THE HIGH COURT

COMMERCIAL

[2023] IEHC 63

Record No. 2021/408JR

BETWEEN

SERE HOLDING LIMTITED

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

AND

IAS MEDICAL LIMITED

NOTICE PARTY

JUDGMENT OF Mr. Justice Twomey delivered on the 10th day of February, 2023

INTRODUCTION

1. The applicant in this judicial review ("Sere") was placed in eighth (and last) place in a tender process conducted by the respondent (the "HSE") for emergency air ambulance services. The tender process was won by the notice party ("IAS") and the HSE awarded IAS the contract for emergency air ambulance services on the 26th April, 2021. The HES estimates the contract is worth €9.5 million over four years, which it says is a considerable saving to the taxpayer on the previous contract.

2. Sere is challenging the award of the contract on the grounds that IAS did not satisfy the selection criteria for entry into the tender competition, i.e. the requirement that each tenderer must have a turnover of €4 million, for the previous three years, in respect of the services for which it was tendering.

3. The key issue in dispute between the parties is what is included in the 'tender services' under the terms of the Request for Tender and supporting documentation. For the reasons set out in this judgment, this Court agrees with the HSE's, rather than Sere's, interpretation of what is included in that term and therefore concludes that IAS did in fact satisfy the selection criteria. This judgment also considers:

- whether, having decided the main issue in the case (i.e. *did IAS satisfy* the selection criteria), it is a good use of court resources to deliver a reserved judgment on a second issue (i.e. did the HSE *verify that IAS satisfied* the selection criteria), in circumstances where the HSE suggests that this would be an academic exercise and therefore a waste of court time.
- whether there is an onus on State agencies to, at least, *consider* mediation, bearing in mind that a State agency does not have the financial incentive of most other litigants to avoid the very considerable cost of High Court litigation, since no individual in a State agency is ever out of pocket if it wins or loses in the High Court.

BACKGROUND

4. Sere claims that IAS was admitted to the tender process even though it did not satisfy the requirement to have a turnover of €4 million relating to the tender services (the 'tender services') in each of the previous three years. Based on Sere's definition of those tender services, it says IAS failed to meet this requirement and should not have been awarded the contract for these 'emergency air ambulance services'. Accordingly, Sere seeks, amongst other things, an order setting aside the award of the contract to IAS (under Regulation 8 and/or 9 of

European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (the "Remedies Regulations") S.I. No. 130 of 2010) and a declaration that the decision to award the contract to IAS is invalid.

5. The value of the contract awarded to IAS is estimated by the HSE to be €9.5 million over *four years* (see the Amended Statement of Opposition of the HSE, para. 20). The HSE has submitted that the contract contains '*very considerable savings for the State compared to the prior contract'*, which savings appear to amount to *circa* €4.5 million over a four-year period. This is based on Sere's evidence that the value of the previous contract was €7 million over *two years* - see Exhibit/Tab 16 of the affidavit dated 15th July, 2021 of Mr. Stanley Edgar ("Mr. Edgar").

6. The key issue in this case, when considering if this turnover requirement was met, is whether the tender services:

- are *restricted* to a transfer involving *a patient* (with a medical team in a specially equipped aircraft), as claimed by Sere, or,
- *include* the transfer by an airplane of (i) *organs* and of (ii) *organ retrieval teams*, in addition to the transfer of patients, as claimed by the HSE.

Based on its more restrictive interpretation, Sere claims that any turnover which IAS had in relation to the transfer of organs *and* the transport of organ retrieval teams, could *not* be used to enable IAS to satisfy the pre-condition that it have a €4 million turnover.

7. It is important to bear in mind that the term 'emergency air ambulance services' is not defined in the Request for Tender, published by the HSE on 25th October, 2020 (the "RFT"), although this term is used by the parties to refer to the tender services. The key issue therefore is not what the term 'emergency air ambulance services' means, but rather what constitutes the tender services under the terms of the RFT and relevant supporting documentation, i.e. the Specification Response Document dated 25th October, 2020 (the "SRD").

8. In sworn evidence on behalf of Sere, Mr. Edgar claimed that:

> "There are a number of obvious elements to an emergency air ambulance service. These include that there must be a sick or injured patient requiring or just having received medical care or treatment; the journey must form part of the journey from or to a place of medical treatment; and the aircraft must be specially designed or adapted to carry a sick or injured patient.
>
> It is simply common sense that **one cannot have an emergency air ambulance service in the absence of a patient, medical personnel and a properly equipped aircraft**." (Emphasis added)

9. Thus, Sere's case rests on its claim that the tender services were services which had three necessary elements, namely a patient, a medical team and a properly equipped aircraft. The corollary of Sere's interpretation is that any services which did not contain each of these three elements were not included in the tender.

10. Thus, if Sere had won the tender, the logic of Sere's interpretation is that it would *not* have been obliged under the resulting contract to transfer organs *or* transport organ retrieval teams. It follows that if Sere, as the winning tenderer, had nonetheless agreed to transfer organs or transport an organ retrieval team, it would have been entitled to charge market rates to the HSE for these transfers, since those transfers would not have been included in the tender price.

11. This issue of what is involved in the services under the tender is therefore key to the dispute between the parties. In this regard, there is no dispute between the parties that if the tender services do *not* include the transfer of organs and the transport of organ retrieval teams, then IAS did *not* have the required turnover of €4 million (from patient transfers alone) to enter the competition.

12. On the other hand, it is also agreed between the parties that if the tender services *did* include the transfer of organs and the transport of organ retrieval teams, then IAS *did* have sufficient turnover to meet the selection criteria and so the award of the contract could not be invalidated on this ground. Accordingly, practically everything turns on whether the tender services included *or* excluded the transfer of organs and the transport of organ retrieval teams.

