specifications shall afford equal access of economic operators to procurements procedures and shall not create unjustified obstacles to competition<sup>39</sup>. Art. 42.3 provides for four means by which technical specifications may be formulated:

- (i) **Point (a):** Performance or functional parameters must be precise enough so that tenderers may determine the subject-matter of the contract and that contracting authorities may award such contracts subject to the Directive’s requirements.
- (ii) **Point (b):** Where EU standards, or national standards transposing EU standards, or others standards when the former do not exist, are used, the words ‘or equivalent’ must be used<sup>40</sup>.
- (iii) **Point (c):** Performance or functional requirements as Point (a) may be used with reference to technical standards as Point (b) as a means of presuming conformity.
- (iv) **Point (d):** By means of technical specifications as Point (b) for certain characteristics and with reference to Point (a) for other characteristics.

[90] A general requirement is that, for all procurement the product of which is to be used by natural persons, the technical specifications must include access criteria for persons with disabilities. It will be noted that the obligation is open-ended in that it expressly provides for account to be taken of future EU legislation as may enhance mandatory access requirements for the disabled. In this respect the ‘get out’ proviso “...except in duly justified cases...” is difficult to comprehend.

[91] Art. 42.4 expressly prohibits references to a specific make, source, process, economic operator, trademarks, patents, types, or origin of production except in *exceptional* cases and must again include the words ‘or equivalent’.

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<sup>37</sup> On the *Spin Communications v IRTC* [2001] 4 IR 411 line of cases, most recent of which includes *O’Shea v Butler* [2015] IECA 48; see Delaney, *Judicial Review of Administrative Action*, 2<sup>nd</sup> Ed., Round Hall, 2009, at page 228.

<sup>38</sup> No adverse inferences are being made against any particular firm or practice re NAMA-related services or otherwise.

<sup>39</sup> See Art. 42.2, as would tend to reinforce the potential for difficulties with Arts. 40 and 41.

<sup>40</sup> “Or other equivalent and approved” or similar, is not permissible; see Case C-45/87 *Commission v Ireland* (1988) 44 BLR 1 (Dundalk UDC water pipes case), C-359/93 *Commission v Netherlands* and C-59/00 *Bent Mousten*.

[92] Art 42.5 considerably enhances the ‘or equivalent’ mandate as opens a new vista for disappointed tenderers relative to Point (b) above. It states:

“Where a contracting authority uses the option of referring to the technical specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in Article 44, that the solutions proposed satisfy in an equivalent manner, the requirements defined by the technical specifications.”

[93] Art. 42.6 includes a similar provision in respect of Point (a) of Art. 42.3 but with reference to national standards transposing a EU standard or European technical approval, or common technical specification, or international standard or reference system by a European standardisation body where same address performance or functional requirements. Yet Art. 42.6 is qualified by a second paragraph thus:

“In its tender, the tenderer shall prove by any appropriate means, including those referred to in Article 44, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.”

[94] It will be noted that the above quoted paragraph relates only to Art. 42.6 and not to Art. 42.5. A question which will again most likely require judicial guidance is whether or not the said paragraph impliedly applies to Art. 42.5.

[95] **Art. 43 Labels** is a device given to contracting authorities for the procurement of works, supplies or services having specific environmental, social or other characteristics. A label is a means of proof that the economic operator has fulfilled the required characteristics. Label requirements must be linked to the subject-matter of the contract, be objectively verifiable, non-discriminatory, accessible to all interested parties and established in an open and transparent manner in which all relevant stakeholders, including ‘social partners’, NGOs, government bodies and consumers may participate. Art. 43.1 provides that label requirements must “be set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.”; and, contracting authorities must accept equivalent labels. What will amount to ‘decisive’ and how equivalence of labels will be determined remains to be seen.

[96] Where due to the time limits prescribed or for reasons not attributable to the economic operator a label cannot be obtained, another means of proof, such as a technical dossier, shall be accepted by the awarding authority. To the extent this occurs, it would suggest poor housekeeping by the awarding authority.

[97] **Art. 44 Test reports, certification and other means of proof.** As a means of conformity with requirements or award criteria set out in technical specifications, contracting authorities may require a test report or certificate from economic operators issued by conformity assessment authorities as may be specified, or equivalent bodies. As with labels, contracting authorities are obliged to accept other means of proof such as a technical dossier, whether due to time restrictions, accessibility or like matter.

[98] **Art. 45 Variants**, if allowed or required, must relate to the subject-matter, be stated in the contract notice, prior information notice, or invitation to confirm interest and have minimum requirements. Award criteria must be applicable to variants and it must be stated if a variant can only be submitted if a non-variant tender has also been submitted.

[99] **Art. 46 Division of contacts into lots.** Contracting authorities may divide a contract into separate lots and may determine the size and subject-matter of the lots. No equivalent article exists in the outgoing directive. The article has considerable political potential in public works contracting towards restoring the current imbalance between large national and smaller regional contractors. What is or is not a ‘lot’ is not defined in Art. 2 or elsewhere (see Art. 58.3) and leaves open how can a contract be divided. The purpose would appear to be to enable a contracting authority to split-award the one competition into separate contracts. This is apparent from Art. 46. 2, second paragraph:

“Contracting authorities may, even where the tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest. Contracting authorities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.”

[100] Whilst the PWC suite of contracts provide for non-exclusive possession of the site<sup>41</sup>, economic operators will be concerned as to the commercial implications of dividing a competition into lots if the split is not precisely identified in the contract notice, or prior information notice. This could spread into other concerns as will be a further cause for inquiry, such as how the turn-over requirements are dealt with in ITT criteria as was touched upon in the decision in *Gaswise v Dublin Co. Co.*<sup>42</sup>

[101] Much will depend on the awaited Regulations as Arts. 46.3 and 46.4 make clear:

Art. 46.3: “Member States may provide that, where more than one lot may be awarded to the same tenderer, contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.”

Art. 46.4: “Member States may implement the second paragraph of paragraph 1 [46.1] by rendering it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law. In such circumstances the first sub-paragraph of paragraph 2 [46.2] and, where appropriate, paragraph 3 [46.3] shall apply.” [Arts. within brackets added]

[102] **Art. 47 Setting time limits.** Nothing in this article upsets the minimum time limits provided in Arts. 27 to 31, inclusive. It enjoins contracting authorities to take the complexity of the contract and related matters into account when fixing time periods for competitions, with longer periods than the minimums where site visits and/or on-the-spot inspection of documents are required, as may spread to other tender matters<sup>43</sup>. A time limit need not be extended if additionally requested information is ‘insignificant’.

[103] Extension to the time limits is mandatory for the two instances stated in Art. 47.3: where an economic operator requests additional information and the same is not supplied at least 6 days before the date fixed for the return of tenders; and, where significant changes are made to procurement documents.

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<sup>41</sup> See PWC v2.0 release (22/02/2016), PW-CF1 to PW-CF5, inclusive, at Clause 7 – ‘Area Provided by the Employer’.

<sup>42</sup> *Gaswise v Dublin Co. Co.* [2014] IEHC 56 (Finlay Geoghegan J.); see below at I.

<sup>43</sup> Such a time to ascertain archaeological risk; see the PWC v2.0, at Clause 7.8 and the Schedule at Part K, Item 18.



[104] **Art. 48 Prior information notices** may be issued by contracting authorities to make known their future procurement intentions provided the notices contain the level of information required in Annex V, Part B, Section 1 and are published by the EU Publications Office or on the contracting authority's buyer profile pursuant to Annex VIII at Point 2 (b) on notice to the EU Publications Office. Publication on a buyer profile is not admissible as notice but additional publication at Art. 52 national level may be made on a buyer profile. Particular provisions apply to Art. 75 and Annex XIV social and like services, which are not the subject of this paper.

[105] For restricted procedures and competitive procedures with negotiation, such notices may be used by sub-central contracting authorities as a call for competition pursuant to Art. 26.5 provided the notice: specifically refers to the supplies, works or services to be the subject of the intended competition; indicates that the award will be by means of restricted procedures or competitive procedure with negotiation and inviting economic operators to express interest without further publication of a call for competition; contains the information required in Annex V, Part B, Sections 1 and 2; and, that the notice was sent for publication between 35 days and 12 months prior to the date of the Art. 54.1 invitation.

[106] **Art. 49 Contract notices** shall be used to call for competition for all procedures but without prejudice to Art. 26.5 at the second paragraph (where Art. 48 is used) or when Art. 32 applies (Use of negotiated procedure without prior publication).

[107] **Art. 50 Contract award notices** must be sent following a decision to award a contract or framework agreement and not later than 30 days after its conclusion. Award notices shall contain the information set out in Annex V, Part D and shall be published pursuant to Art. 51. Where a call for competition was by means of an Art. 48 notice, and the contracting authority decides not to award further contracts during the period covered by the prior information notice, the contract award notice shall so state.

[108] For framework agreements concluded pursuant to Art. 33, award notices for subsequent contracts made pursuant to the framework agreement are not mandatory. For such contracts, Member States may permit contracting authorities to group such award notices on a quarterly basis within 30 days of the end of each quarter. Art. 50.4 enables certain information on framework agreement awards to be withheld if its release would impede law enforcement, or be contrary to the public interest, or harm legitimate commercial interests of an economic operator, or prejudice fair competition. Whilst the latter two are understandable, the first two should be subject to an Art. 84 report.

