THE HIGH COURT

COMMERCIAL

[2024] IEHC 79

[2020 829 JR]

REVIEW OF THE AWARD OF PUBLIC CONTRACTS

IN THE MATTER OF A PUBLIC PROCUREMENT REVIEW APPLICATION

PURSUANT TO ORDER 84 A OF THE RSC

IN THE MATTER OF A REVIEW UNDER THE EUROPEAN COMMUNITIES

(PUBLIC AUTHORITIES CONTRACTS) (REVIEW PROCEDURES)

REGULATIONS 2010 AS AMENDED

BETWEEN

KILLAREE LIGHTING SERVICES LIMITED

APPLICANT

AND

MAYO COUNTY COUNCIL

RESPONDENT

AND

ELECTRIC SKYLINE LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 13th day of February 2024

1. In these proceedings, the applicant ("Killaree") seeks the following reliefs: -

"1. An order setting aside the decision of the respondent dated 9th October 2020 to eliminate the applicant from any further participation in the tender competition for the supply of Maintenance, LED Retrofit, New Works & associated services for public lighting for six Connacht local authorities.

2. A declaration that the contracts concluded between the respondent and the notice party for the supply of Maintenance, LED Retrofit, New Works & associated services for public lighting for six Connacht local authorities on the 27th of October 2020 is ineffective and/or void.

3. An order suspending the operation of the said contract for 27th of October 2020.

4. Such interim order and/or interlocutory orders, as appropriate.

5. Further and/or other orders.

6. Damages.

7. Costs".

2. In the event, no interim or interlocutory relief was sought by Killaree against the respondent ("Mayo"). The notice party ("Electric Skyline") did not participate in the proceedings. A significant amount of affidavits were delivered by both sides; indeed, in his fourth affidavit Mr. Damien Lennon, Killaree's deponent, refers to "the excessive amount of Affidavits which have now been filed….", while Mr. Lennon's reference is to the evidence delivered on behalf of Mayo, it is also the case that Mr. Lennon swore five affidavits in these proceedings.

3. The description of the affidavit evidence as "excessive" is not one with which I would disagree.

4. This is not a case in which much was agreed between the parties. At the start of the hearing, I indicated that an issue paper would be helpful once the hearing had concluded. The issue paper could not even be agreed between Killaree and Mayo. The issue paper ultimately provided to me, therefore, had various issues which were marked as being matters which the parties could not agree actually arose in these proceedings. Taking all issues into account, a total of 27 questions were put before the court for decision. This number includes the separate issue as to whether certain of these questions were in fact before the court at all. Ultimately, I have not followed the list of issues in deciding this application. I have structured the judgment broadly by reference to the written submissions of the parties.

5. It should be noted that the parties' issue paper excludes the question of damages. It was agreed between the parties that the question of damages would be dealt with separately in the event that it succeeded in establishing any illegality on the part of Mayo which would give rise to an entitlement to damages.

6. At a very high level, the facts of the case are these. On the 3rd of July 2020, Mayo published a contract notice on the e – tenders website. On the 31st of July 2020, Killaree submitted its tender. On the 14th of August 2020, Mayo emailed Killaree raising concerns that Killaree's tender included abnormally low amounts. On the 20th of August 2020, Killaree responded to Mayo. There was further correspondence on the 27th of August, 4th of September and 15th of September 2020.

7. Importantly, on the 9th of October 2020, Mayo wrote to Killaree in the following terms: -

> "Dear sirs,
>
> We refer to our letter of 15th September 2020, your letter of 4th September and our previous correspondence in relation to the above tender competition.

Upon review of the documentation submitted by [Killaree] and in the exercise of its professional judgment, the Contracting Authority is of the view that the tender submitted by Killaree is abnormally low for the following reasons:

- 66% of the tendered rate submitted in the Pricing Document were priced at €0.01 values;
- The rates priced at €0.01 do not cover the full inclusive value of the relevant works, supplies and services;
- The clarifications and explanations provided by Killaree do not provide sufficient evidence that the tendered rates and prices submitted in its pricing document are not abnormally low or that they reflect a balanced allocation of the national tender total;
- In light of the works, supplies and services required under the Contract, the Contract is not capable of being performed on the basis of the tendered rates.

In accordance with the request for tenders, you are herewith eliminated from any further participation in the tender competition.

Following the identification of the successful tenderer and the observance of the mandatory standstill period, it is anticipated that the name of the winner will be published by means of a contract award notice".

8. The letter was signed by John Maughan, of Mayo, the principal deponent on behalf of the respondent in these proceedings.

9. In fact, on the same day, Electric Skyline was notified that it was the successful tenderer. In addition, on the same day, the other unsuccessful tenderer was also notified that it had failed, and that "no formal award of the contract with the successful tenderer would take place before 26th October 2020" – first affidavit of John Maughan at para. 72.

10. The standstill period prescribed in the contractual documentation was 14 days. This was known to Killaree.

11. On the 27th of October 2020, Mayo entered into the contract with Electric Skyline. On the 3rd of November 2020, a notice was published in *Iris Oifigiúil* stating the contract had been concluded. On the 6th of November 2020, these proceedings were issued.

12. Both in their written submissions, and in the oral submissions of counsel for Killaree, five broad challenges to the activities of Mayo are outlined. These are, in sequence: -

(a) failure to notify and commence the standstill period;

(b) improper fettering of discretion by Mayo;

(c) misinterpreting the tender documentation;

(d) failure to apply the appropriate test in considering Killaree's explanations;

(e) failure to give adequate or intelligible reasons.

13. It might appear more logical to consider issue (a) at the end, as it was the final issue chronologically to arise, I have decided to follow the sequence as put forward by counsel for Killaree, as that is the way in which the argument developed before me. In addition, rather than set out what would inevitably be an extremely lengthy and in large measure irrelevant narrative, I have focused by reference to each of these five topics on the evidence which I consider relevant. I have also refrained from setting out, on a blow-by-blow basis, the evidence and arguments to be found in the many affidavits produced by the parties.

(a) THE STANDSTILL LETTER

(i) The evidence

14. Clause 3.5.1 of the Request for Tender ("the RFT") provides that: -

"3.5.1 . . . no contract can or will be executed or take effect until at least fourteen (14) calendar days after the day on which the unsuccessful Tenderers have been sent the appropriate notice informing them of the result of this Competition ("Standstill Period") if such notice is sent by electronic means…The preferred bidder will be notified of the decision of the Contracting Authority and of the expiry date of the Standstill Period".

This mirrors the provisions of Regulation 5(4) of the 2010 Regulations.

15. As already noted, on the 14th August, 2020 Mr. Maughan wrote to Mr. Lennon in respect of the tender that Killaree had submitted. While Mr. Maughan is an officer of Mayo, the public maintenance services contracts were in fact ones which involved the provision of services not only to Mayo to but also to Galway City Council, Galway County Council, Leitrim County Council, Roscommon County Council, and Sligo County Council. Mr. Maughan was therefore writing on behalf of all of these entities when he communicated with Mr. Lennon.

16. Mr. Maughan's email raised serious issues about whether or not certain of the rates included in the Killaree tender constituted abnormally low pricing. The email concluded: -

"The evaluation committee has raised concerns about the €0.01 values inserted in approximately 66% of the tendered rates submitted by you.

I am now requesting you, by way of clarification to demonstrate the genuineness of all of your pricing by providing specific details as to how you can offer services, works and goods for the pricing submitted.

A decision will be made based on your response whether to admit or reject your tender.

Can you provide a response to me by 13:00 hours next Wednesday 18th August."

17. The message of this email was quite plain. Depending on the substance of the response to the email, Killaree's tender could be rejected there and then.

18. On the 17th August, at about 11:20pm, Mr. Lennon emailed Mr. Maughan referring to a telephone conversation that the two men had had earlier that day. Mr. Lennon stated: -

> "As discussed over the phone and affording Killaree more time to submit the required information (this is due to staff members been on annual leave) and addressed queries in your email."

On the 20th August, Mr. Maughan replied: -

> "Damien
>
> Good evening. I granted you an extra day to submit your response to my email hereunder. That response was supposed to be with me today by 1pm. Can you reply to me with your response by close of business this evening."

19. At around 11:50pm that day, some seven hours after Mr. Maughan's email, Mr. Lennon replied: -

> "Hi John,
>
> I hope you are keeping well. Apologies as I am having issues with my mails so I had asked David to return by close of business so sorry for any misunderstanding with time.
>
> As far as I am aware David has forwarded on the required information. If you require anything further, please do not hesitate to contact me."

20. As Mr. Lennon has said, by email at approximately 5:50pm earlier that day Mr. David Vaughan (of Killaree) had replied to Mr. Maughan's email in connection with the abnormally low rates. I will come to the substance of this reply in a moment. However, the timing of the various emails (and the acceptance by both Mr. Lennon and Mr. Maughan that matters had to

be dealt with extremely expeditiously, and deadlines met) is important when we consider the response to the letter of the 9th October, 2020.

21. Indeed, early in his response (sent by Mr. Vaughan) Mr. Lennon emphasises the *"very short period of time …"* that had been given to Killaree to prepare its response. The reply runs to four pages. The penultimate paragraph reads: -

> "We are a very well established and highly reputable corporate entity with extensive experience regarding public tendering contracts. We confirm unequivocally that, if successful, we are in a position to, and shall, meet every item listed within our delivered pricing structure, including each and every item priced at €0.01. We have always done this, and continue to do this, within our contracts to other County Councils - notably without any difficulty whatsoever. We believe that our experience and the exceptionally favourable conditions available to us for the supply of products and services allows us to provide excellent value for money to you - as we consistently do with many other County Councils in the country."

Mr. Lennon then signs off his correspondence in the belief that any concerns on the part of Mayo *"as to the genuineness of the prices tendered by KLS in the instant application…"* will be satisfied.

22. Mr. Maughan replied on the 27th August, 2020. It was clear from this letter that Mayo were not happy with the response contained in Mr. Lennon's email of the 20th August. Mr. Maughan notes Mr. Lennon's statement that the response of Killaree had been provided in a very truncated period of time. The letter then goes on, under three headings, to invite a response from Killaree. The reason why Killaree is being provided with a further opportunity to respond is stated to be: -

> "In order to afford you the fairest opportunity to respond in full…"

23. The three headings Killaree is asked to address is as follows: -

"**(a) The employer is of the view, following consideration of your tender and letter of clarification, that the tender rates and prices submitted by you on the Pricing Document do not reflect a balance allocation of the Notional Tender Total.**

(b) The employer is of the view that some of the prices submitted in the Pricing Document appear to be abnormally low.

(c) The employer invites you to provide an explanation on the prices and costs proposed by you."

24. Killaree was asked to furnish its response by 1pm on Friday the 4th September, 2020.

25. Within that time, Killaree provided a reply running to just over one page. It concludes: -

"We are wholly confident that, if successful, we shall provide similar value and reliability to you in the instant matter. The pricing and tender is therefore genuine and it will be performed by KLS at the rates indicated in the event that it is awarded the relevant contract.

We look forward to hearing from you by return at your earliest convenience."

26. By letter dated the 15th September, 2020, Mr. Maughan sent Mr. Lennon a five page letter which, it is fair to say, did not suggest that there has been a meeting of minds on these issues between Mayo and Killaree. In particular, the letter is notable for the number of legal differences which have emerged between the parties. By way of example:

(a) The letter of the 15th September sets out in some detail why Mayo believed that Killaree was wrong in asserting (in th letter of the 20th August) that *"there is no prohibition on abnormally low prices…"* in the tender documents;

(b) Mayo rejects Killaree's claim that Mayo had *"fettered its discretion"*;

(c) Mayo disagreed with Killaree's contention (in its letter of the 4th September, 2020) that Mayo is operating on an erroneous view *"that abnormally low prices are precluded by the tender competition…"* and instead Mr. Maughan made it plain that Mayo is acting in accordance not just with the tender documentation but also with Regulation 69(1) of the Procurement Regulations.

27. It is notable that certain of these arguments now feature in Killaree's case that Mayo has behaved unlawfully, and that the contract should be set aside.

28. Mr. Maughan's letter of the 15th September concludes: -

"The evaluation committee is currently in the process of assessing your tender and clarification responses and a decision will be made in due course on whether to admit or reject your tender."

29. On the 9th October, 2020, Mayo wrote to Killaree in the terms set out at para. 7 of this judgment. To recap, this letter stated unequivocally and finally that Killaree was eliminated from the tender competition.

30. It is submitted by Mayo that this letter has all of the necessary constituents of a *"standstill letter"* as required by the 2010 Regulations. If it does not, one critical issue to be decided is whether the absence of a standstill letter *"has deprived (Killaree) of the possibility of pursuing pre-contractual remedies …"*; Article 11(2)(b)(i). In that context, and given the contents of the letter of the 9th of October, 2020, it is of some importance to understand the reaction of Killaree to this letter.

31. At paragraph 19 of his first affidavit, and having set out the conclusion of the letter of the 9th October to the effect that Killaree *"was thereby eliminated from any further participation in the tender competition."* Mr. Lennon goes on: -

"I say that the respondent delivered this conclusion without engaging with in any meaningful way, or at any time, the itemised and individually annotated explanations

of the applicant's proposed pricing structure which the applicant had delivered to the respondent on 4 September 2020."

