

## CHAPTER TWO

---

# Offer and Acceptance

---

[2:01] In determining whether parties have reached an agreement, the courts have adopted an intellectual framework that analyses transactions in terms of offer and acceptance. For an agreement to have been formed, therefore, it is necessary to show that one party to the transaction has made an offer, which has been accepted by the other party: the offer and acceptance together make up an agreement.

The person who makes the offer is known as the *offeror*; the person to whom the offer is made is known as the *offeree*.

[2:02] It is important not to be taken in by the deceptive familiarity of the words “offer” and “acceptance”. While these are straightforward English words, in the contract context they have acquired additional layers of meaning.

The essential elements of a valid offer are:

- (a) The terms of the offer must be clear, certain and complete;
- (b) The offer must be communicated to the other party;
- (c) The offer must be made by written or spoken words, or be inferred by the conduct of the parties;
- (d) The offer must be intended as such before a contract can arise.

What is an offer? Clark gives this definition:

*“An offer may be defined as a clear and unambiguous statement of the terms upon which the offeror is willing to contract, should the person or persons to whom the offer is directed decide to accept.”*<sup>1</sup>

An further definition arises in the case of *Storer v Manchester City Council* [1974] 2 All ER 824, the court stated that an offer “...empowers persons to whom it is addressed to create contract by their acceptance.”

[2:03] The first point to be noted from Clark’s succinct definition is that an offer must be something that will be converted into a contract once accepted. If a statement does not have this character then it is not an offer. If I say “I were to offer you €80,000: would you take it?” then this may be an offer in the ordinary sense of the word, but it is not an offer in the legal sense, since no contract will result if you say yes.

[2:04] An example of this point can be seen in the case of *Clifton v Palumbo* [1944] 2 All ER 497, where two parties were negotiating for the sale of a large estate. The vendor wrote to the purchaser indicating that he was “prepared to offer you or your nominee my Lytham estate for £600,000” and that he would also agree “that a reasonable and sufficient time shall be granted to you for the examination ... all the date and details necessary for the preparation of the Schedule of Completion”. The purchaser purported to accept this offer. Had a contract been formed?

[2:05] The Court of Appeal held that no contract had been formed, since the letter was not a definite offer to sell, but simply a preliminary indication of price. They were reinforced in this

---

<sup>1</sup> Robert Clark, *Contract Law in Ireland* (7th ed, Round Hall, Dublin 2013), p.8.

conclusion by the fact that the transaction was a complex one: and one would expect in such a large and complicated transaction that an offer would be more definite and more detailed.

[2:06] Even in circumstances where a statement is very detailed and precise, it may not amount to an offer. This is nicely illustrated by *Gibson v Manchester City Council* [1979] 1 All ER 972. Here, a council adopted a policy of selling council houses to tenants. It wrote to the plaintiff under this policy, stating that the council “*may be prepared to sell*” the house he occupied to him at a specified price and on specified terms, and inviting him to make a formal application to purchase the house. He did so. After he made the formal application, the political complexion of the council changed, and a new policy was adopted against selling council houses, under which the only transactions to be proceeded with were those where formal applications had been accepted by the council.

[2:07] The plaintiff claimed that a contract had come into existence once he had made the “*formal application*” to purchase his house, on the basis that the letter from the council amounted to an offer capable of acceptance. This was, however, rejected by the House of Lords, who held that the letter was not an offer, but rather an invitation to the plaintiff to himself make an offer to buy the house by way of the formal application.

[2:08] In the case of *Fisher v Bell* [1961] 1 QB 394 A shopkeeper displayed in his shop window a knife of the type commonly known as a “flick knife” with a ticket behind it bearing the words “Ejector knife - 4s. “A charge was preferred against him by the police alleging that he had offered the knife for sale contrary to section 1 (1) of the Restriction of Offensive Weapons Act, 1959, but the court concluded that no offence had been committed under the section and dismissed the information. On appeal by the prosecutor it was held, that in the absence of any definition in the Act extending the meaning of “offer for sale,” that term must be given the meaning attributed to it in the ordinary law of contract, and as there under the display of goods in a shop window with a price ticket attached was merely an invitation to treat and not an offer.

[2:09] The above categories of statements, which are not themselves offers but are rather invitations to another party to make an offer, are described as invitations to treat. These arise in a number of different contexts, and in a number of these contexts case law and in some instance statute has established that what might appear to be an offer is rather an invitation to treat.

## Offer or Invitation to Treat?

[2:10] An offer should be distinguished from an invitation to treat, which is a statement made in circumstances where it is not intended that a contract will result if the person to whom the statement is made indicates his assent to its terms.<sup>2</sup> The difference is that if the other party agrees to the terms of an invitation to treat, the courts will often view this response as an offer.

Offer and an Invitation to Treat have been explored in a number of cases, particularly in the areas of (a) advertisements, (b) display of goods, (c) auctions (d) tenders, and (e) some other limited circumstances.