[109] For dynamic purchasing systems, award notices shall be sent within 30 days of the award of each contract, but they may be grouped each quarter as [103] above.

[110] **Art. 51 Form and manner of publication of notices** requires notices pursuant to Arts. 48, 49 and 50 to contain the information set out in Annex V which shall be in standard format to be established by the EU Commission. Contracting authorities are charged to e-submit the notices so formatted to the EU Publications Office for publication as per Annex VIII not later than 5 days after they are sent in official languages chosen by the sending contracting authority.

[111] The remainder of Art. 51 contains obligations on the EU Publications Office relating to prior information notices and contracts concerning social and specific services outside of the scope of this paper.

[112] **Art. 52 Publication at national level** provides that Arts. 48, 49 and 50 notices shall not be published at national level before publication pursuant to Art. 51 unless a contracting authority has not been notified by the EU Publications Office of the publication within 48 hours of receipt pursuant to Art. 51. National level notices shall not contain information more than that dispatched to the EU Publications Office and prior information notices shall not be published on a buyer profile before dispatch to the EU Publications Office.

[113] **Art. 53 Electronic availability of procurement documents.** Unrestricted direct and free electronic access to procurement documents shall be available from the date of publication of an Art. 51 notice or from the date of sending an invitation to confirm interest which latter shall include the e-address where the documents may be accessed.

[114] Where e-access as [113] above is not available for reasons set out in Art. 22.1, contracting authorities may indicate other means by which the procurement documents shall be available pursuant to Art. 53.2. In such cases, the tender submission time limit shall be extended by 5 days<sup>44</sup> except in substantiated urgency cases as Arts. 27.3, 28.6 and 29.1. As between “urgent” and “extreme urgency” see [49] and [72] at (iii) above.

[115] Where unrestricted direct and free access is not available due to the application of Art. 21.2 confidentiality restriction, contracting authorities shall indicate in the contract notice or invitation to confirm interest the measures required for the protection of the confidential information and how access to the documents can be obtained. In such cases the time limit shall be extended by 5 days save urgent cases as [114] above and with provision for time allowance if tenderers require additional information the same as provided for in Art. 47.3 (a), summarised at [103] above.

[116] **Art. 54 Invitations to candidates.** Selected candidates in restricted procedures, competitive dialogue procedures, innovation partnerships and competitive procedures, shall be simultaneously invited in writing by contracting authorities to submit their tenders or, if a competitive dialogue, to partake in the same. Such invitations shall contain the information as stated in Annex IX. If an Art. 48.2 prior information notice is used to call competition, economic operators who expressed interest shall be simultaneously invited in writing to confirm continuing interest.

[117] Invitations other than by prior information notice shall include an e-address at which the procurement documents shall be available and such invitations shall include the procurement documents if the latter are or were not made available pursuant to Art. 53.1 first paragraph as [113] above.

[118] **Art. 55 Informing candidates and tenderers.** After a decision is reached to conclude a framework agreement or not, award a contract or not, or admit one to a dynamic purchasing system or not, contracting authorities shall as soon as possible inform each candidate or tenderer accordingly. If the decision is in the negative in any instance, the information shall include the grounds for such decision and whether the procedure concerned is to be re-commenced. Of note is the absence of an express reference to such information being communicated in writing by awarding authorities.

[119] If requested by a candidate or tenderer, a contracting authority shall as quickly as possible and not exceeding 15 days from receipt of a written request inform:

- (a) An unsuccessful candidate of the reasons for its rejection.

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<sup>44</sup> Which is a minimum; see Art. 47.

- (b) An unsuccessful tenderer why its tender was rejected, including grounds as Arts. 42.5 and 42.6, or the reasons for a decision not to accept a product or thing offered as ‘or equivalent’ under Art. 42, or the reasons why a decision was reached that works, supplies or services offered do not meet stated performance or functional requirements.
- (c) A tenderer who submitted a valid tender of the characteristics and relative advantages of the successful tender together with the name of the successful tenderer or the names of the successful parties if a framework agreement.
- (d) A tenderer who has made an admissible tender of the conduct and progress of negotiations and dialogue with the tenderers.

[120] Under Art. 55.3, contracting authorities may withhold certain information in Arts. 55.1 and 55.2 if release would prejudice law enforcement, or be contrary to the public interest, or prejudice legitimate commercial interests of another candidate or tenderer or would otherwise prejudice fair competition.

Title II, Chapt. 3, Sect. 3: Choice of Participants and Award of Contracts

[121] **Art. 56 General principles.** Contracts shall be awarded based on stated criteria pursuant to Arts. 67 to 69, inclusive, subject to verification by the awarding authority pursuant to Arts. 59 to 61, inclusive that:

- (a) The tender complies with the criteria in the contract notice or invitation to confirm interest and the procurement documents having regard to Art. 45, if relevant; and,
- (b) The tenderer is not excluded under Art. 57, meets the selection criteria pursuant to Art. 58 and, if applicable, the Art. 65 non-discriminatory rules and criteria.

[122] The second paragraph to Art. 56.1 provides that if a tender does not comply with Art. 18.2 (environmental, social and labour law), contracting authorities may decide not to award a contract to a tenderer submitting the most economically advantageous tender. The words “may decide not to” convey that compliance with Art. 18.2 and Annex X is not mandatory. All will depend upon what the Irish Regulations prescribe.

[123] In open procedure competitions, contracting authorities may examine tenders before verifying the absence of grounds for exclusion under Arts. 57 to 64, inclusive. If verification is deferred it shall be conducted impartially and transparently to ensure no contract is awarded to a tenderer who should have been excluded. The applicability of the second paragraph to Art. 56.2 will not be known until the Regulations are issued. It provides that Member States may exclude the use of the deferred verification procedure, or may restrict it to certain types of procurement or specific circumstances.

[124] Art. 65.3 give to Member States latitude in requiring contracting authorities to request economic operators to submit, supplement, clarify or complete relevant information or documentation inside of a time limit where information or documentation submitted by economic operators appears to be incomplete or erroneous. If permitted in the awaited Regulations, provision must be made for its application to be operated by awarding authorities having regard to the principles of equal treatment and transparency.

[125] New in the Directive is Art. 65.4 which empowers the EU Commission to adopt “delegated acts” pursuant to Art. 87 to amend the list in Annex X, to add new agreements ratified by all Member States, or remove those no longer so ratified.

[126] Art. 57 Exclusion grounds requires contracting authorities to exclude an economic operator if it verifies pursuant to Arts. 59 to 61, inclusive, "...or are otherwise aware...", that an economic operator, or a person connected thereto, has been the subject of a conviction by final judgment for stated reasons. The obligation is mandatory i.e. "shall exclude". The stated reasons are:

- (a) participation in a criminal organisation per Art. 2 of Decision 2008/841/JHA;
- (b) corruption, as Art. 3, Convention on the fight against corruption involving officials of the EU or of Member States as well as Member States' national laws;
- (c) fraud, as Art. 1, Convention on protection of the Communities financial interests;
- (d) terrorist offences or linked activities, as Arts. 1 & 3 of Decision 2002/475/JHA;
- (e) money laundering or terrorist financing, as Art. 1 of Directive 2005/60/EC; and,
- (f) child labour and human trafficking, as Art. 2 of Directive 2011/36/EU.

[127] The words "conviction by final judgment" are going to prove problematic. If a person connected to an economic operator has a conviction at first instance but in respect of which an appeal is pending as of the date the decision to exclude is made, such a decision will be unlawful and open to challenge.

[128] Art. 57.2 extends the obligation to exclude when the awarding authority is aware of an economic operator in breach of obligations relating to the payment of taxes or social security "...where this has been established by a judicial or administrative decision having a final and binding effect...". Social security obligations apart, hot political issue 'taxes', such as the Irish Water debacle, would be a severe measure to support grounds for exclusion, especially if the incoming government abandons water charges and an economic operator was pursued for a legacy payment.

[129] The second paragraph to Art. 57.2 enables Member States to exclude an economic operator where the contracting authority can "...demonstrate by any appropriate means..." that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions, as is too close to a kangaroo court. Presumably, the awaited Regulations will have due regard to Arts. 37 and 37 of the Constitution of Ireland, as is available by means of the derogation provided in Art. 57.3. The third paragraph to Art. 57.2 further provides a means to avoid exclusion by payment of outstanding obligations, including fines, or by giving an undertaking to pay the same.

[130] In a dangerous cross-over of the line in the sand from "beyond reasonable doubt" implicit in all exclusions under Art. 57.1, Art. 57.4 lists the following exclusion grounds to which the lesser "balance of probabilities" standard applies where:

- (a) the contracting authority demonstrates "by any appropriate means" a violation of Art. 18.2 obligations (environmental, social and labour law matters);
- (b) an economic law operator is bankrupt, or insolvent, or subject to winding-up proceedings, or where its assets are in administration or analogous situation;
- (c) the contracting authority can demonstrate "by appropriate means" that the economic operator is guilty of grave professional misconduct;

- (d) the contracting authority has “sufficiently plausible indications” to conclude that the economic operator has agreed with others to distort competition;
- (e) a conflict of interest per Art. 24 cannot be remedied by less intrusive measures;
- (f) if distortion of competition per Art. 41 cannot be remedied by other measures;
- (g) where an economic operator has shown significant or persistent deficiencies in performing a substantive requirement under a prior public contract, *a prior contract with a contracting entity* or a prior concession contract which led to early termination of a prior contract, damages or other comparable sanctions;
- (h) the economic operator has been guilty of serious misrepresentation in supplying information required for the absence of grounds for exclusion, or fulfilment of selection criteria, or withholding such information, or is unable to submit Art. 59 documents; or,
- (i) an economic operator undertook to unduly influence the contracting authority’s decision-making process, or obtained confidential information to give it an unfair advantage in the competition, or negligently provides misleading information as may materially influence the decision to exclude, select or award.