32. The balance of the paragraph sets out, in some detail, concerns about this asserted lack of engagement and failure to give reasons, but in no way explains why it was that Killaree, on being told of its elimination from the competition, did not consider pursuing, or actually pursue, any pre-contractual remedy. At para. 24 of the same affidavit, Mr. Lennon describes Killaree's unhappiness on becoming aware (on the 3rd November) that the contract had been awarded to Electric Skyline on the 27th October. He then says: -

"The applicant had not raised any notice of the award of the contract specifying a standstill period prior to conclusion of the contract."

33. The meaning of this sentence is not entirely clear. Later in the paragraph, Mr. Lennon says: -

"My concerns and dissatisfaction are compounded whereby the respondent had been placed on express notice that the applicant had sought and was awaiting delivery of a proper statement of reasons from the respondent regarding its treatment of the applicant's tender - and the applicant not only contemplated the issuance of legal proceedings in the matter but required immediate engagement by the respondent having regard to the limited time frame for doing so."

34. The statement about the contemplation of legal proceedings is a reference to a letter sent by Killaree's solicitors on the 22nd October. It does not explain why those proceedings were not prepared or issued in the immediate aftermath of the letter of the 9th October. Mr. Maughan nowhere explains why it is that no such proceedings were brought.

35. In Mr. Maughan's first affidavit (at para. 68) he makes the point that the letter sent by Killaree's solicitors on the 22nd October *"did not make any enquiries in relation to the status*

of the contract award decision. It did not request the Council to refrain from taking any steps with regard to conclusion of the contract."

36. As we will see, that is correct.

37. The letter of the 22nd October, 2020, sent by Killaree's solicitors to Mr. Maughan, quotes the elimination of Killaree from the tender competition, and sets out the basis upon which this was done. It goes on to say that Killaree does not accept *"the validity of [Mayo's] conclusion"*, and sets out some reasons why that is so.

38. The letter continues: -

> "There is no evidence that you engaged with the above explanation. Your letter merely states that there was not 'sufficient evidence' that the tendered rates are not abnormally low or that they reflect a balance allocation of the notional tender total. Further, your previous letter of 15th September 2020 said that following the 'necessary enquiry' you will determine whether to reject the tender as abnormally low. However, neither letter specified the nature of such 'necessary enquiry'. Therefore, your statement of reasons and explanation for eliminating our client is wholly inadequate and it is impossible for our client to understand why or how you rejected the explanations and clarifications given. We therefore call upon you to immediately provide a proper statement of reasons."

39. Very importantly, the letter concludes: -

> "Our client reserves its entitlement to institute legal proceedings challenging its elimination from the tender competition. This letter is further without prejudice to other grounds of challenge. In the light of the limited time to challenge proceedings, we therefore require you reply as soon as possible and any delay on you (*sic*) part will be relied upon by our client should any extension of time in any proceedings, prove necessary."

It is clear, therefore, that as of the 22nd October, 2020 the solicitors for Killaree had sufficient grounds (or at least felt they had sufficient grounds) to launch proceedings to challenge the award of the contract.

40. On the 22nd October, 2020 a holding letter was sent by the solicitors for Mayo. This stated that the solicitors were taking instructions, and would reply *"during the course of next week"*. In fact, the reply was on the 29th October, 2020. The letter set out Mayo's account as to why new proceedings would be unsuccessful. It concluded by asserting that there was no basis for legal proceedings in the matter, that such proceedings would be defended, and that the letter would be used to seek the costs of any such proceedings.

41. The letter did not reveal the fact that a successful tenderer had been identified on the 9th of October, and that contracts had been signed on the 27th October.

42. On the 3rd November, Killaree's solicitors effectively joined issues with Mayo's solicitors on the rights and wrongs of Mayo's behaviour, and stated: -

> "This is to notify you that [Killaree] intends to challenge such decision to eliminate it from the competition, by way of application to court."

In truth, nothing had been learned by Killaree in the correspondence which post-dated the 9th October, 2020 which facilitated the bringing of these proceedings. They could have been brought, in substance, in the immediate aftermath of Killaree's elimination from the tender competition.

43. On the 4th November, Killaree's solicitors again wrote to Mayo's solicitors, this time in the knowledge of the fact that the contract had been awarded. This letter, entirely understandably, recorded surprise on the part of Killaree and its lawyers that they had not previously been informed of the decision to award the contract and the award of the contract in the earlier correspondence that had occurred between the parties.

44. The letter included the statement: -

> "The effect of your failure to inform our client of any intention to conclude the contract, deprived our client of an opportunity of making an application to court in advance of the conclusion of the contract, which would have resulted in automatic prohibition on you concluding the contract."

This contention in correspondence is, as already noted, not grounded on any evidence before the court. It is a matter of fact as to whether, in all the circumstances and given the lengthy correspondence in this particular case, a failure to provide a standstill letter deprived Killaree of the possibility of pursuing pre-contractual remedies.

45. As already noted, these proceedings began on the 6th November, 2020.

(ii) Submissions

46. Killaree submit that, pursuant to Regulation 2 of the 2010 Regulations, it remained a *"tenderer concerned"* until such time as its exclusion had either been declared lawful by the court or could no longer be subject to a *"review procedure"*. That position is uncontested by Mayo.

47. Killaree goes on to rely upon Regulation 5(1) of the 2010 Regulations, which provides that: -

> "5 -(1) A contracting authority shall not conclude a reviewable public contract to which a standstill period applies under these regulations within the standstill period for the contract."

It further relies upon the provision that a standstill period of 14 calendar days will be the applicable one as far as this contract is concerned. Again, none of this is disputed by Mayo.

48. Kilaree also rely upon the provisions of Regulation 6(2), setting out the required contents of the standstill notice, as follows: -

"Such a notice -

(a) shall inform the candidates and tenderers concerned of the decisions reached concerning the award of the contract, the conclusion of a framework agreement or admittance to a dynamic purchasing system, including the grounds for any decision not to award a contract, conclude a framework agreement or implement a dynamic purchasing system for which there has been a call for competition,

(b) shall state the exact stance to the period applicable to the contract, and

(c) for each unsuccessful tenderer or candidate shall include -

(i) in the case of an unsuccessful candidate, a summary of the reasons for the rejection of his or her application,

(ii) in the case of an unsuccessful tenderer, a summary of the reasons for the rejection of his or her tender."

49. At paragraph 15 of the written submissions, it is complained that neither *"the exact standstill period applicable to the contract"* is set out in the letter of the 9th October, nor does it contain a *"summary of the reasons for the rejection of the applicant's tender.."*

50. For an effective standstill letter, it was submitted by counsel for Killaree, the *"decisions"* referred to should include the decision to award the contract to the successful tenderer and the *"reasons"* given should be the reasons for the award of the contract to the successful tenderer.

51. It was further submitted by counsel for Killaree that this is a particularly egregious situation, as the standstill period did not even commence to run as against Killaree at the time that the contract was awarded to Electric Skyline. However, for the purpose of analysing the consequences (which he said arose) counsel for Killaree was content to treat it here as a breach of Regulation 5(1) of the 2010 Regulations.

52. He submitted that Regulation 11(2) applied, and in particular that a mandatory declaration of ineffectiveness should be made pursuant to the following provision: -

> "11. …
>
> (2) Subject to paragraphs (3),(4) and (5), the court shall declare a reviewable public contract ineffective in the following cases …
>
> (b) the cases of a Regulation 5(1) infringement … where the infringement -
>
> (i) has deprived the tenderer or candidate applying for review of the possibility of pursuing pre-contractual remedies; and
>
> (ii) was combined with an infringement of the Public Authorities Contracts Regulations that has affected the chances of the tenderer applying for a review to obtain the contract…"

53. Two further aspects of the Regulation were relevant. Regulation 11(5) reads: -

> "(5) Despite paragraph (2) the court may decline to declare a contract ineffective of fines, after having examined all aspects of the matter that it considers relevant, that overriding reasons relating to a general interest require that the effects of the contract should be maintained."

54. In addition, Regulation 11(7) reads: -

> "(7) In the case of a Regulation 5(1) infringement … (being … an infringement not covered by paragraph (2)(b)), the court may, after having assessed all aspects that it considers relevant, declare the relevant contract ineffective."

55. Finally, counsel argued that the alternative penalties provisions of the Regulations kicked in in the event that the contract was not declared ineffective. This was objected to by

counsel for Mayo, on the grounds that there was no plea that such a penalty should be imposed. Regulation 13(1) provides: -

> "13(1) The court shall impose an alternative penalty if -
>
> (a) under Regulation 11(5), it declines to declare a contract ineffective, or
>
> (b) in the case of an alleged infringement relating to Regulation 11(7), it finds that the infringement occurred but declines to declare the contract ineffective."

The alternative remedy can be the termination, or shortening of the duration, of the contract or the imposition of a civil financial penalty of up to 10% of the value of the contract. Neither side tmade any submission as to what particular penalty should apply.

56. In determining the penalty, Regulation 13(3) provides that all relevant factors *"may be taken into account, including the seriousness of the infringement, the behaviour of the contracting authority and any extent to which the contract remains in force."*

57. Regulation 13 precludes the making of an award of damages as *"an appropriate alternative penalty…"* for the purpose of the Regulation.

58. The submissions of Mayo on this issue were extensive.

59. Firstly, it was alleged that the letter of the 9th October, 2020 satisfied the requirements of the Remedies Directive and the 2010 Regulations. The purpose, it was argued, of provision in both instruments was: -

> "to ensure that there was a minimum period within which the contracting authority could not conclude the contract and thereby frustrate the right of an aggrieved tenderer to challenge the decision by way of judicial review."

Para. 6.6 of Mayo's written submissions.

60. It was submitted that Killaree was told on the 9th October that it was out of the competition, and that Killaree was also put on notice that an award of the contract would be

made in the standstill period then observed. There is no dispute but that, by reason of the provisions of the tender documents to which I have already referred, both Mayo and Killaree were aware that the standstill period was one of at least 14 calendar days.

61. It was further submitted that in construing the 9th October letter, I should follow the approach taken by Akenhead J. in *AEW Europe LLP & Ors v Basinstoke and Deane Borough Council* [2019] EWHC 2050.

62. Secondly, it was argued that this ground of challenge had been waived by Killaree. I should say, at this stage, that Mayo has not established any waiver by Killaree of its entitlement to receive a standstill letter. Without diminishing this submission, it can be dealt with by observing that there was no authority opened to me establishing that such a waiver could be found in circumstances where Killaree was not even told that a decision had been made to award the contract to Electric Skyline. Given that undisputed fact, I cannot see how Killaree could have waived its entitlement to a standstill letter. Mayo's stance, namely that Killaree had waived an entitlement it did not know it had, is simply unsustainable.

63. Thirdly, it was argued that there was no basis for a declaration of ineffectiveness. It was submitted that Regulation 11 required Killaree to demonstrate the following: -

> "First that there has been an infringement of Regulation 5(1);
>
> Second, that Regulation 5(1) infringement has deprived the tenderer applying for review of the possibility of pursuing pre-contractual remedies…;
>
> Third that the Regulation 5(1) infringement was combined with an infringement of the Public Contracts Regulations has affected the chances of the tenderer applying for review to obtain the contract …; and
>
> Fourth, that there are no overriding interests relating to a general interest that require that the effects of the contract should be maintained…"

64. There was dispute between the parties as to who bore the onus of proving the fourth issue, as set out at Regulation 11(5) of the 2010 Regulations. There was no dispute about the first three requirements, as set out at para. 6.36 of Mayo's written submissions.

65. It is worth setting out in full Mayo's submissions on the second issue. They are to be found at 6.38 and 6.39 of the written submissions, and read as follows: -

> "Second, if the court disagrees with this, it is nonetheless clear that it was not the Regulation 5(1) infringement that deprived Killaree of the possibility of pursuing pre-contractual remedies. As set out above, the Council observed the standstill period.
>
> " Rather it was Killaree's own delay between 9 October, 2020 and 22 October, 2020 … that deprived it of the possibility of pursuing pre-contractual remedies …."

66. I have set out the precise form in which this argument is to be found in the written submissions of Mayo in order to facilitate a full analysis of Killaree's response on this point.

67. The oral submissions of counsel for Killaree, focusing on the issue of the standstill letter, begin at p. 95 of the transcript for Day 2, and conclude at p. 107 of that document. There is no reference made in these submissions to Mayo's argument that Killaree has not shown that the alleged regulation 5(1) infringement has deprived of the possibility of pursuing precontractual remedies. This is despite the fact that, at p. 99 of the transcript, counsel for Killaree opened to the court the relevant wording in Regulation 11 (2).

68. In his replying oral submission, on day 4 of the hearing, the question of the standstill agreement is addressed by counsel from page 86 to page109 of the transcript. At this point in the hearing, counsel for Mayo had supplemented in her oral submissions what had been said in Mayo's written submissions on this issue. Again, counsel focused on the nature of the infringement of the Public Authorities Contracts Regulations, which of course is referred to at Regulation 11 (2) (b) (ii). Extensive submissions were also made on what the phrase "*the*

chances of the tenderer applying for review to obtain the contract…" meant; counsel put forward the argument that he merely had to show a possibility that Killaree would have obtained the contract, were it not for an alleged infringement of the Public Authorities Contracts Regulations. However, in all of this, counsel did not address the requirements of Article 11 (2) (b) (i). Ultimately, he was asked about it (at p. 99 of the transcript): -

> "Judge: Mr. Dodd, before you go to that. As I understand it, one of the requirements you have to show is that the infringement deprived you of the opportunity of pursuing precontractual remedies, is that so?
>
> Counsel: Yes.
>
> Judge: And how did it deprive you of that?
>
> Counsel: Well, that is the first element insofar as the standstill letter - -
>
> Judge: How were you deprived of that?
>
> Counsel: Well, because we didn't get a standstill letter. In other words that the requirement thereunder in my reading, is that the whole purpose of the standstill letter, so the first part, that comes into play in the first part, because we didn't get a standstill letter, we didn't know the contract had been awarded, and we didn't know the standstill period was actually running or purported to be running. And so, we were deprived of an opportunity of making an application to court prior to the award of contract, which we didn't know.
>
> So the failure there stems from the failure to send us the standstill letter, and that's my reading of it in terms of being deprived of an opportunity about precontractual remedies. It raised the first element of the test.
>
> Judge: So, therefore you're not asking me to rely on any assumption or submission that your client assumed there would be a standstill letter and therefore held back?