THE RELEVANT LAW

13. There was agreement between the parties regarding the relevant principles to apply from the case law opened to the Court, which included *Gaswise v. Dublin City Council* [2014] 3 I.R. 1, *Word Perfect Translation Services Ltd. v. The Minister for Public Expenditure and Reform* [2018] IECA 156, [2019] IESC 38, [2022] IECA 131, *Sanofi Aventis Ireland Ltd. v. HSE* [2018] IEHC 566 and *Transcore v. The National Roads Authority* [2018] IEHC 569.

14. On the basis of this case law, it is clear that the task of this Court is not to approach the interpretation of the documentation from the perspective of a lawyer interpreting legislation. Instead this Court must interpret the documentation in the way in which all '*reasonably well informed and normally diligent tenderer[s]* [a "RWIND tenderer"] *who would be responding'* to the RFT would '*uniformly'* interpret that documentation– see paras. 23 and 26 of *Gaswise.*

15. In addition, it is clear from the case law that this Court does not interpret what is included in the tender services on the basis of one sentence or one paragraph alone. Rather this Court considers the terms of the documentation as a whole (as noted by Barniville J. at para. 191 of *Transcore*). While that case dealt with the award criteria in the tender documentation, rather than the selection criteria, as in this case, this Court can see no reason for the approach to be different, when a RWIND tenderer is interpreting award criteria, from when she is interpreting selection criteria. As noted by Barniville J.:

"The court must consider the context in which the words being interpreted appear and must consider the criteria as a whole and within their wider setting. Obviously, since context is crucial, **the court should not focus exclusively on some words to the exclusion of others** but should consider the words in the criteria being interpreted in their wider context. Finally, the court must focus on the "industry" concerned in which the professionals and persons involved are not lawyers but participants in that industry." (Emphasis Added)

16. Finally in this regard, there was no dispute that, since the onus of proof lies upon the party making the allegations, the onus is on Sere to convince this Court that RWIND tenderers would uniformly conclude that the services to be provided under the tender in this case *do not* include the transport of organ retrieval teams and the transfer of organs.

Did the tender services include the transport of organ retrieval teams?

17. Before considering the terms of the RFT and the SRD, it is to be noted that Sere acknowledged that external documentation, e.g. from textbooks and documents on emergency air ambulance services, which were opened to the Court, are of limited assistance to this Court in the discharge of its task. This is because Sere accepts that some of that documentation supports its view that organs and organ retrieval teams are included in emergency air ambulance services, while some supports the contrary view. Thus, it could not be said that there is an agreed definition of emergency air ambulance services in the industry.

18. More importantly, since there is no definition of 'emergency air ambulance services' in the RFT itself, the key issue is not whether a definition exists of this term in textbooks or elsewhere, but whether the tender services, whatever they are called, include the transfer of organs and the transport of organ retrieval teams. In this regard, this Court is in agreement with

counsel for Sere (in its closing submissions) that this case is not about a definition, it is about a service:

> "The RWIND tenderer would have looked at the RFT, seen what it required in terms of the specific service and, therefore, would have known what the specific service turnover requirement was about." (Transcript Day 3, p. 118)

19. Furthermore, it is clear that both parties accept that the key documentation necessary for this Court to reach its conclusion is the tender documentation, being the RFT and the clarification of it provided by the SRD.

20. For this reason, the main focus of the parties at the hearing was on the wording of the RFT and the SRD. Counsel for Sere quoted from the first line of the RFT which states:

> "The HSE requires an Emergency Air Ambulance Service to transfer patients …"

and then summarised Sere's case as '*so, first line, that's our case*.'

21. However, as noted by Barniville J. when interpreting a RFT, this Court cannot focus on some words to the exclusion of others. While undoubtedly the transfer of patients, as stated in the first line of the RFT, is an important aspect of the tender services, it would not, in this Court's view, be interpreted by any RWIND tenderers as being the end of their obligations when it comes to the tender services.

22. Taking its own approach to interpreting the RFT and in particular its reliance on the first line thereof, Sere concluded that there are three requirements for the tender services, namely a patient, a medical team and a properly equipped aircraft.

23. However, this interpretation, of the tender services by Sere, ignores terms which are expressly contained in the RFT and in the SRD, to which RWIND tenderers would have regard, in uniformly interpreting the tender services. In particular, RWIND tenderers would see what is stated on the rest of the first page of the RFT, beyond the first line:

"The HSE requires an Emergency Air Ambulance Service to transfer patients (both inpatients and at home based patients) between Ireland and other countries mainly the UK. Emergency Air Ambulance Services and Inter hospital air ambulance transfers both inside and outside Ireland are in general provided by the Irish Air Corps and the Irish Coast Guard Services under existing arrangements. However, due to specific constraints both the Irish Air Corps and the Irish Coast Guard Service are unable to provide Emergency Air Ambulance Services each night between the hours of 7pm and 7:30 am (7pm to 8:30am June, July and August).

The requirement is the transfer, via air ambulance, of patients from Ireland to another jurisdiction, often in emergency situations. The entire provision of the service would be the remit of the service provider i.e. staffing, equipment, etc.

Scope – the provider(s) would provide the air ambulance transport to/from identified airport in Ireland to an airport in another jurisdiction mainly the UK.

This tender process is being undertaken to establish a single provider of Emergency Air Ambulance Services from 7pm to 7:30 am daily (7pm to 8:30am June, July and August).