[131] As may be seen, Art 57.4 is rife with trip wires for an un-savvy contracting authority. At (a), “any appropriate means” may prove to be a noose for some. At (b), precisely when one becomes a bankrupt, or if by exclusion it proves to be the last nail in the coffin when administrative measures might have worked, will likely be grounds for challenge by a liquidator; and, “any analogous situation” may fall foul of examinership, which regime remains in the Companies Act, 2014<sup>45</sup>. Hopefully, the State will exercise the derogation available for the omission of para. (b) to Art. 57.4.

[132] At para. (c), as alluded to earlier<sup>46</sup>, what is “grave professional misconduct” and how it is established is ripe grounds for future challenges. At para. (d), what “sufficiently plausible indications” actually means will require the assistance of the courts as will at what points a conflict of interest at para. (e), or an Art. 41 distortion of competition require exclusion of the economic operator.

[133] Potentially more explosive is Art. 57.4 at para. (g) whereby an economic operator could be excluded for alleged deficiencies in the performance of a prior non-public contract. How would such information come to the contracting authorities notice? Would it include an architect or an engineer on a contracting authority’s valuation ‘team’ who bore a grudge? As “damages” includes liquidated damages, would an economic operator be excluded from a public works competition merely for having liquidated damages levied against it on a previous contract, public or private? What would amount to “other comparable sanctions”?

[134] Remaining with Art. 57.4, at para. (h), what amounts to “serious misrepresentation” (as distinct from non-serious, or innocent, misrepresentation)? What if reasonable reasons existed why Art. 59 documents could not be submitted? Lastly, proof of activity at para. (i) would appear to be grounds in respect of which a finding beyond reasonable doubt should be necessary rather than on the balance of probabilities.

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<sup>45</sup> Thuillier, *Company Law in Ireland*, 2<sup>nd</sup> Ed., 2015, Clarus Press. Chap. 18.

<sup>46</sup> See [7] at (xi).

[135] Art 57.6 appears to provide respite from an overly-enthusiastic evaluation ‘team’ but much will depend upon its application and the means same is exercised. It provides:

“Any economic operator that is in one of the situations referred to in paragraphs 1 [57.1] and 4 [57.4] may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient the economic operator concerned shall not be excluded from the procurement procedure<sup>47</sup>.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgement is effective.”

[136] The above is dangerously close to the Civil Law norm whereby one is presumed guilty until proven to the contrary; it would appear to cross the line as between the Common Law criminal and civil standards of proof. Absent a conviction by final judgment, the burden of proof is awry in that the onus of alleged wrong doing should *prima facie* rest on the contracting authority before any such matter may become the subject of judicial review. The second paragraph appears to confuse the concepts of liability in damages and a criminal conviction. In our system of justice, the contracting authority or an adjunct thereof cannot be, or be a part of, the “investigating authorities”, particularly in respect of indictable offences, which exclusively resides in the DPP. It is only in the last quoted paragraph to Art. 57.6 that a semblance of acceptability returns.

[137] Art. 57.7 obliges Member States to specify the implementing conditions for Art. 57 by law, regulation, or administrative provision, including the maximum period of exclusion which, if not fixed by final judgment, shall not exceed 5 years<sup>48</sup> from the date of final judgment conviction or 3 years in respect of the items dealt with under Art. 57.4.

[138] **Art. 58 Selection criteria** may relate to suitability in terms of professional activity, economic and financial standing, and technical and professional ability. Contracting authorities are limited to the criteria stated in Arts. 58.2, 58.3 and 58.4 and shall limit the requirements to those which are related to the subject-matter and which are appropriate to perform the contract to be awarded.

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<sup>47</sup> To whom and in what forum bearing in mind that, under the Bunreacht, a contracting authority is not a court?

<sup>48</sup> This might, in part, explain why draft Regulations have yet to be released by the Attorney General’s office in that the Directive could be presenting difficulties in relation to the Criminal Justice (Terrorist Offences) Acts, 2005 to 2015, and/or the Criminal Justice (Spent Convictions and Certain Disclosures) Act, 2016.

[139] Art 58.2, concerning professional activity, enables contracting authorities to require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, per Annex XI, or other request therein, which, for Ireland, refers to the Registrar of Companies or the Registrar of Friendly Societies. None of the professional bodies named in the Building Control Acts, 2007 to 2014, are referred to, which is not to say that a contracting authority may not require such enrollment as the second paragraph to Art. 58.2 infers.

[140] Art. 58.3, concerning economic and financial standing, enables contracting authorities to require economic operators to possess necessary capacities, including minimum turn-over in the area covered by the contract which, if required, may not exceed twice the estimated contract value "...except in duly justified cases such as relating to the special risks attached to the nature of the works.", for which latter the awarding authority must indicate the main reasons in the procurement documents or in the Art. 84 report. If transparency is to prevail, the former should be the norm. Contracting authorities may also require an appropriate level of professional indemnity insurance although, unhelpfully, no maximum level of cover is stated.

[141] Remaining with Art. 58.3, the fourth paragraph, in referring to turn-over requirements when a contract is divided into lots, provides that the Article shall apply to each individual lot but that the contracting authority may set the minimum yearly turn-over required with reference to groups of lots, if several lots are to be executed at the one time by the same tenderer. For a simple case, say where a tenderer is to be awarded just one lot, the turn-over requirement would reduce *pro rata* relative as between the estimated award of the individual lot bears to the estimated award value of all lots. As referred to earlier, this needs serious consideration in order that a depleted construction industry may get back on its feet and presents a sensible alternative to forcing main contractors into joint ventures under Clause 1.7 of PW-CF1 to PW-CF5, inclusive. A similar adjustment exists in respect of framework agreements.

[142] Art 58.4, concerning technical and professional ability, enables contracting authorities to require economic operators to possess human and technical resources and experience to perform the contract to a qualitative standard. This may include requiring an economic operator to demonstrate that it has a sufficient level of experience with reference to contracts performed in the past.

[143] No objectively measurable maximums exist as presents a danger point that awarding authorities, in an attempt to by-pass the maximum turn-over requirement, will resort to seeking proof of past performance based on prior contract values to a disproportionate extent, such as was the plaintiff's case in *Whelan Group (Ennis) Ltd. v Clare County Council*<sup>49</sup>.

[144] A further reference exists in this provision whereby a contracting authority may assume that an economic operator does not have the required professional abilities because it has conflicting interests which may negatively affect its performance.

[145] Art. 58.4, at the third paragraph concerns, procurement procedures for siting or installation work, services or works. It provides that the professional ability of economic operators "...may be evaluated with regard to their skills efficiency, experience and reliability." Ultimately, it could result in a state-wide marking scheme but which could fall foul of Treaty principles in that it could act as a barrier to new entrants.

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<sup>49</sup> *Whelan Group (Ennis) Ltd. v Clare County Council* [2001] 1 IR 717 (Kelly J.) see my book., *op. cit.*, at 2-63n.

[146] Art. 58.5 speaks of “minimum levels of ability”, which would tend to reinforce the point made at [145] above, unless every awarding authority attempts to have its own standard which could further result in the equivalent of local authority ‘panel systems’ of consultants which *Duffy v Sligo County Council*<sup>50</sup> held to be unlawful.

[147] **Art. 59 European Single Procurement Document (ESPD)** requires contracting authorities to accept ESPD when receiving requests to participate or tenders. ESPD, to take a standard form established by the EU Commission<sup>51</sup>, to be exclusively in electronic form, is a self-declaration as preliminary evidence that the economic operator fulfils certain conditions. ESPD are to replace certificates issued by public authorities or third parties to the same effect. The conditions concerned are that the economic operator to whom the ESPD relates: is not in an Art. 57 exclusionary situation; meets relevant Art. 58 criteria as shall have been set out in the contract notice or prior information notice; and, fulfils the objective Art. 65 rules and criteria, if applicable.

[148] Where an economic operator relies on capacities of others as Art. 63, the ESPD shall repeat the information required in respect of such entity. An ESPD provided in a previous public procurement can be re-used provided the economic operator confirms that it continues to be correct.

[149] **Art. 60 Means of proof** concerns the means by which contracting authorities may require certificates and the like as evidence for the absence of grounds for exclusion under Art. 57 and for compliance with Art. 58 selection criteria. Other than as provided in Art. 62, a contracting authority may not demand any other means of proof. The following are mandatory means of proof which contracting authorities shall accept:

- (a) in respect of Art. 57.1, an extract from a judicial or similar register where the economic operator is established showing that the requirements have been met;
- (b) in respect of Arts. 57.2 and 57.4(b), a certificate issued by the Member State’s competent authority or, in none are issued by a Member State, an oath or declaration made before a notary to the same effect.

[150] Means of proof of an economic operator’s economic and financial standing, as Art. 60.3, may be provided by means as listed in Annex XII, Part I, or by any other document the contracting authority considers appropriate. Evidence of technical abilities may be by means of Annex XII, Part II.

