This article first appeared in *Construction Law International*, 2 June 2009

NORTHERN IRELAND COURT BRINGS DOWN FRAMEWORK AGREEMENT

By Jon Olson-Welsh and Richard Craven

If you thought public procurement was a little dull and lacked drama, think again. The EU procurement regulations have teeth – and they bite. Ask Rochdale Metropolitan Borough Council. Its £250 million town centre redevelopment scheme was recently re-tendered because of a challenge to its appointment of a preferred bidder. Or ask the Northern Ireland Department of Finance and Personnel, whose plight we consider in this article. Its £800 million framework agreement was set aside at the end of October 2008 by the Northern Ireland High Court. What makes these events all the more significant is that the EU Commission estimates that public procurement accounts for approximately 16 per cent of the EU's overall GDP.

Our drama begins with episode three of *McLaughlin & Harvey Limited v Department of Finance & Personnel*. In the first episode the High Court in Northern Ireland had refused to grant an injunction to restrain the Department from awarding the £800 million framework agreement. Episode two saw the judge decide that the Department of Finance & Personnel was in breach of its duty under Regulation 47(1) of the Public Contracts Regulation 2006 because it had not disclosed, to the contractors seeking to be included in a framework agreement, 39 elements or sub-criteria which its panel had subsequently taken into account when making their assessment. Nor had it disclosed the weightings which the panel attached to those elements or sub-criteria. As the parties could not agree on a remedy for McLaughlin, they had to ask the High Court to decide what that should be. Hence the need for a sequel.

Following consideration of the breach of duty under Regulation 47(1), the court took the view that the matters complained of entitled McLaughlin to some substantive remedy. McLaughlin had come sixth in the competition, within one per cent of the contractors placed fourth and fifth, so that even a modest improvement in its marking could have materially affected the outcome of the tender process.

Under Regulation 47(9), however, the court cannot order a remedy, other than damages, in respect of certain breaches of duty if the 'contract' in relation to which a breach has occurred has been entered into. The framework agreement in question had been entered into some months previously (although no contracts had been let under it), but did the reference to 'contract' in the Regulations apply to the framework agreement?

After reviewing the relevant wording of Directive 2004/18/EC and the Public Contracts Regulations 2006, the judge said it seemed clear that the word 'contract' meant a specific contract and was not intended to cover a framework agreement.

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Mr Justice Deeny stated that in relation to Regulation 47(9) 'the contention of the Department that is extends to a Framework Agreement flies in the face of the ordinary meaning of the terms used'.

The restriction in Regulation 47(9) would, however, extend to a specific contract under a framework agreement.

McLaughlin's first preferred remedy was that it should be added as a sixth economic operator to the Framework Agreement. That was the course that the court in England had suggested as a possibility in the *Letting International v London Borough of Newham* case but no authority was found in McLaughlin for that course and the judge in McLaughlin thought that adding McLaughlin as a sixth operator would dilute the work for all the five current parties under the framework agreement and would therefore introduce some unfairness to the best of the tenderers.

The second remedy sought by McLaughlin was to set aside the decision to enter into the framework agreement with the original five parties, which is what the judge decided to do. That, he said, would, in all likelihood lead to a re-run of the framework agreement competition, in the more transparent way indicated by the court, and would be in the public interest to secure the tenderers who would be most economically advantageous to the public.

The Department had said that the appropriate remedy was damages but the court considered that assessment of the loss of profits due to the breach of duty might well have to wait for some time, perhaps years, to allow the court to make a reasonable estimate of the profits which the successful economic operators would enjoy from the framework agreement. That approach would be necessary, said the judge, and it was clearly not ideal. The court would have to value the percentage of any profits which the plaintiff should recover (ie, the value of its loss of chance) but reliably fixing that would take time, face difficulties and be costly. In the judge's view, damages were clearly an inferior remedy to that of setting aside the framework agreement.

There were also public policy reasons for his decision. There was a question over whether the best of five economic operators had been selected under the framework agreement:

"Given that some £800m of works are said by the Department to be at stake here it must be in the public interest to try and ensure that the best five, whether or not that includes the Plaintiff, are in fact selected. Secondly, it cannot be in the public interest for the public to pay for these new buildings and to pay the Plaintiff again a percentage of the profits of the contractor who actually builds the new buildings. That is in the most literal sense of the word a waste of money".

The judge therefore ordered the Department's decision to enter into the framework agreement, and the agreement of April 2008 acting on that decision, to be set aside. It was a matter for the Department as to whether it wished to persist with a framework agreement covering the works in the competition conducted by it in 2007 but, if it did, it should only be open to the original 11 tenderers and the process should be determined by a different panel.

It is, on any view, a dramatic decision which can only encourage unsuccessful tenderers to look for flaws in the tendering process and increase the pressure on contracting authorities to make sure that they are not the next authority to be sent back to square one.