Counsel: Well, it's not so much – I mean I will come to the waiver point in a moment, basically. I mean it's clear that that is the case from the correspondence in the sense that we write on the night of the 2nd November expressing astonishment about it basically, and go on to say we didn't get any communication.

Judge: Correspondences and evidence, Mr. Dodd?

Counsel: Yes.

Judge: Ms. Donnelly made the point on a couple of occasions that there was no evidence that there was a certain state of mind on the part of KLS suggesting that you were waiting for the standstill letter to arrive. And is she right about that?

Counsel: Well, no, I wouldn't agree with that. And I suppose the context of this is that there's no requirement to look for a standstill letter. There's an obligation on the contracting authority to actually send the standstill letter. So, it's not a question of what we do or what we don't do or otherwise. And that's why it's somewhat hard to understand the logic of the waiver type argument, saying, well, we sat on our hands –

Judge: Mr. Dodd, don't to the waiver argument. I want to understand your position on this. In the first day of the hearing, you said on a number of occasions that your client expected that there would be a standstill letter which is why they didn't even consider taking any action.

Counsel: Yes.

Judge: Ms. Donnelly said there is no evidence to that effect, is she right or wrong?

Counsel: I would accept that there is no specific averment on that particular point. There is in terms of the correspondence and so on. it is a matter obviously for the weight for the court to attach to that".

69. Subsequently, at p. 107 of the transcript onwards, counsel for Killaree referred to the contents of para. 24 of Mr. Lennon's first affidavit. I have referred at para. 33 of this

judgment, to the contents of that section of Mr. Lennon's evidence. Counsel concluded his reference to that paragraph by opening the following sentence: -

"*I believe and most recently have been aware if issued it would have the effect of prohibiting the conclusion of that contract pending the determination of the matter and the Applicant as a tenderer concerned ought as a matter of law have been notified of such intention in advance"*.

70. Counsel then went on to comment: -

"So that's the point about precontractual remedies".

71. In fact, as counsel acknowledged at p. 109 of the transcript, and is absolutely clear from para. 24 of Mr. Lennon's first affidavit itself, that entire section was a reference back to the letter of the 22nd of October sent by Killaree's solicitors. It is not a reference back to the letter of the 9th of October, still less does it give any insight into why or how Killaree acted (or failed to act) after it had been told that it had been eliminated from the tender competition

(iii) Decision

72. In deciding whether or not the letter of the 9th of October 2020 was a standstill letter within the meaning of the Regulations, it is worth considering exactly what Mayo's submissions would mean if they were correct. It would mean that it was possible for two different letters to be sent on the same day, one to the eliminated tenderer such as Killaree (notwithstanding the fact that Killaree remains a *"tender concerned"* for the purpose of the Regulation), and another to the successful tenderer and the other unsuccessful tenderer or tenderers. They would therefore be two radically different form of letter, yet both would be standstill letters. Secondly, it would be possible to inform the eliminated tenderer that it had been eliminated but give no further information about the other significant decision in the process, namely that one of the other tenderers had now been successful and it was intended to award the contract to

it. Thirdly, as opposed to giving a date or *"an exact date"* for the awarding of the contract to the successful tenderer, it would be sufficient simply to say that the contract would be awarded at some indeterminate time in the future, but no earlier than 14 calendar days after the date of the communication.

73. For the reasons advanced by counsel for Killaree, I have decided that this is not what the Regulations require. While there is no obligation to identify the name of the successful tenderer, there is an obligation to inform tenderers *"of the decisions reached concerning the award of the contract…"*, and the paramount decision about which both successful and unsuccessful tenderers must be informed is the decision to award the contract to one of them. That is something that was not done by Mayo. In addition, while the standstill period prescribed by the tender documents and, indeed, by the Regulations, was known to all parties the *"exact"* date upon which this would expire could not have been known to Mayo, as Mayo had been kept in the dark about the proposed date for the awarding of the contract.

74. I therefore find that the letter of the 9th of October did not constitute a standstill letter within the meaning of the 2010 Regulations.

75. I will now consider the effect of this decision..

76. As already noted, in his oral submissions, counsel for Killaree suggests that this be treated as a Regulation 5 (1) infringement. There is no opposition to this approach, and I will consider the consequences of the infringement on that basis.

77. Regulation 11 (2) (b) provides for certain circumstances within which such an infringement requires the court to declare a review of a public contract ineffective. I do not believe that Mayo has met the requirement of Regulation 11 (2) (b) (i). Notwithstanding its other deficiencies, the letter of the 9th of October made plain to Killaree in unequivocal terms that it was out of the competition. That letter must be

seen in the context of earlier correspondence, where it was repeatedly stated by Mayo to Killaree that concerns about abnormally low pricing had to be addressed to the satisfaction of the Awards Committee, and that this was not done Killaree could be excluded from the process. The letter of the 9th of October did not come out of the blue. It was also preceded, as I have noted, by the bandying about between Mayo and Killaree of increasingly legalistic arguments which suggest that both sides were clearly aware of the possibility that court proceedings may result from any decision made by Mayo adverse to Killaree. It is worth noting that in this regard, that Mr. Maughan describes himself as *"Procurement and Efficiency Officer with Mayo County Council"*, while Mr. Lennon stresses his firm's great experience in public procurement.

78. The letter of the 9th October does not invite any further engagement, submission or argument from Killeree. It is clear that much of the challenge launched by Killaree in these proceedings is based on information available to it prior to the 9th October, 2020. Killeree was therefore not in any way inhibited from issuing proceedings immediately after the letter of the 9th October.

79. In addition, the letter made it plain that the contract would be awarded without further reference to Killeree; there is no other way of reading the correspondence. It would certainly have been more helpful if the letter from Mayo had indicated that a decision had already been made to award the contract to Electric Skyline (or any other tenderer). It was open to Killeree to seek to mount a case that Mayo had, in the letter of the 9th October and in subsequent correspondence, sought to keep this information from Killeree with a view to avoiding a court challenge. However, that case has not been made. This would have involved, in all likelihood, the cross-examination of witnesses from Mayo (in particular Mr. Maughan) about the decision (illustrated in a number of items of correspondence) not to tell

Killeree that Electric Skyline had won the tender and in due course had signed the contract. However, this is not the way in which Killeree have approached the case and I will therefore proceed on the basis that Mayo behaved in a bone fide manner in its communications with Killeree.

80. Killlaree accordingly knew on receipt of the letter of the 9th October that the contract could be awarded at any time. It may well be, as counsel for Killeree has suggested, that Killeree felt that nothing would happen until it got a formal standstill letter. However, there is no evidence whatsoever to that effect before me.

81. Faced with the letter of the 9th October, and in order to preserve its position, the objectively appropriate thing for Killaree to have done was to seek an assurance as to when the contract was going to be awarded and, if no sufficient assurance was received, to commence proceedings. It did not do so. There is no evidence as to why it did not do so.

82. Ultimately, and particularly in the circumstances of this case, the question as to whether or not the failure to send the standstill letter *"has deprived [Killaree] of the possibility of pursuing pre-contractual remedies ..."* is a matter of fact. Killaree has given no evidence whatsoever as to why it did not pursue pre-contractual remedies, given the contents of the letter of the 9th October. I have to take into account that this may not be an oversight. There may well be good reason why Killaree did not put forward such evidence, given the very real possibility that such a witness could have been cross-examined.

83. In considering this issue, I proceed on the basis that the onus of establishing the facts set out at Regulation 11(2)(b) is on the applicant. It is, after all, the applicant who seeks to have the contract declared ineffective, and it is therefore for the applicant to establish not just that a Regulation 5 (1) infringement has occurred but also that the infringement has the qualities set out in Regulation 11(2)(b). However, my ultimate decision would not be different in the event that the onus lay on Mayo. It is difficult to see how Mayo would have

the onus of showing that the infringement has not deprived Killaree of the possibility of obtaining pre-contractual relief. Apart altogether from the classic difficulty of proving a negative, the reason why such relief was not possible would usually be something that could be best described by the person who would have liked to have sought it, rather than the person against whom such relief was to be sought. Having said that, the materials put before the court have allowed Mayo to point to the correspondence in its entirety and question why, given the content of the correspondence, Killaree did not seek to prevent the award of the contract to the successful tenderer.

84. As Killaree has failed to establish an entitlement to a declaration under Regulation 11 (2), it is unnecessary to consider whether or not I would have decided - pursuant to Regulation 11(5), that I should decline to declare the contract ineffective for *'overriding reasons relating to a general interest…"*.

85. There are, of course, the provisions of Regulation 11(7) as to whether or not the contract should be declared ineffective *"after having assessed all aspects that [the court] considers relevant …"*.

86. One of the issues in the issue paper is whether or not I can declare the contract ineffective pursuant to the provisions of Regulation 11(7). I would have thought it is clear that that is the case. Regulation 11(2)(b) requires the court to declare a contract ineffective in circumstances whether it has been a Regulation 5(1) infringement and where that infringement has the attributes described at 11(2)(b). Where the infringement does not have those characteristics, nonetheless there is an entitlement to declare the relevant contract ineffective if the court considers it appropriate to do so. Oddly, despite the fact that the issue paper asked me to decide whether or not I can make such an order, the issue paper does not ask me in fact to do so should I determine that I have jurisdiction.

87. Killaree has not, in its extensive pleadings, sought any relief pursuant to Regulation 11(7).

88. There is the further complication that, if I do not make an order under Regulation 11(7) then there is an obligation pursuant to Regulation 13 to impose an alternative penalty on Mayo. Again, this provision was opened to me by counsel for Killaree but no guidance whatsoever was provided as to the principles I should apply in imposing such an alternative penalty. In addition, as with an order under Regulation 11(7), the making of an order under Regulation 13 forms no part of the pleaded case. Needless to say, no application was made at the hearing to amend the pleadings in order to invite or require the court to make orders under either Regulation 11(7) or Regulation 13.

89. Had Killaree sought, in its pleadings, relief under Regulation 11 (7) I would have refused this. As counsel for Mayo submits, an declaration of ineffectiveness is a severe remedy. Killaree has not established an entitlement to a mandatory declaration. The factors to be taken into account in assessing whether to declare the contract ineffective, in any event, are;

(a) The fact that the contract is a significant public one, both regionally and nationally. While Killaree submits that the mere fact that this is a public contract cannot in itself constitute a reason to deny a mandatory declaration (a submission with which I agree), the significance of a particular public contract can be a reason not to exercise a discretion to declare it void;

(b) The fact that the nature of the works involved relate to public safety, and that the carrying out of these works has particular public importance for the reasons set out in the affidavits filed on behalf of Mayo.

(c) The fact that the process impugned by Killaree lead not to just one but to several individual contracts with a number of local authorities. These authorities are not party

to these proceedings, which is the result of a decision by Killaree as to what entities to join as respondents or notice parties. Counsel for Killaree cast doubt on whether any declaration of ineffectiveness could be made against these other parties. As a matter of principle, it is undesirable that the contracts involving the other local authorities should be invalidated as a result of proceedings to which they were not a party. It is equally undesirable that the contract with Mayo (which it was intended would be coordinated with the similar arrangements with neighbouring local authorities) should be struck down but the arrangements with the other parties remain in place.

(d) Finally, there is the desirability for legal certainty. Of course, the fact that the Regulations provide for the making of declarations that contracts are ineffective. That means that there cannot be absolute legal certainty for such agreements. However, in RPS Consulting (to which I will come later in this judgment) Humphreys J held as follows (at para 113);

"Counsel for the applicant also claimed what, in effect, amounted to a declaration that the standstill period had not expired because his client had not been furnished with valid or effective reasons. I would reject that contention on the basis of the need for legal certainty."

Here, I have found that it was open to Killaree to take action before the impugned contract was signed. Instead, Kilaree did not even inquire as to when the contract would be signed notwithstanding having ample opportunity to do so. In these specific circumstances, I would take this factor into account but only as one supporting a decision (based on the other three factors) not to declare the contact ineffective as an exercise of my discretion.

90. In summary, as Killaree has not sought an order under Regulation 11 (7) it will not be granted such relief. The proper approach for Killaree to have taken was to have sought to amend its pleadings to claim such relief. Had this been done, it would have both allowed an exploration as to whether such an amendment should be granted and (if it was) brought a clarity and precision to the case Killaree was making in seeking this relief. However, even had such am amendment been sought and granted my decision would have been as set out at paragraph 89.