[151] Art. 60.5 concerns intra-Member States’ obligations to make available information relating to Art. 57 grounds for exclusion, professional suitability and Art. 58 financial technical capacities of an economic operator; in effect, ‘big brother’ writ large.

[152] **Art. 61 On line repository of certificates (e-Certis)** obliges Member States to main up-to-date forms of documentary evidence when e-Certis is implemented throughout the Union.

[153] **Art. 62 Quality assurance standards and environmental management standards** addresses how contracting authorities’ QA systems monitoring of economic operators shall be accredited, certified and have regard to EU standards and other standards.

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<sup>50</sup> *Duffy v Sligo County Council*, Unrep., 21<sup>st</sup> January 2013, High Court (Cooke J.); followed in *Duffy v Laois County Council* [2014] IEHC 469 (Hogan J.).

<sup>51</sup> The article suggests that the EU legislation has yet to be promulgated and which will require Member States to maintain an e-Certis data base which can be accessed by other Member States with obvious data protection implications.



[154] **Art. 63 Reliance on capacities of other entities** provides that, when considered appropriate for a particular contract, an economic operator may rely on the capacities of other entities in respect of criteria concerning Art. 58.3 (economic and financial standing) and Art. 58.4 (technical and professional ability) irrespective of the legal relationship between the economic operator and the other entities but the former must be able to demonstrate to the contracting authority that it will have at its disposal the resources of the other entities concerned. The awarding authority is obliged to ascertain the veracity of the other entities pursuant to Arts. 57, 59, 60 and 61. A contracting authority may require the substitution of such another entity for whom non-compulsory grounds for exclusion exist and may require joint liability for contract performance.

[155] For works, service and siting or installation contracts, a contracting authority may require that certain critical operations only be performed directly by the tenderer, or if an Art. 19.2 group of economic operators, by a participant of that group. This is catered for in the PWC suite of contracts, PW-CF1 to PW-CF5, inclusive, at Clause 5.4.

[156] **Art. 64 Official lists of approved economic operators and certification of bodies established under public or private law.** This enables Member States to establish or maintain official lists or provide for certification by certification bodies complying with Annex VII of economic operators including Art. 63 other entities. It is more of the ‘big brother’ approach carried over from Arts. 60 and 61.

Title II, Chapt. 3, Sect. 3, Sub-Sect. 2: Reduction of numbers of candidates, tenders and solutions

[157] **Art. 65 Reduction of the number of otherwise qualified candidates to be invited to participate** enables contracting authorities to limit the number candidates provided the minimum number of candidates is available. It applies to restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships. When used, the objective non-discriminatory criteria or rules and the minimum number of candidates to be invited shall be stated in the contract notice or invitation to confirm interest. A maximum number may also be stated. The number of invited candidates shall be sufficient to ensure genuine competition.

[158] The following are the minimum number of candidates for each procedure:

Restricted procedure:	5
Competitive procedure with negotiation:	3
Competitive dialogue procedure:	3
Innovation partnership:	3

[159] If the number meeting the selection criteria and the Art. 58.5 minimum levels of ability is below the minimum number, the contracting authority may continue with the completion by inviting those that qualify but those who did not request to participate or who do not have the required capabilities shall not be included.

[160] **Art. 66 Reduction of the number of tenders and solutions.** Where contracting authorities exercise the option of reducing the number of tenders under Art. 29.6 or solutions to be discussed under Art. 30.4, same shall be achieved by applying the stated award criteria. At the final stage, the number left shall make for genuine competition to the extent that qualifying tenders, solutions or candidates remain.

Title II, Chapt. 3, Sect. 3, Sub-Sect. 3: Award of the contract

[161] **Art. 67 Contract award criteria.** Subject to the Art. 67.2 (as [162] below), public contracts shall be awarded on the basis of the most economically advantageous tender.

[162] Art. 67.2 requires the contracting authority to identify the most economically advantageous tender (MEAT) on the basis of price or cost using cost-effectiveness means such as Art. 68 life-cycle costing and may include the best price-quality ratio to be based on the stated criteria as may include qualitative, environmental and/or social aspects linked to the contract subject-matter. The cost element may be on a fixed price with competition limited to qualitative criteria. The open-ended list of criteria include:

- (a) quality, technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental, innovative characteristics etc.;
- (b) organisation, qualifications and experience of staff where same would have a significant impact on contract performance;
- (c) after-sales service, technical assistance, delivery and period for completion.

[163] Art. 67.2, at the last paragraph, in an apparent compromise at EU-level, gives **Member States a derogation to award public contracts on the basis of price** being the **sole criterion**. It remains to be seen if the Irish Regulations will take up the derogation. The said last paragraph plays on the double use of the word ‘may’ thus:

“Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.”

[164] Art. 67.3 provides that the linking of award criteria to the subject-matter of the contract shall be considered as having been achieved when the criteria relate to the works, supplies or services to be provided at any stage in the contract, including the life-cycle, even where such factors do not form part of their material substance. Being passed-over purely on a life-cycle criterion will likely lead to challenges, especially if life-cycle needs to be reduced to a mathematical expression, such as the PV method (as it surely must), where one might need the perceived wisdom of an Alan Greenspan.

[165] Arts. 67.4 and 67.5 make plain that award criteria do not confer on contracting authorities an unrestricted freedom of choice. The choices must ensure effective competition with specifications that permit tenderers’ information to be effectively verified. Contracting authorities must specify the relative weightings to the stated MEAT criteria in the procurement documents, except if lowest price is the sole criterion. Weightings may be expressed by means of a spread with an appropriate maximum but, if same is not possible, criteria shall be stated in decreasing order of importance.

[166] In respect of award criteria and weightings, awarding authorities still need to heed the line of Northern Ireland decisions including *McLaughlin & Harvey v Dept. of Finance and Personnel*<sup>52</sup>, *Gerard Martin Scott v Belfast Education and Library Board*<sup>53</sup> and *J&A Developments v Edwina Manufacturing*<sup>54</sup> and, no less, the High Court’s decision in *Veolia Water v Fingal*<sup>55</sup> as included issues concerning a variant “upgrade”.

[167] Art. 68 Life-cycle costing contains a list of typical acquisition, recurrent and maintenance costs for a contracting authority and other end-users as may be incorporated in award criteria to the extent relevant to any particular competition. Included are greenhouse gas emissions and other climate change mitigation costs.

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<sup>52</sup> *McLaughlin & Harvey v Department of Finance and Personnel* [2011] NICA 60, [2012] BLR 26.

<sup>53</sup> *Gerard Martin Scott v Belfast Education and Library Board* [2007] NI Ch. 4, (2007) CILL 2510.

<sup>54</sup> *J&A Developments Ltd. v Edwina Manufacturing Ltd. & Others* (2007) CILL 2419 (NI High Court, QBD).

<sup>55</sup> *Veolia Water v Fingal County Council* [2006] IEHC 137 (Clarke J); see my book, *op. cit.*, at 13-15.

[168] Where the costs of environmental externalities can be objectively linked to the product or service or works during its life cycle, the monetary value must be capable of being determined and valued. In this regard Art. 68.2 provides that contracting authorities must, *inter alia*, include in the procurement documents the data to be provided by tenderers and the method the contracting authority will use to determine life-cycle costs relative to the supplied tenderers' data. The latter must be accessible "to all interested parties" which reasonably includes the other tenderers. In ordinary course, such information could not be said to be commercially sensitive although, despite the express inclusion of access thereto for all, in situations where a contracting authority is suspected of having erred, an eligible person<sup>56</sup> may well receive such a response. Such a response may include the contention that the word 'method' as used in the first paragraph to Art. 68.2 is different to the same word as used in the second paragraph to Art. 68.2 with reference to sub-paragraphs (a), (b) and (c) thereto. The position may be aided if awarding authorities use the EU legislation in Art. 68.3 as listed in Annex XIII.

[169] Art. 69 **Abnormally low tenders** mandates contracting authorities to require economic operators to explain tendered prices or costs which appear to be abnormally low in relation to the works, supplies or services. Of interest is that the article makes no express reference to market rates or prices; the same can only be inferred, if it can. Art. 61.9 attempts to list the explanations as may be required, which is open-ended, thus:

- (a) the economics of the manufacture, services of construction concerned;
- (b) chosen technical solutions or exceptionally favourable conditions to the tenderer;
- (c) the originality of the work, supplies or services proposed;
- (d) compliance with Art. 18.2 (environmental, social and labour law obligations);
- (e) compliance with Art. 71 (sub-contracting);
- (f) possibility a tender obtained State aid.

[170] An awarding authority may only reject a tender when it is satisfied that the evidence under any of the above supplied does not account for the low price or costs. Art. 69.4 suggests that the safest grounds for rejection is where a tenderer has received State aid and, within a stated fixed time limit set by the contracting authority, is unable to prove that the aid is compatible with Art. 107 TFEU<sup>57</sup>. If so rejected, the contracting authority must inform the EU Commission of the fact. Other allegations may be more dispute prone as to what is or is not 'satisfactory', for which the OGP's recent ITT release<sup>58</sup> at the note to para. 8.3 is apposite: "[Employers should exercise with caution the rights reserved in this section 8. In most cases, it is expected that Tenderers will be the best judge of their own costs (delete this note before issue of these instructions)]."

Title II, Chapt. 4: Contract Performance

[171] Art. 70 **Conditions for performance of contracts**. Contracting authorities may require special conditions for the performance of a contract provided they are linked to the contract subject-matter in the context of Art. 67.3 and are indicated in the call for competition or in the procurement documents. The conditions may include economic, innovation-related, environmental, social or employment-related considerations.