The service is required from 1st June 2021 for a period of 24 months with the option to extend for a further 2 x 12 months or period thereof at the discretion of the HSE. The aircraft ***may*** **also be required from time to time on a similar emergency basis to transport organ retrieval teams** from one hospital to another." (Emphasis added)

24. Thus, it is to be noted therefore that, as well as providing for the transfer of patients, the RFT expressly provides that a successful tenderer may be '*required'* to transport organ retrieval teams. However, that is not the only reference to the transport of organ retrieval teams. This is because on p. 3 of the RFT it is stated:

"SPECIFICATION OF REQUIREMENT

1.1 HSE Requirements

The purpose of this competition is to identify a suitable provider to provide emergency air ambulance transfers between Ireland and other countries mainly the UK between the hours of 7pm to 7:30am nightly (7pm to 8:30am June, July and August).

The **aircraft may also be required from time to time on a similar emergency basis to transport organ retrieval teams** from one hospital to another.

The provider who provides the most economically advantageous tender for the provision of the **core service** (7pm to 7:30am, 7pm to 8:30am June, July and August) will be awarded the tender subject to the provider's ability to provide same within a specified time frame and ability to demonstrate capability of providing the service." (Emphasis added)

25. In addition, it will be noted that there is second explicit reference to the '*requirement'* to transport organ retrieval teams in a paragraph which is headed '*HSE Requirements*'. Yet, based on Sere's interpretation of the tender services, the transport of organ retrieval teams would not, in fact, be a '*requirement'* of the HSE, despite this explicit heading and language.

26. To support its interpretation, Sere sought to highlight the reference to *'core service'* in the third paragraph of p. 3 of the RFT above. Thus, Sere's logic appears to be that the transfer of patients is part of the 'core' service (as it interprets the term 'core service'). This, it says, means that the transport of organ retrieval teams is therefore not part of the core service. On this basis, Sere claims that it follows that the transport of organ retrieval teams (and organs) must not form *any part* of the tender services.

27. However, this does not appear to this Court to be the uniform interpretation which RWIND tenderers would take. Firstly, as noted hereunder, in the SRD, the transport of organ

retrieval teams (and organ retrieval) are listed in a document headed 'Core Requirement', which therefore militates against the interpretation that the transfer of patients is the only 'core' service. Secondly, even if the transfer of patients were to be regarded as part of the core service, it seems to this Court that RWIND tenderers would take the view that if the transfer of patients is part of the core service, the very use of the term '*core* service' implies that there are services which are not core, but which, by their very nature, as 'non-core services', must still be part of the services. Furthermore, when considering what those non-core services are, a RWIND tenderer would not have to look far. This is because, in addition to the fifth paragraph on p. 1 of the RFT (set out above), the second paragraph on p. 3 of the RFT (set out above) expressly refers to those *allegedly* non-core services (i.e. the transport of organ retrieval teams).

28. Therefore, on the basis of p. 1 and p. 3 of the RFT alone, RWIND tenderers would know that they may be required to transport organ retrieval teams. It would seem to this Court obvious to RWIND tenderers that this *'requirement'* would be understood to be a legal obligation (under the resulting contract) to transport organ retrieval teams which would apply if and when the contracting authority requests the transport of organ retrieval teams. If the HSE does not request any transport, then the winning tenderer is obviously not obliged to do so. However, if the HSE does request such transport, the winning tenderer must provide it under the contract (since it is *'required'* to do so) and is not entitled to refuse to do so or to charge over and above the tender price for so doing. This Court cannot see how RWIND tenderers would reach any other conclusion.

29. For this reason, this Court makes a finding that all RWIND tenderers would uniformly interpret the RFT documentation as including the transport of organ retrieval teams.

The turnover requirement

30. Going through the RFT documentation in chronological order, it is appropriate at this juncture to refer to the next relevant part of the RFT, which is p. 4, since this contains the

section criteria. In particular, this section contains the turnover requirement which has to be satisfied by a tenderer:

Economic and Financial Standing	Overall Turnover	*Minimum of €4m per annum in each of the last three years*
	Turnover Relating to Specific Product(s)/Services(s)	***Minimum of €4m per annum in each of the last three years***
	Professional Statement	*Demonstrate sufficient financial capacity to undertake this contract*

(Emphasis added)

It is this part of the RTF which Sere claims that IAS has failed to satisfy by not having a turnover of €4 million relating to the transfer of patients (based on its interpretation of the tender services).

The Specification Response Document

31. The next document to consider is the SRD, which was sent out by the HSE to all tenderers. As such, it is clearly a document to which RWIND tenderers would have regard, in determining what constituted the tender services. At p. 1, it states:

"Emergency Air Ambulance Service for the Health Service Executive (HSE) 7pm to 7:30am (7pm to 8:30 am June, July and August) – **Emergency Service/ Core Requirement**

Introduction

In the HSE an emergency air ambulance transfer is defined as follows:

'Definition of Priority 1 Transfer:

The transfer by air from Ireland to another country within 8 hours (from time of notification to NEOC to time of arrival at receiving facility) of a patient requiring emergent medical or surgical treatment, without which the patient's life or health is significantly endangered.'

However, in submitting a tender each tenderer should be cognisant that 8 hours is the outside time limit for paediatric liver transplant patients and in fact the timeline which is required is transfer from time of call to time of patient arriving at the UK facility is 4 hours. Paediatric heart transplant patients require to present at the UK hospital within 4 hours of the initial call from the transplant centre including ground ambulance times on both sides of the air ambulance journey. Therefore the timeline to which the service provider is required to provide the service is four hours from time of receiving of the call (activation time) to the patient arriving at a specified hospital in the UK (completion time). This timeline is not negotiable.

By definition Priority 1 transfers are emergencies. In terms of complexity there will be 3 broad categories:

1. **Walking, home based non-complex**
2. Ward based low-complexity
3. Critically ill, HDU/PICU based complex.

Groups 2 and 3 will require HSE teams and HSE equipment. Group 1 is essentially patient escort." (Emphasis added)

32. What is relevant to note here is that Sere's interpretation of the tender services, which it says RWIND tenderers would reach, is in fact inconsistent with the plain wording of the description of the tender services contained in this document.