91. On the question of an alternative penalty under Regulation 13, this is not sought by Killaree either in its pleadings or in the issue paper presented to me. This presents the obvious difficulty that, given the decision I have made about a mandatory declaration of ineffectiveness and the decision I would have made about any discretionary declaration of ineffectiveness, the Regulations require the imposition of some alternative penalty. However, it is simply impossible for me to do so in any way that follows the requirements of the fair procedures that apply in an adversarial system where (a) Mayo is entitled to know, as soon as practicable, exactly what orders are sought to be made against it if it fails in these proceedings; (b) Mayo is entitled to know the legal and evidential basis upon which any specific orders are sought against it; (c) no claim for such an order is made in this action; (d) even at the conclusion of the hearing, Killaree does not ask the court to fix any alternative penalty; (e) no submissions are made by either side as to the principles that govern the nature and extent of the alternative penalty; (f) no evidence is given expressly relevant to the issue of the form of alternative penalty; (g) no evidence is given as to the quantum of any fine to be imposed on Mayo. Fundamentally, given the adversarial nature of this action, Mayo should not face any penalty which Killaree is not asking the court to impose.

(b) Improper fettering of discretion

(i) The evidence

92. Killaree pleads (at para. 34 of its statement of grounds) that: -

> "34. The respondent was erroneously of the view that it had a mandatory obligation to initiate the procedure of requesting an explanation once it considered that there appeared to be abnormally low pricing. The respondent failed to recognise that it had a discretion to request an explanation even where it considered there was abnormally low pricing and thereby fettered its own discretion."

The evidence to support this element of Killaree's case is broadly to be found in correspondence. It is therefore not open to significant debate.

93. Killaree relies upon the letter of the 27th August, 2020, in which Mayo states: -

> "The obligation on the Employer to seek an explanation on prices which appear to be abnormally low prices in relation to works, supplies or services from tenderers is a mandatory one."

94. In Mayo's letter of the 15th September, 2020, Mayo further addressed issues of abnormally low pricing. Killaree complained that that letter omitted portions of the RFT provisions. Killaree argues that the terms of the RFT are inconsistent with an obligation to seek an explanation of abnormally low pricing, once Mayo had considered the possibility that such low pricing was involved in the tender. Killaree relies in particular upon s. 3.3.1 of the request for tender, which reads: -

> "If any tender does not comply with this section, the employer may exclude them from the tender process."

The section included a prohibition on tenderers using *"abnormally high or low rates or prices."*

95. Killaree also relies upon section D.1 of the request for tender which reads: -

"If a tenderer fails to comply in any way with these instructions, the employer may (but is not obliged to) disqualify the tenderer concerned as non-compliant, and reject any tender concerned, and without prejudice to this right, the employer may (but is not obliged to) seek clarification or further information (that does not materially alter a tender) from the tenderer in respect of the relevant tender or take any other step permitted by law."

96. Killaree also argue that Mayo's discretion to seek explanations in respect of abnormally low tenders is to be found at D.2.3 and s. 2.2.1. The first of these reads: -

"D.2.3 Abnormally low tenders, abnormally high or low prices

If, in the employers opinion, any tender demands are abnormally low or abnormally high, the employer may require the tenderer to provide details of the constituent elements of notional tender total or the tendered amount."

The latter reads: -

"2.2.1 If a tenderer fails to comply in any respect with the requirements of this paragraph 2.2.1, the contracting authority reserves the right to reject the tenderer's tenders non-compliant or, without prejudice to this right and subject to its obligations at law, to take any other action it considers appropriate including but not limited to:

- seeking written clarification from the tenderer;
- seeking further information from the tenderer; or
- waiving a requirement, which in the contracting authorities view, is non-material or procedural."

(ii) The submissions of the parties

97. Given the references to a significant number of authorities, for which both sides were responsible, the argument with regard to this issue was extensive. However, ultimately, it can be reduced to three issues. The first issue is whether or not the case law of the Court of Justice of the European Union required Mayo to seek explanations from Killaree about what appeared to be abnormally low aspects of Killaree's tender. Secondly, if there is no such legal requirement did Mayo in effect fetter its discretion by feeling it was under an obligation to seek such explanations. Thirdly, if there was no statutory requirement on Mayo to seek these explanations in the circumstances of the current case, was Mayo in breach of the terms of its own tender documents in acting as though it had no discretion in connection with the seeking of these explanations. Of course, if there was a legal obligation imposed by means of either European or domestic law on Mayo to carry out this enquiry, the contractual terms set out in the request for tender documentation must yield to that. This simple proposition is not seriously disputed by counsel for Killaree.

98. The first issue was complicated by the fact that there is a line of authority from the courts of England and Wales, and Northern Ireland, which strongly suggest that there is no obligation to seek explanations, at least the sort of obligation maintained by Mayo. These authorities conclude that there is an obligation to seek explanations from a tenderer, in connection with apparently abnormally low tenders, only where the employer is considering rejecting the tender because of this issue. Equally, there is forceful and impressive commentary from Professor Arrowsmith rejecting a general duty to seek explanations from a tenderer about prices which appear to be abnormally low. However, as counsel for Mayo submitted, in the event that I find that the CJEU jurisprudence establishes an obligation to seek explanations, that is the case law which binds me no matter how attractive the other analyses may be.

99. In their written submissions, counsel for Killaree quote from *Varney v Hertfordshire County Council* [2010] EWHC 1404, *Nats (Services) Limited v Gatwick Airport Limited* [2013] NIQB 64, *SRCL Limited v National Health Service Commissioning Board* [2019] PTSR 383 and only one CJEU case (Case C - 599/10 *Slovak*). The passage from the CJEU decision quoted by Killaree's counsel is described as *"ambiguous"*. Paragraph 47 of Killaree's written submissions go on: -

> "… It is submitted does not mean that the awarding authority has a mandatory duty to invoke the procedure for requesting an explanation, in all cases. Insofar as this is the construction, Arrowsmith has described this as *'fallacious'* and the English courts should not apply it to construction of Article 69."

100. It is not unfair to describe the written submissions of Killaree as focusing, not on the CJEU jurisprudence, but on the local juristic and academic analysis of European law in England and Wales.

101. Mayo's written submissions, in contrast, focus essentially on the CJEU case law.

102. A similar divergence of approach was to be seen in the oral submissions. Ultimately, the following European authorities were quoted to me. I will arrange them in the order in which they occurred, rather than the order in which they featured in submissions.

103. The first relevant statutory provision is Art. 55(1) of Directive 2004/18/EC. That provision reads: -

> "1. If, for a given contract, a tender appears to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant."

104. This provision clearly imposes an obligation on the contracting authority to seek *"details"* of the relevant elements of the tender, but also refers to the potential rejection of

the tenders involved. A rather different formulation appears at Art. 69 of Directive 2014/24/EU. It reads: -

> "1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services."

105. The overt connection between the request for an explanation and the possible rejection of the tender is not repeated.

106. Article 69(1) is transposed into Irish law by Art. 69(1) of the 2016 Regulations.

107. A number of the authorities to which I have been referred predate all of these provisions. However, they are helpful in showing the approach taken by the CJEU in connection with the issue of abnormally low tenders. I will, broadly, go through these in chronological order.

108. In *Fratelli Costanzo* (Case -103/88, judgment of 22nd June, 1989) a tenderer, whose bid was excluded from the tendering procedure, challenged this decision. The exclusion was based on a mathematical calculation rather than any analysis of the genuineness or otherwise of the tenderer's bid. In considering the three questions referred to it, the CJEU made the following observations: -

> "20. With regard to the first question, it should be observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those tenders are genuine ones that the Council, in Article 29(5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low. That aim would be jeopardised if Member States were able, when implementing Article 29(5) of the Directive, to depart from it to any material extent."

109. More importantly, the court went on: -

"25. In the first part of its third question the national court seeks to establish whether Article 29(5) of Council Directive 71/305 allows Member States to require the examination of tenders whenever they appear to be abnormally low, and not only when they are obviously abnormally low.

26. The examination procedure must be applied whenever the awarding authority is contemplating the elimination of tenders because they are abnormally low in relation to the transaction. Consequently, whatever the threshold for the commencement of that procedure may be, tenderers can be sure they will not be disqualified from the award of the contract without first having the opportunity of furnishing explanations regarding the genuine nature of their tender."

110. In *Fratelli Costanzo,* therefore, the CJEU is ensuring the operation of a procedure by which tenderers are entitled to explain what may, on the face of it, appear to be possibly abnormally low pricing. This protects the interest of the tenderers, who are guaranteed a right to be heard on an issue that might otherwise result in their elimination from the process. It also helps to ensure the *"genuine nature"* of the tenders being considered by the contracting authority, which only wants to have to consider tenders which are genuine.

111. In *Impresa Lombardini* (joint Cases C-285/99 and C-286/99, judgment of the 27th November, 2001). at para. 43 onwards, and in considering Art. 29(5) of Directive 71/35, the court stressed the requirement on the contracting authority *"to seek from the tenderer, before coming to a decision as to the award of the contract, an explanation on its prices …"*; para. 43.

112. Paragraph 44 explains that the opportunity should be provided to a tenderer to give this explanation so that the contracting authority does *"not in any circumstances reject an abnormally low tender without even seeking explanation from the tenderer…"*; para. 44.

113. Importantly, at para. 46 it reads: -

"46. The court thus held that Article 29(5) of Directive 71/305 requires the awarding authority to examine the details of tenders which are obviously abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations (*Fratelli Costanza*, at para. 16)."

114. As we will see, this formulation is materially identical to the formulation found in *SAG*. The wording suggests that there is a primary obligation on the contracting authority to scrutinise the details of such tenders. For that purpose, and also to provide fair procedures to the tenderer, it is necessary to require explanations from the tenderers about abnormally low prices. This dual function is to be found at para. 48 of the judgment, which reads: -

"48. The court also observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those tenders were genuine ones, and thus to ensure the opening up of public work contracts, that the Council, in Article 29(5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low, and that that aim would be jeopardised if Member States were able, when implementing that provision, to depart from it to any material extent (*Fratelli Costanza*, para. 20)."

115. It is essential, therefore, that only *"genuine"* tenders are ultimately successful before the contracting authority.

116. The purpose of this element of the Directive is made clearer still at para. 55: -

"55. It is apparent from the very wording of that provision, drafted in imperative terms, that the contracting authority is under a duty, first, to identify suspect tenders, secondly to allow the tenders concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and fourthly, to take a decision as to whether to admit or reject those tenders …"

117. The duty to identify suspect tenders is one which arises because of the need, to which I have just referred, to ensure that only genuine tenders are successful. A similar message is to be found in para. 62 of the judgment, a portion of which reads: -

> "62. More particularly concerning the first of the rules on matters of detail referred to in para. 60 of this judgment, this appears to be a requirement which affects all tenderers without distinction and appears to be intended to ensure a certain uniformity in the presentation of tenders, likely to facilitate an initial examination by the contracting authority and to allow a *prima facie* assessment to be made of the seriousness of the tender. It may indeed happen that, on the basis of those explanations alone, the contracting authority becomes convinced that, although the tender appears abnormally low, it is serious on the authority therefore accepts it. In that way, this rule contributes to accelerating the procedure for verifying tenders."

118. Paragraph 60 of the judgment referred to the provisions of Art. 30(4) of the Directive. However, paragraph 62 is nonetheless relevant to the analysis which I have to carry out, as it emphasises the need for an initial assessment to be made by the contracting authority about the *"seriousness"* of the tender.

119. The obligation on the contracting authority to ensure that the tender is *"genuine"* or *"serious"* is entirely consistent with it having a duty to seek explanations about abnormally low prices from relevant tenderers. The fact that the seeking of such explanations also facilitates the tenderer (as it can then have a guaranteed opportunity to address concerns about abnormally low pricing) does not elide or diminish the need to ensure, in the interest of the contracting authority, that tenders are genuine.

120. In *TQ3 Travel Solutions* (Case T-148/04, judgment of the 6th July, 2005) the Court of First Instance (referring back to *Renco v Council* [2003] ECR 11-171) stated :-

"31. In that regard, the applicant recalls that the court held in … *Renco*… that *'the Council … must examine the reliability and seriousness of the tenders which it considers to be generally suspect, which necessarily means that it must ask, if appropriate, for details of the individual prices which seem suspect to it, a fortiori when there are many of them'* and that, in addition *'the fact that the applicant's tender was considered to conform to the contract documents did not relieve the Council of its obligation, under the same Article, to check the prices of a tender if doubts arose as to their reliability during the examination of the tenders and after the initial assessment of their conformity.*"

This is also consistent with the obligation, for which Mayo contends, that where prices seem suspect to a contracting authority, that authority *"must examine the reliability and seriousness of the tenders …"*. In the course of that examination the tenderer has an entitlement to address these concerns and provide the appropriate explanations.

121. In the findings of the court, it is noted that *"the Commission enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender…"*. More germanely, the court found: -

"49. Moreover, under Art. 139 of the detailed implementing rules, the contracting authority is obliged to allow the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low. The obligation to check the seriousness of a tender also arises where there are doubts beforehand as to its reliability, also bearing in mind that the main purpose of that Article is to enable ta tenderer not to be excluded from the procedure without having had an opportunity to explain the terms of its tender which appears abnormally low.

50. The application of Art. 146 of the detailed implementing rules is therefore inherently connected with that of Art. 139 of those rules, since only when a tender is

considered abnormally low, within the meaning of the latter Article, is that the evaluating committee required to request details of the constituent elements of the tender which it considers relevant before, where appropriate, rejecting it. There is also the freestanding obligation to check *'the seriousness of a tender'* at its height, paragraph 49 of *TQ3 Travel Solutions* refers to the *'main purpose'* of the relevant Article being to enable a tenderer not to be excluded from the procedure without having an opportunity to explain itself. It is not the sole purpose of the relevant Article."