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<sup>56</sup> 'Eligible person' under the Public Authorities' Contracts Review Procedures Regulations, SI No. 130/2010, r.4 and r.10(1); see my book, *op. cit.*, at 2-53.

<sup>57</sup> Craig and de Burca, *op. cit.*, page 1087, note Art. 107 TFEU lays down the test for state aids but does not define it. The general principle is that state aids are incompatible with the internal market, exemplified by the decision in Case C-249/81 *Commission v Ireland* [1982] ECR 4005 ('Buy Irish goods' case); Craig and de Burca, *op. cit.*, at page 641.

<sup>58</sup> ITT-W1v2.0 (22/01/2016). From para. 8.3 it is clear that the OGP did not take Directive 2014/24/EU into account and that a further release of the ITT for public works is necessary whether before or after the awaited Regulations are issued.

[172] Art. 71 Sub-contracting obliges ‘competent national authorities’ to ensure that Art. 18.2 (environmental, social and labour law obligations) is observed by sub-contractors. Contracting authorities may ask, or Member States may require their contracting authorities to ask, tenderers to state the share of the contract it intends to sub-contract to third parties and proposed sub-contractors. This is well catered for in PW-CF1 to PW-CF5, inclusive, at Clause 5.4 and the Schedule.

[173] Art. 71.3 gives Member States the discretion “where the nature of the contract so allows” (as would include public works), direct payment to sub-contractors for services, supplies or works provided to the economic contractor with whom the awarding authority is in contract. Any such direct mode of payment shall be stated in the procurement documents and may include a mechanism as permits the main contractor to object to undue payments. This existed in some Irish sub-contract forms for many years albeit it was rarely used<sup>59</sup>. It was and is not included in Clause 11 to the PWC contracts although, under Clause 11(d) of the Conditions of Sub-Contract (NN)<sup>60</sup>, after a fixed period of time an unpaid sub-contractor has the right to suspend work. Given the historical attitude, it is unlikely that the government will exercise the discretion. More likely is that the industry will be pointed to the Construction Contracts Act, 2013, and the implementation of the long-awaited statutory adjudication procedure.

[174] The remainder of Art. 71 concerns itself with the means for contracting authorities to require main contractors to supply the names and contact details of sub-contractors’ representatives and like matters, for sub-contractors’ Art. 59 self-declarations, Art. 18.2 compliance and Art. 57 exclusions. It includes the giving to Member States further options to mandate the obligations down the chain of construction to suppliers and sub-sub-contractors. Before the Regulations are issued, further comment at this juncture would be speculation.

[175] Art. 72 Modification of contracts during their term provides for the modification of contracts and framework agreements without conducting a new procedure under the Directive subject to the following:

- (a) if clearly provided for in the initial procurement documents, then, irrespective of the value, such clauses, as may include price revision clauses, shall state the scope and nature of the possible modifications or options and attaching conditions. No such modification or option shall alter the overall nature of the contract or framework agreement;
- (b) additional works, supplies or services not included in the initial procurement but which have become necessary and where a change of contractor cannot be made for economic or technical reasons or would cause significant inconvenience or duplication of costs is permissible;
- (c) where the modification arose in circumstances a diligent contracting authority could not foresee and the modification does not alter the nature of the contract;

provided that the increase in price **shall not exceed 50 percent. of the original contract value**. If successive modifications are made, the 50 percent. limit shall apply so as not to circumvent the Directive.

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<sup>59</sup> It was available for nominated sub-contractors under clause 16 of the RIAI/GDLA standard form contracts.

<sup>60</sup> Conditions of Sub-Contract (NN) for use with the PWC suite of main contracts where the sub-contractor is a specialist named or novated by the employer, issued by the CIF, 1<sup>st</sup> Ed., February 2008. An equal right exists under the ‘domestic’ form of sub-contract for use with the PWC suite of main contracts, also published by the CIF, 1<sup>st</sup> Ed., May 2008.

[176] Art. 72.1 at (d) provides a further option in instances where a new contractor replaces the one who was initially awarded the contract due to the following:

- (i) an unequivocal review clause or option in conformity with Art. 72.1 (a);
- (ii) universal or partial succession following corporate re-structuring, including take-over, merger, acquisition or insolvency of the original economic operator by another who fulfils the initially stated criteria for qualitative selection provided no other substantial modifications are involved and that the aims of the Directive are not circumvented;
- (iii) if the contracting authority itself assumes the main contractor's obligations towards the latter's sub-contractors where provided for under Member States legislation as Art. 71.

[177] How one contractor can be replaced by another without a new procurement procedure appears to stray from the no privity principle, (i) above in particular. Under the PWC suite of standard contracts, such a manoeuvre is not possible because either the contractor subsists or it does not. In respect of (ii), whilst take-overs, mergers and acquisitions are dealt with under the Companies Act, 2014, in a fashion as recognises continuity of the entity, insolvency may not, a situation catered for in the PWC public works contracts<sup>61</sup>. Indeed (ii) conveys the notion of a contractor-in-waiting and that the economic operator placed second in a competition would have to make itself available at short notice; at face value it appears to directly circumvent the Directive. Option (iii) above virtually prescribes that a contracting authority would become its own main contractor following termination of the main contractor, most unlikely in Ireland.

[178] Arts. 72.2 to 72.5, inclusive, contain further and substantial innovative means by which contracts may be modified to a point beyond black letter contract law, despite assertions that any such modification may not alter the overall nature of the contract or framework agreement with reference to the word 'substantial' which, at Art. 72.4, is said to arise when the modification:

- (i) introduces conditions which, had they been part of the competition, would have admitted candidates other than those selected or would have resulted in the acceptance of a tender other than the one as was successful;
- (ii) changes the economic balance of the contract or framework agreement in favour of the contractor in a manner not provided for in the initial contract;
- (iii) considerably extends the scope of the contract;
- (iv) if it entailed a replacement contractor other than as provided for at Art. 72.1(d).

[179] Notwithstanding the reservation as at [177] above as covers Art. 72.4 at (iv), whilst Art. 72.4 at (i) is understandable, (ii) and (iii) make less sense and have the prospect of negating the standing of the change order regime in the PWC contracts<sup>62</sup>. If any of the four grounds for a substantial modification occur, Art. 72.5 requires that a new procurement procedure pursuant to the Directive be conducted.

[180] **Art. 73 Termination of contracts** mandates Member States to ensure that contracting authorities have the possibility to terminate contracts if:

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<sup>61</sup> PW-CF1 to PW-CF5, inclusive, v2.0 release (22/02/2016), at clause 12.

<sup>62</sup> PW-CF1 to PW-CF5, inclusive, v2.0 release (22/02/2016), at clauses 10.4 and 10.6.

- (i) the contract has been subject to a substantial modification as Art. 72;
- (ii) as of the date of award, the contractor was not in conformance with Art. 57.1;
- (iii) the contractor should not have been awarded the contract due to a serious infringement under the Treaties or the Directive as declared by the Court of Justice of the European Union pursuant to Art. 258 TFEU.<sup>63</sup>

## F: THE DIRECTIVE: TITLE III: PARTICULAR PROCUREMENT REGIMES

### Title III: Chapt. 1: Social and other specific services

[181] Arts. 74 to 77, inclusive concern contracts for **social and other specific services** listed in Annex XIV. As the provisions do not concern public works per se, the articles are outside of the scope of this paper.

### Title III: Chapt. 2: Rules governing design contests

[182] Art. 78 **Scope** makes clear that Chap. 2 to Title III concerns design contests organised as part of a procedure leading to the award of a public service contract; and, those with prizes or payments to participants. No mention is made of procedures where the design is part of a design and build contract and the assumption is that the same, such as PW-CF2 and PW-CF4, are outside of the scope of the article.

[183] Art. 79 **Notices** requires contracting authorities to issue a contest notice and, if the intention is to issue a subsequent Art. 32.4 service contract, the same must be stated in the notice. Notice of the results of the contest must also be sent in accordance with Art. 51 and the contracting authority shall be able to prove the date of dispatch. Provided that the release of the outcome of the contest may be withheld if it would impede law enforcement, be contrary to the public interest, or prejudice legitimate commercial interests, public or private, or prejudice fair competition.

[184] Art. 80 **Rules on the organisation of design contests and the selection of participants** require contracting authorities to conduct contests pursuant to Title I of the Directive and this Chapt. II of Title III. Admission of participants shall not be limited by reference to the territory of a Member State or that, with reference to Member States law, they would be required to be either natural or legal persons. If contests restrict the number of participants, clear and non-discriminatory criteria shall be stated and the numbers shall be sufficient to ensure genuine competition.

[185] Arts. 81 and 83 **Composition of the jury and its decisions**. These articles essentially follow earlier provisions in the Directive and observe the three core principles as apply to all public works contracts. Given the nature of design, it is not clear how ranking is to be objectively achieved. The provisions are silent as to how a jury is to be selected.

## G: TITLES IV & V: GOVERNANCE, DELEGATED POWERS, IMPLEMENTING PROVISIONS

[186] Arts. 83 to 94, inclusive contain the remaining provisions. All concern Member States obligations, such as national reporting, statistical information, transitional provisions and the like which are outside of the scope of this paper. Art. 84 **Individual reports on procedures** may be relevant in the event of a challenge.