33. This is because the first group of transfers, Group One, is described as '*walking, home based non-complex*'. Furthermore, it is stated that, unlike Groups Two and Three, Group One *will not require medical teams or medical equipment*, as it is simply *patient escort*. Yet Sere's claim before this Court, as noted above, is based on an interpretation of the tender services which requires three elements in all cases, namely a patient, *medical personnel* and a *properly equipped aircraft*.

34. Accordingly, on this basis, this Court can conclude that Sere's interpretation of the tender services runs contrary to the terms of the documentation, since the Group One patients (as merely involving patient escort) do not in fact require medical personnel. This Court concludes that a RWIND tenderer would on any interpretation of this language conclude that medical personnel were not required for this category of tender services.

35. This Court makes a finding therefore that the tender services do not require, in every case, medical personnel, as claimed by Sere.

Did the tender services include the transport of organs?

36. This still leaves open the question of whether the tender services include the transport of organs (as well as the transport of an organ retrieval team, which as noted above, is included in the RWIND definition).

37. As regard the transport of organs, this is dealt with in the last paragraph of p. 2 of the SRD which states:

> "Please note that the air craft may also be **required** from time to time on a similar emergency basis to **transport organ retrieval teams** from one hospital to another. The **requirement to facilitate organ retrieval** is also considered a Priority 1 mission but patient priority 1 missions take precedence over **organ retrieval missions**". (Emphasis Added)

38. Before considering the transport of organs, it is to be noted that this paragraph contains the third reference in the tender documentation (by which is meant the RFT and the SRD) to '*organ retrieval teams'*. It is also the third reference in the tender documentation to the fact that a tenderer may be required to transport organ retrieval teams (and as previously noted, the RWIND tenderers would interpret this 'requirement' as a legal obligation if requested to so do, by the HSE). This further reference to the requirement to transport organ retrieval teams therefore supports this Court's earlier conclusion that all RWIND tenderers would uniformly interpret the tender documentation as meaning that the tender services include the transport of organ retrieval teams.

39. As regards, the transport of organs, it is to be noted that the language in this paragraph of the SRD regarding *'organ retrieval'* is similar to the language which is used in the RFT regarding '*organ retrieval teams'*, i.e. the expression *'requirement'* to facilitate *'organ retrieval'* is used in the SRD and this echoes the use of the term *'required'* to transport *'organ retrieval teams'* in the RFT. It would seem to this Court, obvious to RWIND tenderers that this '*requirement to facilitate organ retrieval'* would apply in the same circumstances as the requirement to transport organ retrieval teams (discussed above), i.e. a legal obligation on the successful tenderer, if and when requested by the HSE.

40. In addition, it is to be noted that there is one reference to the transport of organ retrieval teams and three separate references to '*organ retrieval*' in this paragraph, which deals with what is *'required'* of the *'air craft'*. In addition, these references are on the second page of the SRD, a document which is headed '*Emergency Services/Core Requirement*' i.e. the core requirement of the tender services. If anything, therefore, this indicates to the RWIND tenderers that the transport of organs (and the transport of organ retrieval teams) is part of the core service, contrary to Sere's claim that the core service is just the transfer of patients.

41. Furthermore, these are not simply passing references to '*organ retrieval*' since the reference to '*organ retrieval*' has a clear purpose, namely to ensure that the winning tenderer is aware that there is a requirement to facilitate '*organ retrieval missions'*. This Court believes that the RWIND tenderers would interpret '*organ retrieval missions'* as meaning to retrieve an organ and implicit in the *retrieval* of an organ, must be the *transfer* of that organ.

42. More significantly, the foregoing paragraph on p. 2 of the SRD then takes the trouble of clarifying what is to happen if the winning tenderer has two conflicting obligations, one to transport organs and another to transfer patients, both as Priority 1 missions. The paragraph makes clear that, without diluting the obligation of the tenderer to transport organs, it must give priority to the transfer of patients.

43. In all these circumstances, it is difficult for this Court to see how all RWIND tenderers could not uniformly interpret the term '*requirement to facilitate organ retrieval*' as anything other than meaning that the tenderer will be legally required under the terms of the contract, resulting from the tender, to transport organs, if the HSE requests it. In particular, it is difficult for this Court to see how RWIND tenderers could uniformly conclude, on the basis of the reference to the priority to be given to patient transfers over organ transfers, that organ transfers are *not* part of the service *at all*. After all, why would the SRD be clarifying which of these transfers is to get priority, if one transfer was not part of the tender services at all?

44. Nonetheless, as previously noted, Sere claims that the core service, as it sees it, is the service referenced in the first line of the RFT. This first line refers only (and so, Sere claims it is limited) to the transfer of 'patients' (and so, Sere claims, it does not include the transport of organs, or transport of organ retrieval teams). In particular, it claims that the transport of organs (and the transporting of organ retrieval teams) is only ancillary, since the SRD states that this *'may'* only be required ('the air craft *may* also be required'). However, this Court cannot agree with Sere that this is how all RWIND tenderers would interpret this language.

45. Firstly, as already noted, the SRD is headed '*Core Service'* and it makes specific reference to '*transport of organ retrieval teams'* and '*organ retrieval missions'*.

46. Secondly, even if the transfer of patients was to be regarded as the primary or core service, as already noted, it seems to this Court that the language in the tender documentation is intended to reflect a legal entitlement on the part of the HSE to *require* the winning tenderer to transport organs (and transport organ retrieval teams), if the HSE so requests. The wording states that the aircraft 'may' be required for such services, i.e. there is a possibility that the HSE might not make such a request, for example, if it turned out that no such emergencies arose. However, if the HSE does so request, then it is intended that the winning tenderer will be legally obliged to carry out those transfers. This seems clear to this Court.