122. The next relevant judgment to which I was referred was *Secalux* (Case T-90/14, judgment of the 8th October, 2015). In that case, an unsuccessful tenderer sought on a number of grounds (including *"the abnormally low nature of the chosen tender…"*; (para. 17 of the judgment) to set aside an award of a contract. On that issue, it was argued on behalf of Secalux that further information should have been sought from the successful tenderer. At para. 61, the court observed: -

"61. An offer which appears abnormally low gives rise to the suspicion that the tenderer will not be able to perform the contract under the conditions offered, in particular because the asking price seems to low or because the technical solutions envisaged appear to exceed the tenderer's capacity…"

123. Importantly, the court went on (at para. 62): -

"62. It also follows from case law that the obligation to verify the seriousness of an offer results in the prior existence of doubts as to its reliability…"

124. It is unnecessary to paraphrase this portion of the judgment. However, consistent with this approach is the most recent judgment opened to me, namely *Tax-Fin-Lex* (Case C - 367/19, Judgment of the 10th September, 2020).

125. This is a case where the tender price was €0.00. The court found that that, in itself, could not lead to the automatic rejection of the tender. The court went on: -

> "32. Thus it is clear from paragraph 1 of Article 69 that where a tender appears to be abnormally low, contracting authorities are to require the tenderer to provide an explanation for the price or costs proposed in the tender, which could relate, *inter alia*, to the elements set out in paragraph 2 of that article. The explanation provided is thus to be used in the assessment as to whether the tender is reliable and enables the contracting authority to establish that, although the tenderer proposes a price of EUR 0.00, the tender at issue will not impair the proper performance of the contract."

126. Again, there is the dual purpose of the enquiry to be made of the tenderer. The first is to establish whether the tenderer is reliable; as I have already observed, there is no point in a tender being successful in circumstances where it is not genuine, serious or reliable. The second purpose is, of course, to allow the tenderer to explain the apparently suspect pricing. Given the reason why this obligation is placed upon the contracting authority, it is not necessary that the contracting authority is considering rejecting the tender. It is simply establishing whether or not an individual tender is a serious one. Naturally, as a matter of practicality any findings that the tenderer is not serious or genuine is very likely to lead to its rejection.

127. It is against those series of decisions, and taken out of sequence because of its importance in the debate before me, that I come to consider the *SAG* case. That is the decision of the court in Case C-599/10, delivered on the 29th March, 2012, and the authority which counsel for Killaree focused in their submissions.

128. Two groups were excluded from a call for tenderer procedure, for a bundle of reasons which included alleged failure *"to provide an adequate response to the request for clarification of the abnormally low price in their tenders."*; para. 11 of the judgment.

129. Among the questions posed by the national court to the court of justice was this portion of question 3: -

> "Is a contracting authority's procedure, according to which it is not obliged to request a tenderer to clarify an abnormally low price, in conformity with Article 55 of [Directive 2004/18], and, on the formulation of the question put by the contracting authority to the applicants in connection with the abnormally low price, did [the applicants] have the opportunity to explain sufficiently the consistent features of the tender submitted?"

130. Having referred to Art. 55, at para. 28 the court commented: -

> "28. It follows clearly from those provisions, which are stated in a mandatory manner, that the European Union legislature intended to require the awarding authority to examine the details of tenders which are abnormally low, and for that purpose obliged it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine (see, to that effect, … *Lombardini* and *Mantovani*… paragraphs 46 to 49)."

Unsurprisingly, the court went on to find as inconsistent with Art. 55 a decision by a contracting authority that it was not obliged to request a tenderer to clarify an abnormally low price.

131. The decision of the court, in as much as it is relevant, reads: -

> "45. Having regard to all of the foregoing considerations, that the answer to the questions referred is that:
>
> - Article 55 of Directive 2004/80 must be interpreted as requiring the inclusion in national legislation of a provision … which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal. It is for the national court to ascertain, having

> regard to all the documents on the file placed before it, whether a request for clarification enabled the tenderer concerned to provide a sufficient explanation of the composition of its tender …"

132. On no less than four occasions (at pages 165 and 171 of the Transcript for day two) counsel for Killaree described this case as the *"high water mark of the European authorities on the 'duty to investigate', at least as far as Mayo was concerned."* I disagree. I accept the submission made by counsel for Mayo that *SAG* is just one of a number of cases which, consistently over a lengthy period of time, established an obligation on a contracting authority (when there is a belief that a tender involves abnormally low prices) to require the tenderer to address this issue. The reason for this is to ensure that the tenderer is a genuine one, capable of being performed.

133. These judgments of the CJEU are binding on me. I should add that they are so clear that there is no question which I feel should be referred to the CJEU.

134. Having decided this issue, it is unnecessary for me to consider the English and Northern Irish cases, or the views of Professor Arrowsmith. It is also unnecessary for me to decide whether or not Mayo has fettered its discretion, as I have already determined that it was under a legal obligation to raise these queries with Killaree. Even if the tender documentation suggested that there was some element of discretion on the part of Mayo in this regard, that is overridden by the statutory obligation on Mayo to investigate abnormally low pricing in the circumstances of this case.

135. It may, however, be helpful to reflect on one aspect of Professor Arrowsmith's work. In *"The Law of Public and Utilites Procurement"* (3rd ed.) at para. 7-267, Professor Arrowsmith comments: -

> "The 2014 Public Procurement Directive deals with abnormally low tenders in Article 69. Unfortunately, this provision does not take the opportunity offered by the new

Directive to clear up the uncertainty of the issue as to whether it is generally a duty, or merely a power, to reject a tender that presents a certain risk of non-completion. Rather it compounds the confusion that currently exists.

In this respect the 2014 Directive simply writes into the legislation the statement in [*SAG*] that there is a duty to investigate an abnormally low tender, without limiting this to the situation which the contracting authority wishes to reject the tender: Article 69(1) states that: 'Contracting authorities *shall* require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services (emphasis added)'. However, Article 69 does not then clarify whether in consequence there is also a duty to *reject* tenders for which there is no satisfactory explanation. Rather, it uses the language similar to that of the 2004 provision, and merely indicating matters that may be taken into consideration in the investigation … Stating … that tenders may *only* be rejected when there is no satisfactory explanation - without indicating whether they *must* be rejected or merely *may* be rejected in such a case."

136. At paragraph 7-268, and having set out three possible interpretations of Art. 69, Professor Arrowsmith writes: -

"A second – and better – interpretation, however, is that there is a general duty to investigate but no general duty to reject tenders based on risk and non-performance – such a duty is this only in the specific case stated in Article 69, namely non-compliance with certain legislation."

137. As I read them, and notwithstanding the severe criticism of *SAG* contained in Professor Arrowsmith's work, she seems to indicate that Art. 69(9) provides for a duty to investigate an abnormally low tender, and this is not limited to a situation which the contracting authority wishes to reject the tender. She argues that, on carrying out this

investigation and hearing what the tenderer has to say, there is a discretion on the part of the contracting authority as to whether or not to accept the tender (except in specific circumstances which do not apply here). In large measure, this analysis supports Mayo's submission (set out initially in the written submissions) at para. 2.12 in the following terms: -

> "2.12 Therefore, it is submitted that when one looks at Art. 69 in the round – in terms of the words used on the scheme – there is:
>
> '2.12.1 a **duty** to investigate what the contracting authority suspects to be an abnormally low tender;
>
> 2.12.2 a **duty** to afford the tenderer an opportunity to offer an explanation; and
>
> 2.12.3 a **discretion** to eliminate the tender (save for the duty arising in connection with Article 18(2) (which does not apply here)."

138. On the basis of the case law of the CJEU, and taking into account the observations of Professor Arrowsmith, I have concluded that this analysis is correct. This ground of challenge therefore fails.

(c)Misinterpreting the tender documentation

139. The approach to be adopted by the court towards the interpretation of tender documents is well settled. While there was some difference of emphasis between the parties, they agreed that the principles were set out by Finlay Geoghegan J. in *Gaswise Limited v. Dublin City Council* [2014] 3 I.R. 1, Baker J. in *Somague* [2016] IEHC 435 and Barniville J. in *Transcore v. National Road Authority* [2018] IEHC 569.

140. In particular, the parties emphasised the section of the judgment of Finlay Geoghegan J. in *Gaswise* where she said (at p.9):-

"The interpretation of the ITT is a matter for the court. That interpretation must be carried out in a manner which gives effect to the core principles of equal treatment and transparency in the legislative framework as amplified by the judgments, in particular of the CJEU."

141. Counsel also referred to the comments of McCloskey J. in *Clinton v. Department for Employment and Learning* [2012] NIQB 2 where he observed that the interpretation of tender documents is neither *"an exercise of statutory construction"* nor *"as one involving the interpretation of a deed or contract or other legal instrument".* These dicta were endorsed by Finlay Geoghegan J. in *Gaswise,* at para. 22.

142. The parties did not dispute the attributes of the hypothetical tenderer to whom the documentation is addressed, as set out in *Gaswise,* as follows:-

"The test provides some insight into the characteristics and attributes of such a tenderer: well, but not necessarily fully, informed and usually careful and attentive, but not invariably a paragon of diligence…."

143. The following observation of Barniville J. in *Transcore* was cited by both parties in their written submissions:-

"The contracting authority must also interpret the criteria in the same way for all bidders throughout the entire procurement process. 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…"

144. While both sides agreed on these as the principles to apply in construing the tender documents, it has to be said that the approach taken on behalf of Killaree was not one which emphasised context, and did not seek to avoid the over legalistic construction warned against

by McCloskey J., Finlay Geoghegan J. and Barniville J. Certain of the submissions made on behalf of Killaree were somewhat divorced from the wider context of the contractual documents. In particular, Killaree overlooked the simple fact that an abnormally low tender will not infrequently include a certain amount of abnormally low individual prices or costs.

145. As we will see, the rather legalistic approach adopted by Killaree predated the decision by Mayo to exclude Killaree from the process. While there were many complaints during the course of the hearing about an alleged failure of on the part of Mayo to engage with Killaree, Killaree's own engagement in the relevant correspondence bore the hallmarks of a legal debate as much as an effort to provide the commercial explanations being sought by Mayo. That approach is, of course, one which Killaree is entitled to adopt. However, it is notable that the very legalistic approach taken by Killaree while it was involved in the tender process has now carried through to an excessively strained argument about the meaning of the tender documents. I will now set out the relevant portions of those documents.

146. The RFT at clause 2.2 sets out the need for compliant tenders, and specifies that Mayo reserves the right to reject a tender as non-compliant in the event that certain formalities are not observed. That does not, of course, mean that Mayo's ability to reject a tender is confined to breach of the procedural requirements of the RFT.

147. Clause 2.10 deals with pricing, and requires tenders to complete the pricing schedule included with the tender.

148. Clause 3.2 deals with selection criteria. It provides:-

> "Tenders will either pass OR fail each of the Selection Criteria in this part 3.2. A tenderer who fails Selection Criteria will be excluded from participating in this competition."

149. The award criteria are set out at 3.3. These include certain requirements which, counsel for Killaree submitted, had nothing to do with abnormally low tenders. It is certainly the case

that some of the requirements at 3.3.1(d) do not relate to pricing at all, let alone to abnormally low tenders. For example, the requirement that the sums given in tenders must be in euro to two decimal places is not something that impinges on any abnormally low pricing or abnormally low tendering. However, there are two express requirements which could have a relevance to the issue of whether or not a tender is abnormally low. They are as follows:-

> "Tenderers must not use abnormally high or low rates or prices.
>
> Each amount in the Pricing Document must cover the full inclusive value of the relevant work and, where applicable, a balanced allocation of the Notional Tender Total."

150. Related to these is the obligation that all items and quantities in the Pricing Document must be priced.

151. Still in para. 3.3.1 is the section dealing with Tender Evaluation. Section d.1 reads:

> "Non-compliant Tenders
>
> If a tenderer fails to comply in any way with these instructions, the Employer may (but is not obliged to) disqualify the Tenderer concerned as non-compliant, and reject any tender concerned, and without prejudice to this right, the Employer may (but is not obliged to) seek clarification or further information (that does not materially alter a tender) from the Tenderer in respect of the relevant tender or take any other step permitted by law."

152. In the same section of clause 3.3.1, there are two further provisions. The first of these relates to "Unbalanced Tenders" and reads (at d.2.2):-

> "If, in the employer's opinion, the tendered rates or prices in the Pricing Document (after adjustment under s.6.1 above) do not reflect a balanced allocation of the Notional Tender Total, the employer may (but is not obliged to) do either or both of the following:-

"require the tenderer to provide a breakdown of any tendered amounts, to show that they reflect a fair allocation of the Notional Tender Total and

Invite the tenderer to adjust rates or prices tendered in the Pricing Document, but without adjusting the Notional Tender Total.

If, having considered the information provided, the employer is of the view that the tenderer's tendered rates or prices in the Pricing Document do not reflect a fair allocation of the Notional Tender Total, the employer may reject the tender."

153. The final relevant rule in clause 3.3.1 is d.2.3., headed "Abnormally Low Tenders, Abnormally High or Low Prices" which reads:-

"If, in the employer's opinion, or any tendered amounts are abnormally low or abnormally high, the employer may require the tenderer to provide details of the constituent elements of the Notional Tender Total or the tendered amounts.

This may include (without limitation) the information listed in reg.69(1) of the European Communities (Award of Public Authority Contract) Regulations 2006. Any failure to provide such information, on request may exclude the tenderer from further consideration. *If, having considered the information provided, the employer is of the view that the tendered amounts are abnormally low or abnormally high, the employer may reject the tender."*

I have added the emphasis to this section.