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<sup>63</sup> Art. 258 TFEU concerns the principle of direct effect and the ability of the Commission to sue Member States and, as the jurisdiction has evolved since Case 26/62 *Van Gend en Loos* [1963] ECR 13, the ability of a citizen of a Member State to directly sue the Member State. Craig and de Burca, *op. cit.*, at chap. 7.

## H: THE REMEDIES DIRECTIVE, 'PACR', THE OCS V DAA AND BAM v NTMA DECISIONS

[187] The Remedies Directives, 89/665/EEC and 2007/66/EC are read together and are collectively referred to in the singular. The latter was transposed into Irish law by means of the EC (Public Authorities' Contracts) (Review Procedures) Regulations, 2010 ('PACR')<sup>64</sup>. The purpose of the legislation is to, inter alia, provide an effective means for economic operators to enforce the provisions of the Works Directives in circumstances where such a party believes that it has not been fairly treated; a means of remedying a wrong. This paper could not hope to deal with what is a detailed subject.<sup>65</sup>

[188] The need for a remedy arose out of the *Alcatel*<sup>66</sup> decision in Austria when a contract was wrongly awarded in haste after which the disappointed tenderers had no effective remedy, the Austrian court saying that it only had authority to take interim measures, such as setting aside an unlawful decision of a contracting authority, up to the time the award was made. The result was a strengthened directive as introduced the 'standstill' period<sup>67</sup> between the notification of an award and the contracting entering into contract with the notified successful tenderer. The 'standstill' has raised its own problems such as when a disappointed party knew or ought to have known of the decision, as prompted modifications to the Rules of the Superior Courts<sup>68</sup>, of which only bare mention can be made here<sup>69</sup>.

[189] Issues came to a head concerning the application of the PACR Regulations concerning a public tender competition at Dublin Airport. Although a number of issues were raised in *One Complete Solution Ltd. v Dublin Airport Authority*<sup>70</sup>, this paper concentrates on rule 8 of the PACR and the automatic suspension of the award pending the competent court's judicial review of the matter. In the action, DAA sought the lifting of the automatic suspension so that it could award the contract to the party it considered had won the competition. The plaintiff considered otherwise who petitioned the Court to set aside or vary the award.

[190] Amongst the issues before the Court were (a) whether there was in fact an automatic suspension; (b) if so, if it could be lifted by what was an interim application; (c) if it could be lifted which party was subject to the burden of proof and what is the appropriate test; and, (d) what is the result of the application of the test? With respect to r.8, the Court was in no doubt that automatic suspension arose on OCS issuing proceedings, noting that statutory interpretation is subject to the primacy of EU law<sup>71</sup>. The Court further noted that *Marleasing* C-106/89 settled that national courts are obliged to interpret national law in the light of the wording and purpose of an EU directive, including domestic legislation – harmonious interpretation does not require a *contra legem* interpretation of national law as in the *IMPACT v Min. for Agriculture* C-268/06 [2008] ECR I-2483 line of cases and the more recent obligation of sincere cooperation in *Dellway v NAMA* [2011] 4 IR 1 (SC, Fennelly J.).

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<sup>64</sup> S.I. No. 130/2010.

<sup>65</sup> Refer my book, *op. cit.*, at chapt. 2.

<sup>66</sup> Case C-81/98 *Alcatel* [1999] I-7671

<sup>67</sup> A minimum of 14 days per r.5(4), PACR; see my book, *op. cit.*, at 2-56 *et seq.*

<sup>68</sup> RSC Order 84A, Rules of the Superior Courts (Review of the Award of Public Contracts) 2010; S.I. No. 420/2010.

<sup>69</sup> Refer my book, *op. cit.*, at 2-38 *et seq.*

<sup>70</sup> *One Complete Solution Ltd. v Dublin Airport Authority* [2014] IEHC 306 (Barrett J.).

<sup>71</sup> *Costa v ENEL* [1964] ECR 585, *Pigs and Bacon Commission v McCarron* [1981] 1 IR 451, *Melloni* [2013] 2 CMLR 43, *Aklargen* C-617/10 [2013] 2 CMLR 46, with an overlay in *O'Domhnaill v Merrick* [1984] IR 151 (SC) in that statutes are to be construed so as not to lead to conflict between domestic and international law.

[191] The Court continued noting the purpose of the PACR and the importance of pre-contractual remedies – Recital 4 of 2007/66/EC – that the minimum standstill period is not a ‘maximum’ and that determination of the duration of the standstill period must be for discretion of first instance court to decide. In this regard the Court was not persuaded by *Partenaire v Dept of Finance & Personnel* [2007] NIQB 100 in which Coghlin J. suggested *Alcatel* [1999] ECR I-7671 intended injunctive relief to be the primary remedy before going on to hold:

- (a) whether automatic suspension. OCS was an “eligible person” per r.4 and suspension commences immediately after a r.8(1) application is made. The suspension subsists until, per Art. 2(3) of 89/665/EEC, the High Court makes decision on application for interim measures.
- (b) Can the automatic suspension be lifted by this interim application? r.8 admits of the lifting of an automatic suspension but an awarding authority shall not conclude a disputed award until the High Court has determined the matter, or court gives leave to lift any suspension of a procedure, or proceedings are continued or disposed of.
- (c) If it can be lifted which party is subject to the burden of proof and what is the appropriate test? The burden of proof falls on party asserting to lift the suspension. As to the applicable test, the Court considered *American Cyanamid* and *Okunade v Min for Justice* [2012] 3 IR 152, 180 inconsistent with EU law and Court’s obligations of harmonious interpretation. UK and NI decisions (see *Group M v Cabinet Office at I*) did not aid the Court due to different wording in the UK 2006 Regulations. Two elements of *Campus Oil* guidelines were not contemplated by 92/13/EEC: (i) requirement to demonstrate impossibility of calculating damages and (ii) requirement for an applicant to provide an undertaking in damages to benefit from continuance of suspension. Where an applicant was unable to provide undertaking, the effect would be contrary to the overall EU schema. The Court considered correct that the test was to be found in r. 9(4) and DAA had to satisfy Court that negative consequences of making an interim or interlocutory order as sought by DAA did not exceed the benefits of such order; that is, the usual *Campus Oil* undertaking in damages did not arise.
- (d) What is the result of the application of the test? r. 9(4) required a balancing to ensure that the negative consequences of lifting the suspension do not exceed the benefits. Damages might not be an effective remedy where loss of a contract could negatively affect competitive status was anticipated in *Alstom Transport v Eurostar* [2010] EWHC 2747 (Ch). The public interest must also be weighed of which two limbs exist: the need for a fair and transparent process; and, avoiding the burden of damages on the public purse which would be on top of that paid to the party DAA determined was the successful tenderer. Court considered greatest benefit was to leave the suspension extant pending OCS’s application for review. Hence an order lifting the suspension was denied.

[192] The Supreme Court issued an interim ruling, *OCS v DAA* [2014] IESC 51: Once an application is made under Art 8(1)(b) of the 2010 Regulations, the awarding authority is precluded from concluding the contract under Art 8(2) of the Regulations notwithstanding the fact that the application to the Court was initiated after the standstill period provided for in the Regulation had expired. Not necessary for an applicant to make a specific application to the Court as the preclusion arises automatically on the bringing of the Art 8 (1)(b) application.



[193] Possibly without waiting for the Supreme Court's final ruling, the government ran to the Attorney General's office as a result of which the EC (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations were issued in 2015<sup>72</sup>. For the sake of convenience, the said amendment Regulations are considered with respect to the *BAM v National Treasury Management*<sup>73</sup> decision below.

[194] At issue was the tender process for the DIT Grangegorman campus. BAM commenced judicial review proceedings under the PACR, *inter alia*, an order to set aside the NTMA's decision to accept a late tender submitted by the Eriugena consortium as a result of which an automatic suspension arose. The Court noted that, since *OCS v DAA* retroactive amending Regulations had come into force which entitled an awarding authority to apply to the High Court for an order to lift an automatic suspension, which was in point in the concerned proceedings.

[195] BAM contended that the PACR together with the 2015 amending Regulations were incompatible with 2007/66/EC because the latter required the automatic prohibition on concluding the contract should stay until the determination of the proceedings. The Court disagreed as what was at issue was a review of an interim decision of the NTMA and not a review of a contract award as provided for in recital 4 of the 2007 Directive thus: "...to provide for a minimum standstill period during which the conclusion of the contract in question is suspended...", as given effect to in Art. 2a of the 1989 Remedies Directive.

[196] Of greater interest in terms of the 2015 amending Regulations, the Court considered regulation 8 thereto by which an eligible person may apply to the court (a) for an order to correct an alleged infringement or prevent further damage to the eligible person's interests including measures to suspend the procedure or (b) to review the contracting authority's decision to award to a particular tenderer, amongst other measures. But the critical section in the 2015 amending regulations is that all action as may be ordered under regulation 8 is subject to para. 2A of regulation 8 which provides that, notwithstanding an application under r.8 (1) which has not been disposed of by the Court, a contracting authority may conclude a contract if, on application to the Court under r. 8 (2A), the Court orders that the award may proceed (which is further subject to various notice requirements and procedural observances not considered here), the Court shall have discretion:

"...whether, if Regulation 8 (2)(a) were not applicable, it would be appropriate to grant an injunction restraining the contracting authority from entering into the contract, and (b) only if the Court considers that it would not be appropriate to grant such an injunction may it make an order under this Regulation.

