

# Judicial Communications Office

Monday 26 September 2011

## **COURT OF APPEAL DISMISSES APPEAL BY DEPARTMENT OF EDUCATION IN PROCUREMENT CASE**

### Summary of Judgment

The Court of Appeal today dismissed an appeal by the Department of Education against a decision to set aside a Framework Agreement which had led to a consortium of building contractors, headed by Henry Brothers (Magherafelt) Ltd, not being able to tender for individual government works contracts for the building of schools under the NI Schools Modernisation Programme (NISMP).

On 13 March 2007 the Central Procurement Division, acting as agents for the Department, published a contract notice inviting contractor-led teams to apply for appointment to the Framework Agreement for the design and construction, or construction only, of schools or other projects as might be required under the NISMP. A Framework Agreement allows the preliminary work in procurement to be carried out in one exercise which then provides the contracting authority with a pool of contractors who have been assessed as the best qualified to carry out individual contracts that are put out to tender. The notice stated that the Framework Agreement in this tender exercise would last for a period of 48 months and that the estimated total value of projects to be awarded under the Framework was £550million to £650 million.

Henry Brothers (Magherafelt) Ltd formed a consortium with other contractors (the consortium is referred to in this summary as “the respondents”) for the purpose of submitting a tender for inclusion in the Framework Agreement. A 2 stage process was used for those seeking to apply for the Framework Agreement. Firstly, there was a pre-qualification questionnaire stage which all 12 applicant contractors passed. This was followed by an invitation to tender (ITT) stage. The ITT documents consisted of four volumes and 11 ITT Clarification Notes. ITT Clarification Note 4 indicated that tenders would be evaluated in accordance with the weighting specified in the ITT documents namely 80% qualitative and 20% commercial. This Note confirmed that the commercial section would be based on a submission of direct fee percentages, sub-contract fee percentages and indicative fee percentages for design services.

On 17 October 2007 the respondents were informed that they had been unsuccessful. A debriefing meeting was held with the Department and further correspondence ensued. On 9 November 2007 the respondents wrote to the Department notifying of their intention to institute High Court proceedings.

#### **High Court Proceedings**

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The trial judge, Lord Justice Coghlin, noted that the use of fee percentages was intended to address the historic problems with lowest price tenders which introduced a low bid/high claim culture. He was told that fee percentages were the key financial differentiators between contractors and were a very clear indication of the most economically advantageous offer. Lord Justice Coghlin concluded that the Department had used fee percentages as a mechanism for competitively assessing price, the underlying assumption being that Defined Costs would be the same for each contractor. The judge said that that assumption was incorrect and amounted to a manifest error. Fee percentages could give misleading results in terms of competitiveness depending on the manner in which a contractor allocated his management staff. Lord Justice Coghlin found for Henry Bros on the issue of liability and ordered that the Framework Agreement be set aside as a remedy for the breach.

## **Appeal**

The Department appealed against this decision. It submitted that the trial judge erred in finding that price was a mandatory criterion in the selection process for the most advantageous tender, that the plaintiffs' claim was statute barred and that the judge did not have the power to set aside the Framework Agreement.

## **Liability**

The Court of Appeal dealt firstly with the trial judge's conclusions on liability. The Lord Chief Justice, delivering the judgment of the Court, rejected the Department's submission that the trial judge was in error in his determination of the liability issue. He said that the trial judge found that the Department had opted to employ a criterion related to price at the primary competition stage. That mechanism was the use of fee percentages on the basis that since costs are the same or broadly the same between contractors the fee percentage would be a very clear indication of the most economically advantageous offer. The trial judge concluded that the advice to the Department to use this criterion was erroneous and that the Department was in fact basing its decision making on an unreliable indicator. The Court of Appeal agreed with the trial judge that the Department was in error in considering that the use of fee percentages was a significant element of the arrangements which would introduce price competition and that this error could be properly described as manifest. The Court of Appeal therefore rejected the submission that the trial judge was in error on the liability issue.

## **Time Limits**

The Regulations giving effect to the EU procurement legislation provides that proceedings may not be brought unless they are brought promptly and in any event within 3 months from the date when grounds for bringing the proceedings first arose unless the court considers there is good reason for granting an extension. The Court of Appeal considered that the earliest date on which the Department could argue for an infringement in this case was the date for receipt of the tenders ie 7 August 2007. If that was correct, the time for bringing proceedings expired on 7 November 2007. In those circumstances the claim by the respondents was lodged 5 days late on 12 November 2007. The Court of Appeal, however, noted that the claim was lodged on the last day of the extension of the standstill period which had been extended because of ongoing correspondence and exchange of information

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between the Department and the respondents. The Court of Appeal, therefore, concluded that the plaintiff's claim was not statute barred.

## Remedy

The legislation provides that where a decision by a contracting authority breaches the duty owed to an economic operator a court may order the setting aside of that decision, award damages or do both. The court, however, does not have power to award any remedy other than damages if the contract in relation to which the breach occurred has been entered into. The trial judge held that the legislation distinguished between agreements to enter a Framework Agreement and contracts and that it was therefore open to him to set aside the Framework Agreement.

The Department submitted that the Framework Agreement was in fact a contract which had been entered into and therefore the trial judge did not have the power to set it aside. The Court of Appeal considered the relevant legislation and case law relating to the meaning of the term contract. The Court concluded that the use of the term contract in the legislation was intended to exclude Framework Agreements. It did not consider that there was any basis for failing to give proper effect to the clear differentiation in the legislation between contracts and Framework Agreements. The Court of Appeal agreed with the trial judge that it was open to him to set aside the Framework Agreement.

## Conclusion

The Court of Appeal dismissed the appeal. It also refused an application by the Department to refer the case to the European Court.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website ([www.courtsni.gov.uk](http://www.courtsni.gov.uk)).

**ENDS**

If you have any further enquiries about this or other court related matters please contact:

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