154. At 3.3.1(e) it is specified that the tenders *"will be comparatively assessed under the Quality Criteria"*.

155. A query was raised by another tenderer in respect of the Pricing Document. This query, and the response to it, is relied upon by both sides. The query read:

"Can you please advise on the procedures in place to identify and deal with Abnormally Low Rates submitted by Contractors for this Tender i.e. rates which could not possible (sic) include for the labour, materials."

156. The format of the question is not ideal. Notwithstanding that, the following answer was provided by Mayo:

"1. The contracting authority will identify suspect tenders; secondly, to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate; thirdly, to accept the merits of the explanations provided and, fourthly, to make a decision as to whether to admit or reject those tenders…

2. In relation to which the tenderer cannot explain his price on the basis of the economy of the construction method, or the technical solution chosen, or the exceptionally favourable condition.

3. In the light of client's preliminary estimate & of all the tenders submitted, it seems to be abnormally low by not providing a margin for a normal level of profit and

4. Ans: European Commission Guide to the Community Rules on Public Procurement of Services – a level below which an offer cannot be considered as being serious having regard to the services provided."

157. In their written submissions, counsel for Killaree suggest that the answer is confusing. The procedures on which the other tenderer sought clarification are certainly not set out crisply. However, the reasonably well-informed tenderer would understand that what is been set out here is a series of ways in which abnormally low tenders would be identified and dealt with. One way is set out in para. 1 which clearly follows the scheme set out by the CJEU in

Impresa Lombardini and *Renco Spa*. Even if a tenderer is not excluded at that stage, it is possible for the contracting authority to come to the view (when all the tenderers are in) that an individual tenderer's abnormally low *"by not providing a margin for a normal level of profit"*. In addition, Mayo could have come to the view that the offer could not be considered as being serious, in the fashion set out on Point 4 of the reply. What Mayo has not done, and cannot have been seen by any reasonable well informed tenderer as having done, is to confine itself to deciding if a tender was abnormally low only after all other tenderers were received and compared with each other. That construction, for which Killaree contends, is not correct. It would involve Mayo significantly limiting its ability to deal with tenders that they did not feel were genuine, and would involve requiring it to allow all of these to proceed to a very advanced stage of the process. There is no reason whatsoever why such a limiting approach would have been taken by Mayo towards its entitlement under the tender documents and, in particular, its power to exclude at a relatively early stage tenderers who did not appear to be genuine. Its entitlement to do so arose not only under the tender documents but also under European law.

158. Killaree now argues that May misinterpreted its tender documents. In its written submissions, from paras. 52 to 57 inclusive, counsel for Killaree set out this argument. In order to understand these submissions it is necessary to consider the range of correspondence moving between Mayo and Kilaree, to which I have referred earlier in this judgment.

159. Killaree are highly critical of the mail/e-mail of 14 August 2020. This e-mail is stated to involve confusion and conflation of *"a number distinct (sic) matters relation to pricing"*. One particular point made is that the e-mail *"appeared to quote from para. 3 of the clarification"*. In fact, the e-mail expressly refers to the invitation to tender documents and the query raised by the other tenderer, which I have already set out. Naturally, therefore, the e-mail refers to requirements placed on the tenderers either in the tender documents or as set

out in the response to the Q & A inquiry. The e-mail could have been more clearly drafted and could have identified the individual references which are made, but that does not involve any confusing of the tenderer. It sets out a series of obligations placed on Killaree by the tender documents, and concludes by expressing (in the light of these obligations) a concern about the 0.01 € values to be found in approximately two-thirds "*of the tendered rates…*" put forward by Killaree. Mr. Maughan, on behalf of Mayo, then asked:

> *"I am now requesting you, by way of clarification to demonstrate the genuineness of all of your pricing by providing specific details as to how you can offer services, works and goods for the pricing submitted."*

160. This e-mail does not indicate any misunderstanding or misinterpretation on the part of Mayo of the tender documents. Apart from the allegation of confusion and conflation, para. 54 of the Kilaree written submissions makes more four further points about the email of the 14th of August.

161. The first of these is the reference to Kilaree's "preliminary estimate and of all the tenders submitted". I already set out what I understand that response to the query to mean. The fact that there is a repetition of this possible basis upon which a tender will be found to be abnormally low is unsurprising and does not indicate any misinterpretation by Mayo.

162. Counsel make a second point, which in truth is a variant to the first point. They state that there is a reference to *"all the tenderers submitted"*. Counsel then argue that the Statement of Opposition specifically denied (at para. 7) that Mayo had to assess abnormally low tenderers by reference to the tenders submitted and that there is no evidence this was taken into consideration contrary to the Council's own Q&A clarification. As I have already decided, the construction placed on the Q&A clarification, in the context of the tender documents generally, by Killaree is incorrect. I have earlier set out the correct construction..

163. Killaree take issue about the fact that the concerns about the €0.01 values *"were not identified as relating to any particular item…"* I do not see how that constitutes a misinterpretation of the contractual documents by Mayo. The concern related to all of the items priced at this very low level. As it later became clear from the evidence, individuals on the Employers side may have had heightened concerns about particular items, but that does not mean that Mayo was not entitled to raise concerns about all items bearing a 1 cent rate.

164. Finally, counsel observed:

> *"This rule that the rates must be for the full item of relevant work on a supplies and services does not relate to abnormally low pricing but that the rates must not be for only part of the relevant, supplies and services."*

165. However, the e-mail of 14 August referred to the requirement, plainly set out in the RFT, that tenderers must not use abnormally high or low rates for prices. Mayo was quite entitled to remind Killaree of this obligation on its part, particularly where Mayo was seeking the details as to how the pricing submitted allowed Killary to offer particular *"services, works and goods"*.

166. Killaree replied on 20 August 2020. Mayo responded on 27 August 2020. In that letter, Mayo sought a response under three headings. These are set out at para. 23 of this judgment. Three *"observations"* are made about this letter. It is suggested that the e-mail of 14 August *"confused considerations of abnormally low pricing and balanced allocation of costs"*. There is no reason to believe that it did. Counsel also observe that *"without further explanation"* a suggestion was made in the letter of 27 August that the tender rates *"do not reflect a balance allocation of the tender costs…"*. Two things can be said about that. Firstly, this request on the part of Mayo clearly arises from its concern about the one cent rate quoted for much of the work. There is no restriction on Mayo raising this issue by reference to the requirement that there be a balanced allocation of the notional tender total. Secondly,

while it is submitted that Mayo do not provide any reason for making this request, that does not in itself indicate a failure on the part of Mayo to interpret correctly the tender documents.

167. It is further submitted that Mayo's request for details of *"constituent elements of the one cent items makes no sense"*, as a request for constituent elements concerns elements of the proposed total tender. In fact, Mayo gave Killaree an opportunity *"to provide details of the constituent elements of the Notional Tender Total as well as the "tender rates and prices"*. The emphasis is mine. Taken at its height, however, this argument does not indicate any misinterpretation by a mail of the tender documents.

168. Finally, counsel argue that the explanation sought at (c) of the letter of 27 August was unnecessary, as Killaree *"had already furnished explanations which were not ever acknowledged"* (para. 55 of the written submissions). This is not an argument that goes to Mayo's interpretation of the tender documents, let alone even begin to establish the alleged misinterpretation of the tender documents by Mayo.

169. There is a glancing reference at para. 56 of Killaree's written submissions to subsequent correspondence, but no argument or observations are made in respect of these. This section of the Killaree written submissions concludes:

> *"It is submitted that the council, in misinterpreting and confusing the invitation the tender document in seeking an explanation for alleged abnormally low tenders, failed to apply its own stated test in considering abnormally low pricing and these amounted to manifest and clear errors."*

170. This argument is simply not made out at all in either the written or the oral submissions on behalf of Killaree. The conclusion which Killaree invites the Court to reach is unsupported by a proper construction of the tender documents, and a full consideration of the correspondence on which Killaree relies. I should say that, while I have analysed this aspect

of Killaree's case by reference to the written submissions, I have also carefully considered the oral submissions of counsel, which do not carry the matter significantly further.

171. I therefore find that this ground of challenge fails.

(d)Failure to apply appropriate test for considering Killaree's explanations

172. I have already summarised the letter of 9 October 2020, which is the central document in respect of this section of the Killaree case. By way of reminder, this letter excluded Killaree from the tender process. It did so in the context of the earlier correspondence, which is expressly referred to at the commencement of the letter. It goes on:

> *"Upon review of the documentation submitted by [Killaree] and in the exercise of its professional judgment, the Contracting Authority is of the view that the tender submitted by Killaree is abnormally low for the following reasons…"*

173. The reasons are then given. I will return to them shortly.

174. Counsel for Killaree submit that there were four *"fundamental flaws in this letter…"*; para. 59 of the written submissions. I will consider each of these in turn.

175. Firstly, it is argued that Mayo has come to the view that the tender submitted is abnormally low based on the four bullet points set out in the letter. It is said that all of these (but in particular the second and third items) concern different pricing rules *"concerning the full inclusive value of the works and a balanced allocation of the total."* It is then submitted that Mayo *"misinterpreted the rule concerning the full inclusive value of the works."*

176. This one flaw appears to have two constituent parts. The first relates to the meaning of the phrase *"full inclusive value of the works"*. The second relates to the assertion that the four bullet points *"concern different pricing rules…"*.

177. As indicated earlier, I will now set out the four reasons why Mayo had come to the view that the tender was abnormally low. These are:

"1. 66% of the tender rates submitted in the pricing document were priced at €0.01 values;

2 The rates priced at €0.01 does not cover the full inclusive value of the relevant works, supplies and services;

3. The clarifications and explanations provided by Killaree do not provide sufficient evidence that the tendered rates and prices submitted in its pricing document are not abnormally low but that they reflect a balanced allocation of the Notional Tender Total; and

4. In light of the works, supplies and services required under the Contract, the Contract is not capable of being performed on the basis of the tendered rates."

178. The phrase *"full inclusive value"*, as has already been noted, appears at Clause 3.3 in the context of the requirement that every amount in the Pricing Document must cover the full inclusive value of the relevant work. In the Pricing Schedule, appended to the RFT at Appendix 2, this phrase is defined. The definition is a lengthy one. It begins with the phrase (at 1.1 of the Pricing Schedule):

"The rates and prices entered in the Pricing Schedule should be deemed to be the full inclusive value of the work covered by the several items including the following, unless expressly stated otherwise:"

179. In his oral submission, counsel for Kilaree emphasised that the word *"value"* is not interchangeable with the word *"cost"*. He suggested there was an ambiguity in the phrase, and concluded that the phrase *"full inclusive value"* did not require the tenderer to price individual items in a way that covered the full cost of each of them.

180. I cannot accept this construction. The very first item which is covered by the rates on prices constituting the full inclusive value of the work is (my emphasis) :

(i) Labour *and Costs*;

181. The other specific items (including (a) the supply of materials, goods, storage, depot overheads and costs at market rates in connection therewith, (b) establishment charges, overheads and profit, (c) waste/package removal and disposal …in accordance with WEEE Directive and current legislation, (d) preparation of designs, (e) preparation and supply of drawings and manuals) all involve costs and outlay which must be covered by the rates and prices entered in the Pricing Schedule. Full inclusive value therefore, seen by the reasonably well informed tenderer in the context of the Tender Documents, would involve the costs of the relevant works, supplies and services at least as set out at Clause 1.1 of the Pricing Schedule. While by no means definitive, the fact that the requirement that each entry in the Pricing Document cover the full inclusive value of the relevant work is to found cheek by jowl with the prohibition on tenders using abnormally low rates or prices in itself would lead a tenderer to conclude that the rates quoted must cover the costs of any work or services or goods to be provided. This requirement is entirely consistent with a prohibition on abnormally low prices, though for obvious reasons the two are not absolutely co-terminus. For the sake of completeness, it should be noted that Clause 1.3 of the Pricing Schedule also obliges tenderers to submit a rate "for all work items even if they believe these items are not included in the works requirements." This is especially relevant when one considers the efforts by Killaree to show that its tender was a genuine one.

182. In their submissions, and consistent with the way they operated the process, Mayo argued that the obligation in the RFT on the tenderer is that the rates cover the full inclusive value (by which they mean the full inclusive cost) of the specific good or service. For the reasons I have given, I think that it is the correct construction. This alleged "*fundamental flaw*" in the letter of 9 October 2020 does not in fact exist.

183. The second aspect of this first argument is that the four considerations set out in the bullet points contained in the letter relate to different pricing rules. I do not think that is so.

As I indicated at the start of the section of the judgment dealing with Mayo's alleged misinterpretation of the Tender Documents, it is simply unreal to treat abnormally low rates (or rates that do not even cover the cost of individual pieces of work) as having nothing to do with an abnormally low tender. In concluding that a tender is abnormally low, it is quite appropriate for Mayo to take into account the fact that a quoted rate of 1 cent does not cover the relevant piece of work. I wil take just two examples highlighted by Mayo in its submissions. Under Item 4.8.15 of the Pricing Document, Killaree has given a rate of 1 cent per day for a JCB with driver and including one general operative. Under Item 3.10.3.1 Killaree has quoted a rate of 1 cent for the supply, installation, testing and commissioning of an artic flex in a galvanised steel conduit inclusive of all fixing details to the wall. This job has a requirement for a qualified electrician. Both of these examples indicate that the quoted rates require further explanation to show that they satisfy the requirement that the rate covers the full inclusive value of the individual piece of work. Givien the specific term in the contract to that effect, it was not improper of Mayo to take the 1 cent rates into account in coming to the view that the tender submitted by Killaree was not a genuine one. That is particularly the case given the fact that the 1 cent rate covered 66% of the items in the Pricing Document, and that (in the view of Mayo) the clarifications and explanations provided by Killaree were insufficient. This first fundamental flaw is therefore not made out by Killaree.