(3) The Court may, if it considers it just to do so, specify in the order...subject to there being satisfied one, or more than one, condition that it determines to be appropriate and specifies in the order."

[197] In disposing of the matter, the Court, having regard to *Campus Oil* criteria, in respect of which BAM pointed to the existence of divergence in the English authorities, considered that the balance of convenience rested with the State authority for reasons of the public convenience with reference, *inter alia*, to *Lowry Bros. v Northern Ireland Water Ltd.* [2013] NIQB 23 (QBD (NI)) but on the condition that NTMA gave to BAM an undertaking as to damages, the suspension on the awarding of the contract was lifted.

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<sup>72</sup> SI No. 192/2015.

<sup>73</sup> *BAM PPP PGGM Infrastructure Cooperatie v National Treasury Management Agency* [2015] IEHC 765 (Barrett J.)

[198] Given that BAM may have or be in the process of instituting further proceedings upon the NTMA's undertaking in damages, further comment would not be appropriate.

#### I: SOME OTHER RELEVANT CASE LAW

[199] At or about the time of the *OCS v DAA* and *BAM v NTMA* decisions, other cases arose both within the jurisdiction and in the England and Wales courts. The following are some of those decisions in which an attempt has been made to summarise the relevant points without commentary. To save space, the text has been clipped. 'A' is Applicant; 'R' Respondent. Cases referred to are not in the List of Cases to this paper.

**Copymore Ltd. v Commissioners of Public Works in Ireland** [2014] IEHC 63 (Charlton J.) O.84A RSC and Remedies Regulations 2010 at r.7(2) – 30 days – Application to amend grounds for JR must explain failure to include in the original application – courts reluctant if to do so would advance a new cause of action *Ni Eli v EPA* [1999] IESC 64. A sought to add capacity ground (that R did not have the capacity to set up or enter into a multi-supplier agreement) – a legal point as added little to the factual matrix – simply forgotten in the rush to serve the original proceedings – approach of courts – look to the time limit in the legislation, whether strict or may be extended, if amendment is permitted expressly or by statutory implication – O.84, r.4 and r.21 onus on applicant - extend the time if “good reason” to do so – *Keegan v GCOC* [2012] 2 IR 570 – *Deckra Eireann v Min. for Enterprise* [2003] 2 IR 270 and *O'Donnell v Dun Laoghaire* [1991] ILRM 301 (Costello J.) approved and appeal allowed. A also sought to add a claim for damages on the grounds they had wrongly been shut out of profits from contracts under the multi-supplier framework, effectively a new point not part of the first set of proceedings before Hogan J. in 2013 – no reason given why not included in the original JR – Court refused application to add damages.

**Coreologic Ltd v Bristol City Council** [2013] EWHW 2088 (TCC) (Akenhead J.) – Public procurement – 30-day limitation period for claims to be issued and served from when A knew or ought to have known of the grounds – application to amend claim – whether time barred as of date of amendment – whether “new claim”.

Mini-competition under a framework agreement for computer management systems – two tenderers. 90% marks for “statement of requirements’ and pricing (SOR); and, 10% for “user demo”. The SOR was sub-divided with weightings given to each. A advised on 12Mar13 its tender was unsuccessful and standstill period to expire 1Apr13. Comparative marks provided. On 25Mar13 A e-mailed R requesting a debriefing. Reply On 27Mar13 R extended the standstill to 8Apr13. A replied it was unable to reach the price R said was A's tender. On 5Apr13 A advised R that the info provided was inadequate and not in compliance with the 2006 Regulations, r.32, and that A could not understand properly R's reasons. Detailed reasons why A did not understand provided in the letter, including lack of scoring methodology. A served proceedings on time.

On 30<sup>th</sup> Apr/13 R denied a problem existed with further details. A replied that R's reasons established its bid had been wrongly evaluated and that it had submitted the lowest bid. Claim particulars served on 21Jun13. On same date A applied to amend the claim form contending manifest errors in A's bid evaluation and lack of transparency. The original claim sought an order to suspend the procurement and restraining R from awarding to the other bidder. A said its amendments merely clarified the existing pleading and that the full claim could be gleaned from earlier correspondence between the parties (i.e. error of omission in the pleadings), relying on *Evans v CIG Mon Cymru* [2008] EWCA Civ 390, in which Toulson LJ said the just approach was to look at the totality of the pleaded case as a whole. R said the amendment gave rise to new claims.

Court considered the Regulations and CPR before saying that the facts were different to *Evans*. The amendments, adding breaches for manifest error in assessment of A's tender and non-disclosure of formulae for translating prices into scores raised new claims because the original statement related to the period of time after the tender was rejected whereas the new claims related to the period before A's tender was rejected i.e. the new claims did not arise out of the same or substantially the same facts. In addition, the new claims were time-barred having regard to *SITA UK v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156 (“...knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement...”). Extension of time period as in *Jobsin v Dept of Health* [2001] EWCA Civ 1241 and *Mermec v Network Rail Infrastructure* [2011] EWHC 1847 (TCC) also considered but A had proffered no “good reason” per r.47(D). Held: Amendment of claim refused; particulars of claim to be as original claim form [with hint that A's original solicitors were negligent in framing the statement of claim.] Form over substance?

**Gaswise v Dublin City Council** [2014] IEHC 56 (Finlay Geoghegan J.)

Public procurement – Remedies Regulations, 2010 – the reasonably well informed and diligent tenderer test. A challenged R's decision to exclude it from a two-stage process to allocate 4 ranked places in a framework agreement – maintenance and repair of boilers in public housing for 3 years with option to extend by a further year – first stage was pass/fail screening based on stated criteria – second stage entailed evaluation based on service offered, price and CM procedures. A excluded on alleged failure to pass the replacement parts criterion. On 23<sup>rd</sup> Jul/13, A notified of the decision with the names of the successful tenderers in order of ranking. In correspondence A notified that Carillion, the fourth ranked, had withdrawn and that the first ranked was Brian McGrady t/a BM Services. On 13<sup>th</sup> Aug/13, proceedings commenced to set aside the exclusion decision; no contracts then entered into between R and successful tenderers.

Various interlocutory amendments. Modular trial with first module confined to the exclusion decision. The questions before the Court were:

- (1) With respect to replacement parts statement criterion (RPSC): (i) did the ITT require submission of a replacement parts statement (RPS)? (ii) If so, was it lawful for R to exclude A? (iii) If R did not err in excluding A for non-compliance with RPS, did R also err in not excluding BM Services and Athena for non-compliance with RPSC?
- (2) With respect to ITT turnover ('t/o') requirement (a) Does A's case re BM Services relying on t/o of 3<sup>rd</sup> parties fall within the grounds? (b) If so, is it time-barred? (c) If not, is A 'eligible person' to challenge BM Services t/o requirement? (d) If yes, did R correctly consider BM Services met the t/o requirement?

Q1 and RPS: The ITT required the submission of a statement that a priced itemised list of parts be submitted prior to award and be agreed before work commenced; this was a pass/fail criterion. Included in the ITT was a checklist which included 'Additional documents to be included', item 10 of 14 of which was 'Itemised list of replacement parts' but the checklist did not include a RPS. R accepted item 10 was an error in the ITT which it rectified in a Q/A document prior to submission of bids. A did not submit an RPS; it submitted an item 10 list. Court referred to principle of equal treatment Art. 2 2004/18/EC, Art. 17 2006 Regulations, *Fabricom* Case C-21/03, *Universale-Bu* Case C-470/99 and *SIAC v Mayo* Case C-368/10, noted *requirement that criteria be formulated to allow reasonably well-informed and normally diligent tenderers to interpret them in the same way* – test as in *Commission v Netherlands* Case C-368/10 “...principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner...”.

In *Clinton v Dept. for Employment and Learning* [2012] NIQB 2, McCloskey J. in a practical application of *SIAC* test (to occupy the shoes of the hypothetical tenderer) observed that the court "...should approach the matter not as an exercise of statutory construction...Rather, court's attention must focus very much on the 'industry' concerned, in which the professionals and practitioners are not lawyers", noting that 5 (DCC said 3) out of 15 tenderers did not submit an RPS and that in respect of one such tenderer, non-inclusion did not result in that tenderer being excluded in the initial stage by the evaluation team (which DCC admitted was an error).

Court held on (1): (i) that, applying *SIAC* test, the ITT was not clear and precise on the point; (ii) it was not lawful for R to exclude A for failure to attach an RPS; and, on issue (iii) court not required to answer the point due to conclusions at (i) and (ii).

Court held on (2): Due to (1) above not necessary to address the issues but some Qs pertinent to Q of appropriate remedy. Turnover required was €250k in any of last 3 years or *pro rata* if recently established with evidence to be provided if requested prior to award. A note allowed a tenderer to use or rely on financial resources of other undertakings directly or indirectly linked but tenderer must establish that it would have those resources available for the performance of the contract. Appendix B to ITT required tenderer to confirm the turnover with a 'Yes' or 'No' answer to the confirmation sought. Appendix B was included on the check-list at item 2 but made no reference to sub-contractors or third parties with whom tenderer had links. ITT para. 29 referred to Appendix E (Use of Sub-Contractors) and required 'Prime Contractor' (tenderer) to submit sub-contractor details incl. a letter from each confirming it would provide the resources. Tender clarification that t/o "relates to individual years and does not relate to combined t/o". No evidence that BM completed Appendix B in the provided format but it included a statement "Our combined t/o has exceeded €250k i.a.c. with [the] criterion." and identified 4 sub-contractors. A contended BM was not registered with RGII and did not comply with the t/o requirement of the ITT. In amendments to A's statement of grounds, A said R only disclosed on 2<sup>nd</sup> Sept/13 that BM was Brian McGrady, a sole trader operating from his home with t/o circa €50k to €75k p.a. Court considered that Ground 2(a) sufficient to enable A to challenge R's decision to admit BM to the second stage evaluation – r.7(2) and applying *Uniplex Case C-406/08* but *Baxter Healthcare v HSE* [2013] IEHC 413 (Peart J.) did not assist re. level of knowledge required before time runs.