47. Even if this Court were to agree that the tender documentation makes clear that the transfer of patients is the core service (which this Court does not), this Court cannot see how it makes any difference to Sere's case, whether the transport of organs (and the transport of organ retrieval teams) is part of the core service or an ancillary service. This is because it is still part of the service and all RWIND tenderers would, in this Court's opinion, uniformly interpret the tender documentation in this way, i.e. that the transport of organs (and the transport of organ retrieval teams) is part of the tender service, whether a core service or an ancillary service.

48. Finally, in this regard, RWIND tenderers are only concerned with what they will have to do under the contract and to price that service accordingly. If they read the documentation, it is this Court's view that RWIND tenderers will appreciate that they will be obliged to transport organs (and transport organ retrieval teams), if the HSE requests them to do so. Accordingly, the transport of organs is also part of the 'service', as uniformly interpreted by all RWIND tenderers, in this Court's view.

The impact of this interpretation on the selection criteria

49. When it comes to interpreting the selection criteria, all of this means that a tenderer must have a turnover of €4 million *relating to the specific services*, which now have been interpreted as requiring a tenderer to have a turnover relating to the transfer of patients, the transport of organs and the transport of organ retrieval teams.

50. In this regard, it is not disputed by Sere that, if the tender services include the transport of organs and the transport of organ retrieval teams (as well as the transfer of patients), IAS satisfies the selection criteria in order to be lawfully admitted to the tender.

51. For all these reasons therefore, this Court finds that IAS satisfied the selection criteria. Accordingly, the contract which was awarded by the HSE to IAS, and which was concluded on 26th April, 2021, cannot be invalidated on the basis of Sere's interpretation of the tender services.

The alleged failure of the HSE to *verify* that IAS satisfied the selection criteria

52. While the claim, that IAS *failed to satisfy* the selection criteria, was the key issue in this case, Sere also claimed that the HSE *failed to verify that IAS satisfied* the selection criteria (i.e. it failed to verify that IAS had in fact a turnover of €4 million in respect of the tender services, regardless of how those services were to be interpreted).

53. However, as already noted, at the hearing before this Court, Sere did not dispute that if this Court concluded that the tender services (as interpreted by RWIND tenders uniformly) *included* the transport of organs and the transport of organ retrieval teams, IAS satisfied the selection criteria. This therefore raises the question, now that this Court has reached this conclusion, whether it is a good use of court resources for this Court to go ahead and spend time determining the verification issue.

A good use of court resources for this Court to determine the verification issue?

54. Now that the 'selection criteria issue' has been determined, to determine the 'verification issue', will require this Court to consider the evidence and law that was opened to the Court in relation to the alleged failure by the HSE to verify that IAS satisfied the selection criteria.

55. On the last day of the hearing, counsel for the HSE claimed that, *if* the Court determined that the tender services included the transport of organs and the transport of organ retrieval teams (which it now has), this was the end of the case. In those circumstances, the HSE claimed that whether the HSE *verified* that IAS had a €4 million turnover, from this expanded interpretation of the tender services, was a '*red herring'*, in the sense of being academic.

56. To put it another way, counsel for HSE claimed that, if the Court decides that the correct interpretation of the tender services is the expanded one (not restricted to the transfer of patients), then this raises an eligibility issue for Sere's verification claim, i.e. is Sere eligible to claim a remedy for a failure to verify, if it has suffered no harm? In particular, the HSE asks what *'harm'* can Sere be claiming (in order to justify coming to court for a remedy) arising from this alleged failure on the part of the HSE to *verify* that IAS satisfied the €4 million turnover requirement (if Sere accepts, as it does, as a result of this judgment, that IAS did in fact *satisfy* that requirement)?

57. The HSE relies on Regulation 4 of the Remedies Regulations which states:

> "For the purposes of these Regulations, a person is an eligible person in relation to a reviewable public contract if the person:
>
> (a) has, or has had, an interest in obtaining the reviewable public contract, and
>
> (b) alleges that he or she has been **harmed, or is at risk of being harmed**, by an infringement, in relation to that reviewable public contract, of the law of the

European Communities or the European Union in the field of public procurement, or of a law of the State transposing that law." (Emphasis added)

58. Although, it did not express it in these terms, it appeared to this Court that the HSE was saying that this situation is comparable to Sere claiming that the HSE breached its duty to have a proper look out while driving, even though Sere was not injured. In such a case Sere would not be entitled to a remedy, as it was not injured. Similarly, the HSE appears to be saying that even *if* there was a breach of a verification obligation in this case (which it denies was the case), by the HSE not verifying that the IAS satisfied the turnover requirement, Sere has not been harmed and so is not entitled to any remedy (since it turns out IAS satisfied the turnover requirement in any case).

59. However, at the stage when this matter was put to counsel for Sere, on the last day of the hearing, this Court had not determined that, in effect, IAS satisfied the selection criteria.

60. In those circumstances, counsel for Sere was not prepared to concede that the 'verification issue' would be academic, *if* the Court took the expansive interpretation of the tender services (which it has taken). He made the point that '*Sere was entitled to allege harm*' and so at that stage of the proceedings Sere was an eligible person under the Remedies Regulations. On this basis, counsel for Sere also made the case that it was perfectly appropriate for Sere to have raised the verification issue, since it cannot become '*ineligible halfway through the case'*.

61. However, that is not exactly the point at issue, since while Sere was of course entitled to allege harm, it was being asked (at the completion of the hearing) for its position, *in the future, if* the Court found that IAS satisfied the turnover requirement.