184. The second fundamental flaw asserted by Killaree is that Mayo asked itself the wrong question. Counsel argued that the question was not whether the tender was abnormally low but whether the tender was genuine or serious. This was also expressed, at the hearing, as "the circularity argument…"; page 68 of Day 2. This can be summarised briefly. The argument is that Mayo had taken a view that the tender was abnormally low, it raised its queries, but only considered Killaree's response by reference to the whether the tender was abnormally low and not whether it was serious or genuine.

185. This submission reflects the approach adopted by Killaree, quite at odds with that which the authorities suggest the Court should take. Consistent with *Gaswise* and *Transcore* an excessively legalistic and semantic approach to the construction of documents has to be avoided. This submission is based on reading the letter of the 9th of October in isolation. In fact, the correct question (as described by counsel for *Killaree*) was very much at the forefront of Mayo's mind when one considers the correspondence as a whole. To take but one example, in the lengthy letter of 15 December 2020 from Mayo, it is stated:

> *"There is no lack of clarity in the tender documentation or in the applicable rules in relation to what we are considering to be abnormally low prices. For the avoidance of any doubt, the decision to raise our clarification request of 14 and 27 August 2010 was on the basis of the following:*
>
> *"→ There were concerns give (sic) that approximately 66% of the tender rates submitted by you were priced at 0.01 values. Your offer was not <u>serious</u>…"*

186. The emphasis is mine. While two other factors are given, the indisputable fact is that Mayo at that point in time was making plain that the correspondence (from its inception with the email of 14 August) was driven by a concern to test the seriousness of Killaree's tender. Equally, as already seen the email of 14 August expressly invites Killaree "to demonstrate the genuineness of all of [its] pricing…"

187. It would be an unreal reading of the correspondence (to include the letter of 9 October 2020) to take it that Mayo was, in its letter of 14 August, 27 August and 15 September raising queries in order to assess whether or not Killaree's tender was serious by reference to the issue of abnormally low pricing, but had not considered that issue (or asked itself that question) in making the decision communicated by the letter of 9 October. The only reasonable reading of the chain of correspondence is that the question Mayo asked itself was the very question that counsel for Killaree suggest was the appropriate one.

188. The third alleged fundamental flaw is that Mayo failed to consider all of the other tenders submitted together with that of Killaree, and that there was an obligation to do so. That involves a misconstruction of the Q&A exchange. I have already found that there was no obligation for Mayo to wait until all tenders had been submitted and then to carry out a comparison between them before it excluded any individual tenderer from the process on the grounds that that tender was abnormally low. As already noted, the procedure followed by Mayo was in accordance with judgments of the CJEU. Mayo did not in any way confine its ability to follow that process in providing its response to the question raised by the other tenderer.

189. The fourth and final alleged flaw is that the conclusion of Mayo to the effect that the contract was not capable of being performed (on the basis of the tendered rates) was mistaken, and that the capacity of Killaree to perform the contract was the determinative factor. I do not think that this precisely states the position. A more correct analysis is that Mayo had been attempting, for some time, to understand the one cent rate and also to comprehend whether or not the tender was a serious or genuine one. As already noted, Mayo's letter of 15 September had referred to the seriousness of the Killaree bid. The email of 14 August from Mayo made it quite clear that the it wanted Killaree to address *" all of your pricing…"*.

190. By 9 October, Mayo had come to the view that Killaree had not provided *"sufficient evidence"* that the rates and prices submitted by it were not abnormally low. Mayo had also come to the view that the one cent rates did not cover the full inclusive value of the relevant works, supplies and services. For those reasons, it had come to the view that the contract was not capable of being performed on the basis of the tendered rates, as set out in the fourth bullet point of its letter of 9 October. That conclusion, in itself, was a synonym for describing the tender as not genuine or serious. Killaree had ample opportunity in the period

between 14 August and 9 October to provide sufficient evidence to Mayo that the tender was capable of being performed at the tendered rates, and was therefore a genuine one. It did not do so, either by reference to its own *"capacity"* or otherwise. For these reasons, and given the contents of the exchanges from 14 August on, I do not agree with the submissions that the fourth bullet point does not flow from the previous three. For the reasons I have just set out, it does. I also do not accept that, on the basis of that correspondence, Mayo should have accepted that the contract could have been performed at the tender's rates notwithstanding the position Mayo had reached as set out elsewhere in the letter.

191. I therefore find that this ground of challenge does not succeed, and I will dismiss it. The challenge is not saved by the reference to Case C-367/19 *Tax-Fin-Lex* (September 10, 2020), referred to earlier in this judgment, where a tender was submitted for a total of €0.00. There may well be other reasons, such as in *Tax-Fin-Lex* the entry into fresh markets, which must be taken into account in considering a possible abnormally low a tender. In order to assess whether or not there are such reasons, the tenderer must, of course, be given an opportunity to outline these. However, despite being told in terms that the genuineness of its tender was at issue from 14 August on, Killaree gave no such satisfactory explanation prior to its elimination from the competition.

192. I therefore dismiss this grounds of challenge.

(e) **Failure to give adequate/intelligible reasons**

193. Paragraphs 20 - 33 of the Statement of Grounds sets out this head of complaint. Fundamentally, it is argued that:

> *"In deciding to eliminate the applicant from further participation in the tender process, there was a requirement for the Respondent to give adequate reasons (in particular by reference to explanation/clarification requested and giving by the Applicant), arising,*

inter alia, from natural and/or constitutional justice, fair procedures, the European public procurement Rules and the principles of transparency and equal treatment."

194. While these paragraphs in Killaree's pleadings refers in general terms to the email of 14 August and the subsequent exchange, Killaree's central claim is that Mayo's letter of 9 October 2020 did not provide adequate or satisfactory reasons. Of course, reasons for a decision (or leading to a decision) can be found in a number of different documents. In addition, the context of the letter communicating a decision is important. It is simply unreal (or, to use the phrase employed by counsel for Mayo in her oral submissions on a different topic *"atomistic"*) to refer to one document shorn of the documents that proceeded it. That is, however, precisely what the pleaded case in respect of reasons and engagement does.

195. The Statement of Grounds also complains of a lack of engagement on the part of Mayo.

196. In the Statement of Opposition, Mayo pleads:

> *"3. The applicant's entitlements are provided by…the Procurement Regulations and the Remedies Regulations, which provide an exhaustive regulatory framework. In the premises, it is denied that the applicant is entitled to rely on natural and/or Constitutional justice and/or fair procedures more generally."*

197. This plea was focussed on intensely in the written and oral submissions for Killaree. It was described in the written submissions as *"extraordinary (and wholly incorrect)"*. However, this sharp dispute turned out to be, as counsel for Mayo submitted, essentially an academic one. The phrase *"more generally"* in the plea at para. 3 of the Statement of Opposition was significant. Ultimately, it was accepted that the requirement to give reasons as set out in authorities such as *Connolly v. An Bord Pleanála & Ors.* [2018] IESC 31 and *Mallick* [2012] IESC 59 was mirrored in the requirements of the Remedies Regulations and the Procurement Regulations.

198. The real issue, therefore, was whether or not in this specific case adequate reasons were giving by Mayo for its decision. In addition, there was the associated point relating to Mayo's engagement with Killaree in respect to the issue which led to Killaree's exclusion from the process.

199. In her oral submissions, counsel for Mayo relied upon the judgment of Clarke C.J. in *Connolly,* and the judgment of Fennelly J. in *Mallak.* In particular, emphasis was placed on paras. 5.1 and 5.2 of the judgment of Clarke C.J., which appear under the heading *"Some General Observations"*. These paragraphs read:

> *"5.1 It is perhaps trite to say that it is very difficult to be specific about the manner in which the obligation to give reasons must apply in different types of situations. This is so not least because the kind of decisions to which the obligation to give reasons applies can vary enormously. Furthermore, the process leading to a decision can differ greatly from one case to the next. Some decisions follow on from a largely adversarial process not entirely unlike that which might occur where a court is required to consider a similar question. Others involve a decision of a regulator who has engaged only with a regulated entity. Some decisions, such as most in the environmental field, can involve the interests of a wide range of persons and the participation of many in the process itself."*
>
> *5.2 Furthermore, the legal requirements which go into different types of decisions may, themselves, vary very significantly from case to case. In certain circumstances a decision maker may be required to determine whether very precise criteria are met. The issue will, therefore, be as to whether those criteria are present, and the reasons which will require to be given will necessarily have to address why it is said that the criteria were, or were not, met. That, in turn, may very well itself require an*

understanding of the process which led to the decision and the precise issues which were focused on in that process. On what basis was it suggested that the criteria were not met and how did the person concerned suggest that those questions could be answered in its favour? The issues which arise clearly inform the reasoning behind any decision."

200. Counsel also relied upon the conclusion at para. 5.3, which reads:

"5.3 ...However, the point is that the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached."

201. Of relevance is para. 5.4 of the judgment of the then Chief Justice. Having warned against *"box ticking"*, he goes on:

"5.4 ...It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons."

202. This passage was relied upon by counsel for Killaree in his submissions.

203. It is clear that, on the basis of *Connolly*, there is a need to *"enlighten"* anybody interested in a decision as to the reasons why it was made.

204. That approach is, of course, consistent with the judgment of Fennelly J. in *Mallak*. The purpose identified by Fennelly J. in *Mallak* for the giving of reasons was summarised by Clarke C.J. in *Connolly* at para. 6.9, as follows:

> *"6.9 Therefore, Fennelly J.'s decision in Mallak points to at least two purposes served by the provision of reasons by a decision maker being, first, to enable a person affected by the decision to understand why a particular decision was reached, but secondly, to enable a person to ascertain whether or not they have grounds on which to appeal the decision where possible or seek to have it judicially reviewed."*

205. Counsel for Mayo submitted, without contradiction, that this second purpose had been achieved in that here (apart altogether from the assertion that inadequate reasons have been given) Killaree was able to formulate an elaborate application for judicial review seeking to quash its exclusion from the procurement process. While downplaying its significance, counsel for Mayo also argued in her oral submissions that throughout the judicial review process there have been no application to amend the case advanced by Killaree notwithstanding the fact that some seventeen affidavits have been sworn (many by Mayo) in which the reasons for Mayo's decision had been elaborated upon and further explained. While that latter argument is hardly *"trite"*, as it was described by counsel for Mayo, it is certainly by no means determinative.

206. It is also important to note Fennelly J.'s comment at para. 66 of *Mallak*, where he expressed the view that:

> *"66 ….the underlying objective is the attainment of fairness in the process."*

207. In their submissions on the law, counsel for Killaree emphasised the terms of Article 69 of the 2016 Regulations and in particular the fact that – pursuant to Article 69(4) – Mayo must have had reasons for coming to the view that the evidence supplied by Killaree did not *"satisfactorily account for…the low level of price or costs proposed, particularly where two*

elements refer to in Article 69(2) were in play here. These were the economies of the services provided by Killaree and exceptionally favourable conditions available to [it]…" as it had claimed in correspondence. Very heavy stress was placed by Killaree's counsel in their written submissions on the judgment of Humphreys J. in *RPS Consulting Engineers Limited v. Kildare County Council* [2017] 3 I.R. 61. In his judgment, Humphreys J. found there could be no retrospective creation of reasons, a position accepted by both sides. Reliance was also placed upon para. 60 of the judgment, which reads:

> *"60 In addition, the provision of reasons promotes acceptance of the decision. Any feelings of dissatisfaction that an unsuccessful tenderer may have in relation to the process may be significantly assuaged by the provision of a good standard of reasons for the outcome reached and a willingness to engage to explain the outcome. In the present case, it seems to me that a more active approach by the respondent in engaging with the applicant on foot of its initial requests of reasons of 14th April, 2015 might have produced greater acceptance of the decision ultimately reached. By declining to furnish any further reasons, any feelings of mystification or grievance on the part of the applicant were naturally aggravated. The provision of reasons serves the important policy objective of promoting acceptance of decisions within the community of persons affected. In the case of judicial decisions, it has long been recognised not just that public acceptance of such decisions is necessary (see e.g., Rooney v. Minister for Agriculture and Food [2016] IESC 1,…per O'Donnell J. at para. 4), but also that the giving of reasons helps to promote such acceptance. The latter point equally holds for administrative decisions."*

208. I would fully agree with those sentiments inasmuch as they underline the desirability of sufficient reasons being provided in order to avoid feelings of mystification and grievance. However, this does not assist hugely in deciding whether or not, in the circumstances of this

case, adequate reasons were given. With regard to engagement, I agree with counsel for Mayo that here the relevant engagement preceded the decision of the 9 October. This is different to the factual situation in *RPS*, where the desired engagement post dated the decision. In referring to engagement in this case, I mean the process by which the employer gives the tenderer an opportunity to address any concerns that could inhibit its chances of obtaining the contract. Where such an opportunity is provided, and where of course adequate reasons are provided by the employer for its decision, the process is not rendered unlawful simply because the employer has not engaged in further dialogue with the tenderer after the decision about the rights and wrongs of the outcome.

209. Counsel for Killaree referred to an extensive portion of the judgment of Humphreys J. in *RPS* about what (in the circumstances of that and similar cases) constituted adequate reasons. It must be kept in mind that RPS was a case in which the scoring of the tender submitted was critical, and that RPS had been much the more competitive tenderer price wise but it lost out by a relatively small margin in respect of quality.