Ground 2(b): until A given full ID of BM it did not have sufficient knowledge of the facts to consider if it had grounds to challenge; hence not time-barred.

Ground 2 (c) and if A was an 'eligible person' (r.4 of Regulations) to challenge the compliance of BM with the t/o requirement; A has interest in being awarded the contract – r.4 (a) satisfied – at risk of being harmed if BM wrongly admitted to the second stage – therefore A 'eligible person'.

Ground 2 (d): R relied on r. 55(1) of the Regulations, Art 47 of the Public Contracts Directive and *Holst Italia Case C-176/98* [1999] ECR I-8607. Court noted para. 10.1 stated "your turnover" hence ITT not in clear and precise terms to enable uniform construction on the reasonably well informed and diligent tenderer test – no provision in Appendix B to third parties or sub-contractors but not necessary for Court to answer this Q as R in breach of obligations of equal treatment and transparency in formulation of the ITT.

Possible future Art 267 TFEU reference: r.55 of Regulations (Art. 47(2) of the directive) does not expressly permit an economic operator to rely on t/o of third parties to prove its financial standing.

*Obiter*: Not clear that *Holst* covers the situation of a prime contractor and sub-contractors combined t/o as in *Holst* the companies had shareholding links but nothing in directive or in regulations to preclude an awarding authority to include for such in a properly worded ITT as would meet the reasonably well-informed and diligent tenderer test.

Remedy: Wide discretion of court to set aside, affirm, vary or quash the competition or award. Court to be guided by *Unibet (London) Ltd.* Case C-432/05 [2007] ECR I-2271 – must be proportionate – Order given to quash the procurement procedure rather than the exclusion decision as, to ensure equal treatment, A entitled to an evaluation of its tender by a fresh evaluation team; A had legitimate concern as to attitude to it by the evaluation team. *Trelleborg v Commission* T-147/09 & T-148/09, 17<sup>th</sup> May 2013, considered: person relying on principle of equal treatment may not rely on an unlawful act committed in favour of a third party.

**Geodesign Barriers v The Environment Agency** [2015] EWHC 1121 (TCC) (Coulson J.) Procurement – 2-stage process – alleged winning bid did not comply with mandatory spec. (first stage pass/fail) – C’s hurdle to overcome as in *Group M v Cabinet Office* [2014] EWHC 3659 (TCC) - early specific disclosure in procurement disputes since *Alstom Transport v Eurostar* [2010] EWHC B32 (Ch) (Vos J.). Principles in *Roche Diagnostics v Mid Yorkshire Hospitals* [2013] EWHC 933 (Coulson J.) – flows from short time period allowed in Regulations – starts from knowledge of the infringement – *Mears v Leeds City* [2011] EWHC 40 (QB). Tender evaluation a “rag-bag”; oral, informal and ad hoc; absence of contemporaneous tender evaluation report. E-mails between evaluators ordered to be disclosed; bid documents of other bidders disclosable when defence put those bids at issue otherwise they would be irrelevant to C’s claim – specific disclosure of those bids ordered to C’s ‘confidentiality ring’ but not identity of the other bidders. Rationale for disclosure to ‘confidentiality ring’ at para. 42: if claimant sees the early disclosure of the other bids he ought to be quickly able to say if they are/not compliant as could end the litigation. Confidentiality ring – what is and its composition, para. 51. Expert evidence rarely admissible in a procurement dispute: *BY Development v Covent Garden Market Authority* [2012] EWHC 2546 (TCC).

**Group M UK Ltd v Cabinet Office** [2014] EWHC 3659 (TCC) (Akenhead J.). Remedies Directive 2007/66/EC - Proposed single supplier framework agreement. Losing tenderer by issuing proceedings within 30 days of its failure to win secured a suspension of the award under UK Public Contracts Regulations. Application by R to lift the suspension and award contract to Carat. ITT two-stage process; first was “quality evaluation” required 70% marks to go through to second pricing stage. Decision to award on price alone by means of a ‘media pricing grid’ devised by a Crown agency consultant explained to the bidders and no Qs raised. Four bidders submitted sustainable pricing; Carat’s was lowest. Group M advised and issued proceedings claiming breaches of ITT and that Carat’s pricing had to be unsustainable as Group M had greater market share in UK and could get lower base costs from media owners. Group M sought damages incl wasted tendering costs and claimed approach of courts in using *American Cyanamid* principles to remove the statutory suspension, repeatedly used by TCC, was wrong having regard to 2007/66/EC at Art. 2(3) (“...Member States shall ensure that a contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review.”). Examples in TCC: *Excel Europe v University Hospitals Coventry* [2010] EWHC 3332 (TCC), *Alstom Transport v Eurostar* [2010] EWHC 2747 (Ch), *Covanta Energy v Merseyside* [2013] EWHC 292 (TCC) and *NATS (Services) v Gatwick* [2014] EWHC 3133 (TCC).

In *NATS*, Ramsey J. held *American Cyanamid* principles was the appropriate approach and was consistent with Art. 2(4) of Remedies Directive as did Court of Appeal in *Letting Intl v Newham L.B.* [2007] Civ 1522 although amended Remedies Directive not then law. Bowsher QC for Group M argued that Remedies Directive does not provide for whether damages are an adequate remedy and does not permit court to require undertaking in damages for continuance of an automatic suspension, citing *OCS v Dublin Airport Authority* [2014] IEHC 306 and an article by the Irish judge in the EU general court ('Damages in Public Procurement – An Illusory Remedy').

Held: *American Cyanamid* principles not excluded by the amended Remedies Directive; Ramsey J. in *NATS* adopted. Court added it could not be intention that Remedies Directive could disrupt public procurements with clearly weak or unsustainable challenges and the serious issue test is a pragmatic approach to weed out weak cases. Court considered Art. 2(4) was clear that review procedures do not have to be automatic and that use of word "may" in Art. 2(5) gave court a discretion which was not inconsistent with *American Cyanamid* at first stage (whether serious issue to be tried) and at balance of convenience stage. Art 2 (5) allows public interest to be taken into account of which part is the securing of fair and transparent public procurement processes. "...all interests likely to be harmed" in the Directive equates to the balance of convenience test. Serious issue to be tried. Whether or not – If it depends on materially different facts and broadly credible evidence on both sides, conclusion will be a serious issue remains - as *Pearson Driving Assessments v Minister for the Cabinet* [2014] EWHC 2741 (TCC) and *NP Aerospace v Min for Defence* [2014] EWHC 2741 (TCC). Court could not say it was demonstrated that Carat's prices were unsustainable. On alternative argument that Carat's tender was "abnormally low" within the meaning of the Public Contracts Regulations, the argument suffered from the same flaws as the sustainability argument and the Regulations did not impose on an awarding authority obligations to determine if an offer is "abnormally low" or to reject same but to give a bidder an opportunity to respond: *Fratelli* [1989] ECR 1-1839, *Impresa Lombardini* [2001] ECR 1-9233 TQ3 *Travel Solutions Belgium* [2005] II-2627 and *SAG ELV Slovensko* [2012] 2 CMLR 36 all in point. Court found no serious issue to be tried.

Adequacy of damages. Damages an adequate remedy for Group M but not a cross-undertaking for the Cabinet Office as important media campaigns would not be able to take place, incl the "purdah" before the 2015 general election. Result: Suspension lifted.

**Solent NHS Trust v Hampshire Co. Co.** [2015] EHC 457 (TCC) (Akenhead J.) Public procurement – the public interest factor – application to lift statutory suspension for award of replacement contract to another – alleged breach of Public Contracts Regulations 2006 by Hampshire. *American Cyanamid* principles, development of – "whether it is just in all the circumstances claimant should be confined to his remedy in damages" (per Jackson LJ in *Iraci v Fallon* [2011] EWCA Civ 668 at Para 42) – serious issue to be tried about the marking on MEAT criteria; provided marking is not irrational, Court should not find a breach. On balance of convenience, damages an inadequate remedy where potential loss of reputation as in *DWF LLP v Sec of State for Business Innovation and Skills* [2014] EWCA Civ 900 at 52 and *Alston Transport v Eurostar Intl.* [2010] EWHC 2747 (Ch). Court concerned re impact on patients if replacement contract delayed – the public interest– Court should take into account compliance with the Regulations but must also consider spectrum of factors as to where balance of convenience lies – lifting of the suspension provided best opportunity for patients' interests. Court considered damages an adequate remedy w.r.t. *Newcastle upon Tyne NHS Foundation Trust v Newcastle Primary Care Trust* [2012] EWHC 2093 (QB) at 43 and *Glasgow Rent Deposit & Support v Glasgow City Council* [2012] SCOH 199 at 21.