62. This issue is also one which may be of more general application, since it raises an issue about the most appropriate use of court resources for this Court, i.e. should this Court spend time considering if the HSE properly *verified whether IAS satisfied* the selection criteria

(bearing in mind that the effect of this judgment is that *IAS did in fact satisfy* the selection criteria). Or to put it another way, is this the equivalent of this Court going on to consider whether a driver breached a duty of care to a pedestrian, even though the court determined that the pedestrian was not injured?

63. The stage at which this question is now being considered by this Court is after that key issue has been decided (the effect of which is that Sere *accepts that IAS satisfied* the selection criteria).

64. Since Sere answered the question negatively when it was a hypothetical position, the question now is whether it remains Sere's position, now that it is no longer hypothetical. To put the matter another way, now that Sere accepts that IAS satisfied the selection criteria (in light of this Court's judgment), does Sere believe that it would be an efficient use of publicly funded court resources for this Court to prepare a judgment on whether the *HSE verified if* IAS satisfied the selection criteria? In this regard, some time was spent during the three-day hearing in which legal authorities were opened on the law applicable to verification and evidence of the alleged verification/failure to verify was also adduced by both parties.

65. This is a matter of some significance because a requirement on a court to deliver a reserved judgment on a particular issue will impact, not just the parties to the case, but also the availability of that court to hear other cases and so other litigants waiting for their cases to be heard. It will also impact on the time available for the relevant judge to work on judgments in other cases, for the benefit of other litigants.

66. Invariably the time involved, in determining the legal and factual issues in a reserved judgment takes a multiple, and sometimes several multiples, of the time it takes to hear those issues in court. In this case, it took three days of court time to hear the two issues in this case – the 'selection criteria issue' and the 'verification issue' – and a reasonable proportion of that time was taken up with the evidence and law relating to the verification issue.

67. In this regard, recent comments by O'Donnell C.J. contain an implicit reference to the amount of time involved in preparing written judgments:

> "I enjoy the judging, I enjoy being in court, and I enjoy trying to work out the answer. Sometimes it's a bit like a puzzle. If you feel you can make it fit together in a coherent picture, that's satisfying. **I don't enjoy writing judgements because it's hard work** but I enjoy sometimes if I feel I've come to a conclusion and explained why, and it fits together, at least as far as I'm concerned." (Emphasis added) - *The Bar Review*, Vol. 27 (4) - October 2022 at p. 98

68. In view of the well-publicised shortage of High Court judges, this Court concludes that there is a particular onus on judges to seek to use court resources in as efficient a manner as possible for litigants as a whole (and not just the litigants in one particular case).

69. Adopting such an approach to this case, this Court concludes that the most efficient way for this Court to effectively manage limited court resources is, firstly, for this Court to deliver this judgment on the 'selection criteria issue' sooner, rather than later, for the benefit of both parties, instead of delaying the finalisation of that judgment in order to include this Court's conclusion on the 'verification issue'. Secondly, and in light of this Court's conclusion on the 'selection criteria issue', this Court will hear from the parties as to whether it would be the most appropriate use of court resources for this Court to allocate further court time in preparing a reserved judgment on the 'verification issue'.

70. Finally, there is one other matter which arose in this case, namely the question of whether there is an onus on State agencies to *consider* whether a satisfactory resolution of the dispute might be achieved by means of mediation (i.e. any form of alternative dispute resolution or settlement discussions).

Is there an onus on State agencies to consider mediation/alternative dispute resolution?

71. This issue arose in this case because on the first day of the hearing, this Court asked *both parties* about the efforts that had been made to resolve their dispute by mediation. This issue was raised with the parties before this Court had heard all the evidence and so therefore before it formed a view as to the likely outcome of the case. This Court outlined to the parties some of the reasons why it feels there is an onus on *all parties* to litigation to, at least, consider resolving their disputes, without the necessity for court intervention and why this is particularly the case, where one party is a State agency.

(i) Litigation is the most 'expensive way imaginable of resolving disputes'

72. Firstly, it is because court hearings should be a last resort, for the simple reason that litigation is such an expensive way to resolve any dispute. This is because, as noted by the *Review of the Administration of Civil Justice*, October 2020 at p. 267 (which was chaired by Kelly P.) *'Ireland ranks among the highest-cost jurisdictions internationally for civil litigation'*. This is particularly so in the High Court (rather than say the District Court) as the High Court is the most expensive court of first instance. In very broad terms, to resolve a straightforward dispute in the High Court, which might cost say €50,000-€100,000, is ten times the likely costs of resolving a legal dispute in the Circuit Court, which might cost say €5,000-€10,000, and it is 100 times the likely costs in the District Court, which might cost say €500-€1,000.

73. In this regard, the Supreme Court has held that litigation is *'the most protracted and expensive way imaginable of resolving*' disputes (*Lett & Company Ltd v. Wexford Borough Council & The Minister for Communications* [2012] IESC 14 at para. 14 per O'Donnell J.). This was said in relation to a High Court dispute, which was on appeal to the Supreme Court. On the basis therefore that High Court litigation is the most expensive way imaginable of resolving a dispute, it seems that the only logical conclusion that one can draw from this

statement is that State agencies should, when involved in High Court litigation, at least *consider* mediation or alternative dispute resolution.

(ii) <u>The taxpayer could be footing the bill, even if the State agency wins</u>

74. The second reason why State agencies should consider mediation is because it is the taxpayer who will have to pay the legal costs if a State agency loses. In addition, even if a State agency wins, the taxpayer may still have to pay the legal costs (i.e. if the losing party does not pay, or does not have the funds to pay, the State agency's legal costs).

(iii) <u>The costs are often not 'proportional' to the value/importance of the dispute</u>

75. A third reason is that the High Court costs paid by the taxpayer, in the tens/hundreds of thousands of euro, will in many cases not be *'proportional'* to the value or importance of the dispute.

