

## **The Word on Procurement**

The recent judgements in the Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform cases should be carefully considered by contracting authorities and tenderers alike.

Word Perfect Translation Services Ltd (“WP”) was the incumbent provider of interpretation services under a Department of Justice and Equality framework agreement. In 2015, the Office of Government Procurement published a request for tenders to establish a new framework agreement for the provision of interpretation services. In 2016, three suppliers were invited to submit a supplementary request for tender (“SRFT”) for the contract award in question. WP’s tender was unsuccessful, and it sought judicial review of the decision.

The WP saga has provided three important judgements this year in relation to public procurement:

### **1. Damages (*Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* (No. 1) [2018] IECA 35)**

A key factor in a suspension hearing is whether damages are likely to be an adequate remedy, if they are, the automatic suspension is lifted. The Court of Appeal (“COA”) in the WP case increased the threshold for proving that damages are an adequate remedy by reference to Francovich damages, which are only awarded where the breach of law is “grave or manifest” or “inexcusable”.

The effect of this judgement is that an application on behalf of a contracting authority to lift an automatic suspension may be less likely to be successful. This potentially increases the incentive to challenge the award of a contract especially for an incumbent.

### **2. Discovery (*Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* (No.2) [2018] IECA 87)**

The second case provided a test for discovery of applications in public procurement challenges. The court determined that to obtain discovery of a competitor’s tender documents, an applicant was required to establish that they are relevant to the argument and “indispensable for the fair disposal of the procurement challenge”.

The court, however, recognising the sensitivity of a rival’s documents, stated that “...only named solicitors and counsel...” are permitted to have sight, thus establishing a confidentiality ring.

### **3. Manifest Errors? (*Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2018] IECA 156)**

The substantive hearing involved four grounds of appeal by WP. The first two are in relation to marking in the evaluation process and the latter are in relation to the administration of the procurement process:

- **The assessment of interpreter skill retention:**

The court considered the wording used in the SRFT which stated that tenderers must set out methods “to ensure that interpreters will retain their skills”. The winning tenderer referred to steps that would “encourage” rather than “ensure” interpreters would retain their skills and

scored full marks. As the winning tenderer did not fully comply with the SRFT, awarding it full marks was held to be a manifest error.

- **Marks for the missing “*narrative*”:**

The court again considered the wording used in the SRFT which read that each report must include “*a narrative*” and determined that this question required a written submission. The winning tenderer only provided visual material for this answer. The court found that having received full marks when it could not have “*fully met*” the requirements of the SRFT amounted to a manifest error.

- **Alteration of marks during the evaluation process:**

WPs third appeal was in relation to the bidder’s marks being altered during the evaluation process. At the initial evaluation, WP scored the highest marks, by the third and final evaluation WP scored 15 marks less than the winning tenderer. The High Court rejected the argument that evaluators were required to explain why the marks were altered.

The Court of Appeal agreed with this and stated that the manifest error test applied to an “*impugned decision*” rather than the notes that the decision is based on. The Court of Appeal stated that “...*evaluators should have the freedom to explore, consider and reflect on the strengths and weaknesses of the various tenders*” and that the task of requiring them to explain changes would add to the complexity of the process.

- **Reasons in respect of criteria where WP had outperformed its rival:**

WP were provided with reasons and a comparative assessment in respect of criteria where it was outperformed by the winning tenderer. However, it was not provided with a comparative assessment in respect of criteria where it had outperformed the winning tenderer. WP maintained that it was entitled to this information. The court dismissed this appeal on the grounds that it was not a statutory requirement, nor was there any case law that determined otherwise.

## **Conclusion**

The WP decisions have significant implications for contracting authorities who find themselves presented with a procurement challenge. The previous trend of the courts lifting automatic suspensions may be curtailed due to the increased threshold to prove that damages are an adequate remedy. This may reduce the number of applications by contracting authorities to lift an automatic suspension and increase the number of challenges made by aggrieved bidders.

The WP cases are also a stark reminder that the evaluation process must be consistent with the tender documents. As such, it is of pivotal importance that tender documents are drafted in a clear and concise manner so that the evaluation team and tenderers alike can clearly interpret them.