210. In a case such as *RPS*, therefore, one can understand why Humphreys J. came to the view he had about the level of reasoning required. At para. 85, and by reference to the decision of the General Court in *European Dynamics Luxembourg v. European Commission* (Case T-165/12) Humphreys J. approved the statement:

> *"87. However, in order to meet the requirements of Article 100(2) of the Financial Regulation, the contracting authority's comments must be sufficiently precise to enable the applicants to ascertain* ***the matters of fact and law*** *on the basis of which the contracting authority rejected their offer and accepted that of another tenderer."*
>
> (emphasis added)

211. I was invited to apply a mildly varied version of this, as the test to apply here, namely that Mayo must be sufficiently precise in its communications to enable Killaree to ascertain

the matters of fact and law on the basis of which it had rejected Killaree's explanations and clarifications. I think this sort of manipulation of language adopted by another judge (Humphreys J.) from a ruling of a third court (the General Court) quite unhelpful. It smacks of the type of recycling of a formula on the basis that one size fits all, when in fact the relevance and appositness of the original form of words is reduced with every variation and every change of circumstances to which it is applied. I think sufficient guidance is provided by the judgments of Clarke C.J. and Fennelly J. and (on the question of the retrospective creation of reasons) Humphreys J..

212. Counsel for Killaree also referred to the judgment of Power J. in *J.S.S. v. Tax Appeal Commission* [2020] IECA 73. In particular, there was reliance on para. 43 of the judgment where Power J. says:

> *"43 Furthermore, there is no evidence in the letter of 26 April 2018 which demonstrates that the Commissioner had addressed his mind to any of the arguments raised by the appellant. For example, at no stage is it explained why he considers the appellants to be a chargeable person. At no stage does he address the question of his agent being the appropriate chargeable person. At no stage does he consider, let alone determine, the issue of the residence or non-residence"*

213. While counsel for Killaree suggests that there was a *"particular resonance in the context to this in terms there been correspondence stating they carefully considered the matter"*, he does so by referring to emails sent by Mr. Maughan to the other members of the Tender Assessment Board. Counsel then went on to invite the Court to doubt evidence given by members of that group at para. 17 of their affidavits in as much as they swear:

> *"Each local authority was directed to conduct a rigorous and systemic interrogation of the applicant's clarifications."*

214. It will be remembered that Mayo was coordinating the procurement process on behalf of a number of other local authorities. The averment which I have just quoted is evidence given on oath by executives of certain of those other local authorities. It is not appropriate for counsel for Killaree, in the context of an issue about the adequacy of reasons, to ask the court to find that that evidence is unreliable or wrong. The correct approach is that as set out by Hardiman J. in *Boliden v. Tara Mines* [2010] IESC 62 where he said (at pages 17 – 18):

> *"It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a Notice of Intention to Cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which have been deposed to. In a case where there is no contradictory evidence an attack on the evidence which is before the court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out is case, even taking the evidence it has produced at its height."*

215. In any event, *pace* Humphreys J., if reasons cannot be added after the event it is difficult to see how subsequent evidence can assist in determining whether the original reasons were adequate.

216. I will now assess the correspondence and the reasons, if any, provided by Mayo. In doing so, I accept the submissions of Mayo that the correspondence must be considered in the round. That is entirely consistent with the judgment of Clarke C.J. in *Connolly* at para. 9.2, where he said:

> *"9.2 The test is, in my view, that identified in Christian. Any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned...The reasons may be*

found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear."

217. Here we are talking about a very limited number of documents to which one can refer in order to try to ascertain the reasons why Mayo came to the decision that it did.

218. The email of 14 August 2020 told Killaree that there were concerns about the 1 cent values inserted in 66% of the tender rates submitted by it. Killaree was therefore asked to demonstrate the genuineness of its pricing. It was asked to provide *"specific details"* as to how it could offer the relevant services, works and goods for a cent per item. This concern applied to a very large range of items. That undoubtedly presented a challenge to Killaree in terms of explaining, on an item by item basis, how individual goods and services could be provided for a cent or less. However, that is not the fault of Mayo. It was Killaree which presented a tender document indicating, by reference to a very wide range of goods and services, that these could be provided for 0.1 Euro. Having submitted a tender with those prices and giving the terms of the RFT which I have emphasised earlier in this judgment, it was always possible that it would asked to demonstrate if this pricing was *"genuine"*. This is what Mayo asked Killaree to do. The email, which is brief, concluded by asking Killaree to demonstrate the genuineness of *"all of your pricing…"*. Killaree was also left in no doubt that, depending on its response, a decision could well be made to reject its tender.

219. Killaree sought, and obtained, an extension of time within which to reply. Its substantive reply, sent on the 20th of August 2020, is very significant. The letter runs to four pages. The first two pages do not address Mayo's query at all. Instead, it contains complaints (some amplified in the subsequent litigation) about legal issues. It is only on the

third page of the letter that Killaree turns to the request concerning the genuineness of *"all pricing"*. It goes on:

> *"Considering the volume of items of pricing it is clearly not possible in the very limited time frame given for a response to address every single item of pricing and if this is what is intended, then such a request is wholly unreasonable, disproportionate and unfair."*

220. Notwithstanding the number of grounds advanced in these proceedings, it was not been suggested that the process is unlawful because of any irrationality, lack of proportion or unfairness in the time provided for a response to the email of 14 August.

221. As it happens, Killaree did not in this response explain the one cent rate in respect of a single item which it says it can deliver at that price.

222. Killaree goes on to say that it has established a supply chain of suppliers *"that have agreed certain competitive prices, which allows KLS to pass these saving (sic) onto the client"*. Killaree then say:

> *"In the context of the present tender, KLS decided to pass on these saving over a range of items by marking the pricing rate at 0.01 Euro."*

223. However, in terms of putting any flesh on these bones, Killaree then go on:

> *"You will appreciate that due to commercial confidentiality reasons, KLS is not in a position to disclose the precise nature of these exceptional favourable conditions which enables KLS to tender for prices in this manner."*

224. Killaree than refer to six other public sector contracts which have used *"a high proportion of 0.01 Euro rates…"*

225. Apart from the fact of these contracts, which range from 2013 to 2020, no detail is given. While I have already quoted the penultimate paragraph, it is probably helpful to revisit it here:

"We are a very well established and highly reputable corporate entity with extensive experience regarding public tendering contracts. We confirm unequivocally that, if successful, we are in a position to, and shall, meet every item listed within our delivered pricing structure, including each and every item priced at 0.01 Euro. We have also done this, and continue to do this, within our contracts with other County Councils – notably without having difficulty whatsoever. We believe that our experience and the exceptionally favourable conditions available to us for the supply of products and services allow us to provide excellent value for money to you – as we consistently do with many other County Councils in the country."

226. With the exception of the reference to the other contracts, no real details of which are given, this letter can safely be described as been at a high level of generality and aspiration and does not in any way demonstrate the genuineness of the tender in the fashion sought by Mayo, namely by providing *"specific details"* which supports *"all of your pricing"* as sought in the email of the 14th of August.

227. To turn on their head the complaints made by Killaree against Mayo, and solely by way of illustration, this correspondence does not engage in any detailed way with the request made by Mayo to stand over all of the one cent price rates. With the exception of the reference to the other Local Authority contracts, the reasons giving as to how the one cent rates are maintainable are (to paraphrase Humphreys J. in *RPS) "elusively vague"*.

228. I have mentioned on several occasions the responding letter from Mayo on 27 August, which refers back to the concern expressed in the email of 14 August about *"what appeared to be abnormally low rates and prices"*. Having noted the complaint by Killaree about the lack of time, Mayo asked for a focussed response by 4 September.

229. The response of the 4 September is the second and final occasion on which Killaree deals with the issues raised by Mayo. Again, the first portion of the letter deals with

effectively legal or procedural arguments. The substantive reply is set out in the third paragraph as follows:

> *"We have carefully calibrated our Pricing Document to allow us to make a profit under the tender – whilst pricing as competitively as possible. The items which have been priced at 0.01 Euro have been carefully chosen for that reason and are so identified in the attached document. In certain instances this is because KLS have in place existing services to perform the item of work and will not incur any additional costs for carrying out the works or services. In other instances, based on specific experience in carrying out similar public lighting, certain items will not arise and so the items are marked accordingly. Furthermore, KLS has built up strong and lasting relationships with our suppliers and have exceptionally favourable conditions available to us for the supply of the products and services and certain of these saving are been passed and reflected in the tender. We have vast experience and expertise in this area of work, and we are wholly satisfied that the framework enclosed shall be adequately profitable for us notwithstanding the pricing of certain items at 0.01 Euro. We approach the pricing structure in its totality and delineate our individual item pricing accordingly. In fact in broad terms, KLS do not believe that prices are abnormally low and/or reflect a fair and balanced allocation of pricing in the context of the above explanations."*

230. I will return shortly to the document which was attached to the letter. However, this paragraph is again at a level of generality which does not really advance the position set out by Killaree in its original reply. That is not withstanding the fact that that reply was clearly found unsatisfactory by Mayo, hence the request that Killaree address the three items set out in Mayo's letter of 27 August.

231. The letter concludes by referring to profits of €1,562,976 which Killaree recorded *"in the last fiscal year"*. This was stated to be *"due heavily"* to similar pricing structures having

been used in contracts with other Local Authorities. The other work done by Killaree over that year, which may have contributed to this level of profit, is not described eve in the most general of terms. With regard to the details of the local authority contracts, nothing is added to the statement in the letter sent on the 20th of August to the effect that a "high proportion of 0.01 euro rates [were] being used on these contracts on a daily basis." The reference to the profit for one year does is not stated to establish that Killaree had the capacity to fulfil the contract. In any event, one year's profit does not assist in showing the profit and loss over the preceding years, or the level of retained profit in the company.

232. The document attached to this letter for the first time provides a narrative in respect of individual one cent items in the Pricing Schedule. However, a very large number of these individual items bear the solitary comment;

"KLS have assessed these tender item rates and have found that this item which is rarely if ever used in our experience but KLS shall stand over all tendered rates."

Apart from the provisions of Clause 1.3 of the Pricing Schedule, Clause 3.3.1 of the RFT required tenderers to price "all items and quantities in the Pricing Document." All tenderers must have known this. Notwithstanding this, in respect of a considerable number of items Killaree were seeking to establish the genuineness of its bid by stating that the items simply would not be provided. If they were to be provided, Killaree did not identify how this could be done at the 1 cent rate, contrary to the requirement that all rates cover the full inclusive value of the work.

233. In Mayo's letter of 15 September 2020, the legal and procedural issues raised in Killaree's correspondence was addressed. The letter ends by stating that the Evaluation Committee was assessing the tender and the clarification responses.

234. The final relevant letter is the letter of 9 October. Any tenderer would have understood, as any reasonable well informed tenderer would, that the decision of Mayo was that Killaree should be excluded from the process because Mayo, having sought information about the genuineness of the tender, had come to the view that the tender was not serious or genuine as it was abnormally low. Any such tenderer would have understood that the reasons why Mayo had come to that view were four fold.

235. The first reason for Mayo's decision was that 66% of the tender grades were priced at a cent. The second reason was that the rates priced at one cent did not cover the full inclusive value of the relevant works. The reasonable or well-informed tenderer would have understood *"full inclusive value"* held the meaning that I have decided it has.

236. Any reasoanble tenderer would have been aware of the fact that Killaree had provided no detail of the other contracts with local authorities which (it asserted) showed that the tender was a genuine one and that the pricing was also genuine. Killaree, and any well informed tenderer, would have understood that it had given high level assurances about its relationship with suppliers, its confidence about making a profit on the tender, and its ability to make the one cent rate work. They would also understand that it had not (for reasons of commercial confidentiality) giving any meaningful detail of these *"exceptional favourable conditions"*. It would therefore had understood why Mayo had come to the view that Killaree had not provided *"sufficient evidence"* that the rates were not abnormally low. Killaree may not, of course, have agreed with Mayo's decision or the reasons for it. However, that does not make the reasons in any way inadequate.

237. All of these facts are plain from consideration of the correspondence. Much of the facts I have set out in the last number of paragraphs were known to Killaree at the time or are set out in explicit terms in the letter of 9 October. Together, they create a scenario in which any tenderer in Kilaree's position, acting reasonably, would have been quite aware of the reasons

for Mayo's decision. To apply Fennelly J. in *Mallick*, the documentation enabled Killaree to understand why Mayo reached the decision it did, and to enable it to ascertain whether or not they had grounds to seek to review that decision (which it did do). With regard to the obligation to engage, in as much as this involves a process (as in *RPS*) designed to enable a participant to understand a particular decision, for the reasons I have given that has already been achieved in the exchange of correspondence up to and including 9 October. In as much as it is suggested that there is a further obligation to engage in order to be able to state a position and avail of fairness or procedures, that was also done in that Mayo's concerns were set out in the email of 14 August and in the letter of 27 August, and Killaree was given full opportunity to respond to them.

238. For the reasons I have sent out, this ground of review also fails.

Conclusion

239. I have found in favour of Killaree, to a certain extent, on the question of the standstill letter. I have found in favour of Mayo on the other pleaded issues. A number of arguments deployed by Killaree were not pleaded, and some were recognised by Killaree's counsel as not having been pleaded. I have confined myself to deciding the pleaded case.

240. I will deal with the issue of costs, and the form of the final order, at 9 a.m. on the 15 February 2024.