76. A striking example was the recent application for the judicial review of the legality of the actions of the National Transport Authority regarding a clamping release fee of €80. As the law currently stands, *all judicial reviews*, even minor ones such as this clamping fee case *can only be heard in the High Court*, at a cost of tens/hundreds of thousands of euro. This is despite the fact that it may concern a sum of €80, which does not even exceed the jurisdiction of the Small Claims Court of €2,000, let alone the District Court jurisdiction of €15,000. It is also despite the fact that, *in other areas of law*, the District Court deals with some of the most serious issues imaginable, such as depriving a person of their liberty for up to 12 months and removing children from their parents for up to 18 years. The fact that minor matters such as this are heard in the civil division of the High Court is also in complete contrast to the position in the criminal division of the High Court, where only the most serious matters are heard, which effectively means only rapes and murders. However, as judges do not decide which civil courts hear which disputes, all Meenan J. could do in that car clamping case was to query whether it was

'proportional' that the High Court should have to hear this €80 legal dispute (*Irish Times*, 18th October, 2022).

77. Another example of minor judicial reviews having to be heard in the civil division of the High Court is provided by *Gannon v. Road Safety Authority* [2022/544/JR], where an application for leave for judicial review was brought in respect of the failure of the Road Safety Authority to renew Mr. Gannon's driving licence. This arose, it seems, through an alleged mix-up regarding his son, of the same name, who was disqualified from driving. Meenan J. expressed the view that it was an *'utter waste of time'* for the High Court to have to deal with this matter (*Irish Times*, 30th June, 2022).

78. As noted by Noonan J. in the Court of Appeal case of *Tennant v. Reidy* [2022] IECA 137 at para. 23, regarding a dispute over €20,000 which had been heard in the High Court:

> "[G]iven the amounts involved and the value of the property, it seems to me that **this matter should never have come before the High Court** at all." (Emphasis added)

While those comments relate to a private dispute with a financial institution/receiver over €20,000 which had been expended on a family home, they are equally applicable to judicial reviews of State agencies regarding minor/low value disputes. Yet, as matters stand, in the absence of a change in the law permitting such minor judicial reviews to be heard, say in the District Court, the most that judges of the High Court and the Court of Appeal can do is simply point out, as has been done in the foregoing cases, that it is not *'proportional'*, a '*waste of time'* and that these matters '*should never have come before the High Court'.* For so long as this continues to be the case, this is yet another reason why State agencies should consider mediation/alternative dispute resolution of those disputes.

(iv) ***Resolution of disputes by mediation would ease the pressure on court resources***

79. A fourth reason is that if State agencies resolved their disputes without litigation, it would mean that scarce court resources would be available for other citizens of the State to have access to justice. This is because as noted by Murphy J.:

> "The High Court and the Court of Appeal **are inundated by the volume of litigation** pending before those courts […] over **100,000 applications were added** to the existing caseload within a period of three years [2016-2018]" (Emphasis added) from *The Role and Responsibility of the State in Litigation, Irish Judicial Studies Journal* [2020] Vol 4(1) at p. 77.

If State agencies were to, at least, consider, in every dispute, if mediation might lead to a more efficient resolution of the dispute for the State/taxpayer this has the potential to improve court waiting lists. This is because, as noted by Murphy J. at p. 79 of her article, '*the State is the most frequent litigant appearing before our courts*' and so even if a small proportion of cases involving State agencies resolved, this could have a significant impact on the pressure on court resources.

(v) ***State agencies do not have same financial incentive to mediate as other litigants***

80. A final, but important, reason why State agencies should *consider* mediation is because a State agency does not have the financial incentive that most other litigants have to consider mediation. For individual and corporate litigants, the financial consequences of having to pay High Court costs are usually very much to the fore of their minds, since they will feel the effect in their pocket.

81. However, settling or mediating a dispute is not something that might necessarily be to the forefront of the minds of the decision makers in a State agency - after all it is not going to cost any individual in the State agency any money, if High Court litigation is lost (at enormous cost) or won (at enormous cost, i.e. if the losing party does not pay the State agency's costs).

This point was made by Murphy J., in *National Museum of Ireland v. Minister for Social Protection* [2017] IEHC 198 at para. 4,

> "Unlike private litigants, these state parties do not have the concern that if unsuccessful in litigation, they will be **saddled with costs which will have to be met from their own resources**. In private litigation the prospect of a **hefty costs order is a potent incentive to reasonableness,** both in the conduct of litigation and in the settlement of actions. Such **incentive is entirely absent** where the competing parties know that whatever the outcome of the action **their costs will be met from the public purse**. This strikes the Court as being an undesirable state of affairs both because of the **burden placed on the public purse** and the burden placed on the resources of the courts." (Emphasis added)

While that case involved two State agencies suing each other, the point is clearly applicable to any case where a State agency is a plaintiff or a defendant, since, as noted by Murphy J., that State agency will not have the *potent financial incentive* to resolve the dispute without a court hearing, as the costs will always be met by the public purse.

82. Finally, it is relevant to note the approach, which is taken in Australia. In her previously referenced article, Murphy J. observed, at p. 84, that the Australian approach obliges a State agency to endeavour:

> "to avoid, prevent and limit the scope of legal proceedings wherever possible, including by **giving consideration in all cases to alternative dispute resolution** processes where appropriate". (Emphasis added)

She also noted, at p. 85, that a State agency in Australia

"**is only to start court proceedings if** it has considered other methods of dispute resolution (e.g. alternative dispute resolution or settlement negotiations)." (Emphasis added)

Conclusion that State agencies should, at least, consider mediation

83. In concluding that a State agency should, at least, consider mediation in every dispute in which it is involved, this Court relies in particular on the observations of the Supreme Court in *Lett & Company* that it should have been possible for that dispute to be resolved without court involvement. That case involved a dispute between two State agencies and at para. 14, O'Donnell J. noted that:

"**[I]t ought to have been possible to have the differences between [the parties] resolved by an effective process of internal mediation or adjudication,** which if it did not resolve the dispute, might at worst have allowed the litigation to be dealt with more efficiently. […] Litigation will produce a final result but at a considerable cost in terms of time, resources and finance. It was perhaps, **the most protracted and expensive way imaginable of resolving these issues**." (Emphasis added)

It seems clear that O'Donnell J.'s point, regarding the possibility of resolving disputes without litigation (because of the costs), is also applicable to a case where only one party to the litigation is a State agency, as in this case. Thus, in many (*albeit* not all) cases it may be possible to resolve differences without having to resort to the most '*expensive way imaginable'*. The conclusion which one can draw from *Lett* is that State agencies should, at the very least, *consider* the possibility of mediation as a means of resolving disputes, since, as noted by O'Donnell J., even if the litigation proceeds, it should mean that it will be dealt with more efficiently (and so with a saving of court resources).

84. In reliance on *Lett* and the *National Museum* cases therefore, this Court concludes that litigation should be the last resort for the resolution of disputes in all cases and particularly in

disputes involving State agencies. This does not mean that some disputes involving State agencies will still not end up in the courts. Rather, it means that a State agency should *consider* mediation in every dispute in which it is involved, i.e. address its mind to whether the dispute could be resolved in a satisfactory way without the necessity for a court hearing. In doing so, it should be alive to the fact that, even though it does not have the *potent financial incentive* of most other litigants to resolve the dispute without court involvement, it should nonetheless direct its minds as to whether it might be possible and appropriate for the dispute to be resolved, without the need for court resources (in the interests of the taxpayer and other litigants relying on court resources).

Consideration by the HSE of mediation/settlement in this case

85. In this case, this Court raised with the parties on the opening day of the three-day hearing the possibility of their dispute being resolved without the need for court involvement and in reply the HSE made the following submission:

> "[A]s regards the safeguarding of public funds in the conduct of litigation and my instructions are to simply to say to the Court, in terms of **putting the Court's mind at rest,** that this is a case that **has been considered from the very outset at the very highest levels of HSE** and the **conduct of this case** has been considered at the very highest levels of the HSE." (Emphasis added)

On the basis of this reply it seems that the State agency in this case had in fact given consideration to the resolution of the dispute, without the need for litigation.

86. It is important to add that this Court makes no criticism of the HSE for how it dealt with the litigation or for the fact that this dispute required a court hearing. Indeed, quite apart from the fact that it has won the litigation, it is relevant to note that:

- This was a case involving a considerable amount of money, since the alleged savings to the taxpayer from the €9.5 million contract under challenge amount to *circa* €4.5 million over four years,
- Judicial review proceedings (such as a claim that a contract is invalid), do not resolve as easily as say a claim for damages (although, as submitted by counsel for Sere, they do sometimes settle). Since there may be no obvious settlement to a claim of invalidity of a contract, resolving such disputes may require creative solutions,
- There is no reason to believe that Sere is not in a position to pay the HSE's legal costs and so the taxpayer should not be out of pocket (*if* full costs are awarded to the HSE as the winning party),
- There may well have been unsuccessful without prejudice correspondence/discussions between the parties, of which this Court is not aware,
- Most importantly of all, there may be other reasons (whether specific to this case, or broader policy reasons, of which this Court is unaware) why a State agency may decide to litigate and why mediation/settlement may not be feasible or appropriate.

87. In addition, of course, it is the case that this Court has found that the HSE was subject to an *unjustified* challenge to the legality of its award of the contract to IAS. Accordingly, the HSE might legitimately argue that it has been completely vindicated by its decision to defend this challenge in a fully contested hearing. While this is true, it is important to also point out that firstly it is only with the benefit of hindsight that one can say that the challenge was *unjustified*. Secondly, even if a State agency believes it might win a case and duly wins that case, there may still be reasons why settling/mediating the case *might* make sense (e.g. if the costs dwarf the value/importance of the claim and/or the costs are unlikely to be recoverable). However, it is not being suggested by this Court that this was such a case. This Court would emphasise that it appears from the HSE's submissions that it did consider mediation/alternative

dispute resolution and no criticism is being made of it in relation to these proceedings which were brought against it and which it has now won.

CONCLUSION

88. For the reasons set out above, this Court concludes that the meaning of tender services in this case includes the transport of organs and the transport of organ retrieval teams. As noted above, this means that Sere accepts that IAS satisfied the selection criteria in order to be admitted to the tender. For this reason, this is not a basis for invalidating the contract entered into between the HSE and the winning tenderer, IAS.

89. While Sere now accepts, as a result of this judgment, that IAS *satisfied* the selection criteria, there remains the question of whether the HSE *verified that IAS satisfied* the selection criteria.

90. What this Court proposes to do is, to ask Sere, after considering this judgment, whether in light of this Court's decision on the 'selection criteria issue', it still needs the 'verification issue' to be decided by this Court. If Sere concludes that it does *not* need a determination of this issue, then there will be a saving of court resources, which can be utilised for the benefit of other litigants.

91. Of course, if Sere decides that it still wishes to have a determination on the 'verification issue', this Court will consider this issue, having also heard from the HSE and IAS. If after hearing from all parties, this Court were to conclude that it should give a judgment on the 'verification issue', then adopting this course will not put any additional strain on court resources (since this was the position of Sere at the conclusion of the hearing).

92. In these circumstances, this Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court

time, with the terms of any draft court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders and outstanding issues, this case will be provisionally put in for mention a week from the date of delivery of this judgment at 10.30 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).