### Advertisements – Unilateral Offers

[2:11] Advertisements offering to sell goods or provide services will also generally amount to invitations to treat rather than offers. The same considerations are at work as in the context of the display of goods: a vendor should not be put at the risk of finding himself contractually

<sup>2</sup> P.A. McDermott, *Contract Law* (Butterworths (Ireland) Ltd, 2001), p. 4.

bound to so many parties that he cannot meet each contract. In fact, these considerations have greater weight in this context: advertisements cannot be retracted with the same ease as goods can be taken out of shop windows, and advertisements are likely to reach more people than shop displays. It is worth noting that where advertisements turn out to be false, it may be in breach of various legislation banning misleading advertising, e.g., Consumer Information Act 1978 sections 6, 7 and 8, Consumer Protection Act 2007 sections 44 and 69 and European Directives 84/50/EEC and 97/55/EC.

[2:12] This rule is illustrated in *Partridge v Crittenden* [1968] 2 All ER 421 where the defendant was prosecuted for unlawfully offering for sale a wild bird, contrary to the English Protection of Birds Act, 1954, where he had put an advertisement into a newspaper stating “*Bramblefinch cocks and hens, 25s each*”. This was held not to be an offer but rather an invitation to treat. Similarly, in *Grainger & Sons v Gough* [1896] AC 325, the distribution by a wine merchant of a price list for various wines was deemed not to be an offer.

[2:13] In the US case of *Leonard v PepsiCo* (Unreported, District Court SDNY, 4 August 1999). In this case, the alleged offer was part of a Pepsi promotion where points could be collected and traded in for various goodies. The television advertisement set out some of these: a t-shirt for 75 points, a leather jacket for 1450 points and sunglasses for 175 points. It then cut to a teenager flying into school in a Harrier jumpjet, landing it by the bicycle rack, scaring the teachers and attracting the admiring looks of his peers. The caption then read “Harrier Fighter 7,000,000 Pepsi Points”.

[2:14] The plaintiff, impressed by the advertisement, set out to drink enough Pepsi to purchase a Harrier. Although he failed to do so, he discovered that the promotion rules enabled additional points to be bought for 10 cents each. The plaintiff then managed to raise \$700,000, and submitted an order form claiming the Harrier. Unsurprisingly, the defendant replied stating that the ad was merely humorous, and did not constitute an offer capable of acceptance. The court on a motion for summary judgment, the court holding that no reasonable person could have believed that the advertisement actually offered Pepsi drinkers a fighter plane, ultimately accepted this.

### ***Exceptions to the General Rule – Unilateral Offers***

[2:15] A unilateral offer may be described as an offer capable of being converted into an agreement by some clear act of acceptance. Such an offer must consist of a definite promise to be bound. However, it is quite clear that this is only a general rule, and in some circumstances, an advertisement will be held to be an offer capable of acceptance, where the circumstances are such as to indicate that it is intended to be binding where a person accepts it. The most famous example of this principle is *Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256. In this case, the defendant company made a “smoke ball” which was advertised as a medicinal product. To bolster this claim, the company offered in its advertising to pay £100 to any person who caught influenza having purchased and used the smoke ball. The advertisement went on to indicate that “as a mark of the manufacturer’s sincerity” the sum of £1000 had been deposited with a bank to meet any claims that might be made.

[2:16] The plaintiff purchased a smoke ball, used it, and caught influenza regardless. She sought the payment of £100. The company resisted this claim, on the basis that the advertisement was not intended to be an offer capable of acceptance: it was, they claimed, a mere “puff” which was not intended to create a binding contract. This was rejected by the Court of Appeal, which held that the advertisement did in fact constitute an offer: in particular, the reference to the sum of £1000 could have no other function other than to persuade potential buyers that the offer was made seriously and was intended to be binding if accepted.

[2:17] In *Kennedy v London Express Newspapers* [1931] IR 532, the Daily Express invited its readers to become registered subscribers, the incentive being that the newspapers offered those who registered free accident insurance for 1929. The plaintiff's wife registered in 1929. An advertisement appeared in the newspaper renewing the offer for 1930, stating that registration was not needed for anyone who had already registered in 1929. The plaintiff's wife died as a result of an accident in 1930, and the plaintiff sought to recover the insurance payable under the alleged contract. However, the defendants claimed that the plaintiff's wife had failed to satisfy one of the conditions, i.e., to take the newspaper out on a daily basis. Nonetheless, the defendants conceded that their advertisements constituted an offer, which Ms Kennedy could validly accept through registration and taking the newspaper out on a daily basis. Kennedy C.J. was of the opinion that the contract was completed when the plaintiff placed an order with the local newsagent.

[2:18] Two cases with similar facts, but very different conclusions, are instructive in this regard. In *Wilson v Belfast Corporation* [1921] 55 ILTR 205 an unauthorised newspaper report stated that the council would pay half the salary of any employee who enlisted in the war. This was held to be incapable of amounting to an offer. However, in the case of *Billings v Arnott* [1945] 80 ILTR 50 a very different outcome was reached. In this case, as an incentive to their employees to join the Defence Forces, the defendants offered any of their employees who joined the Defence Forces half of their salaries, up to £2 per week. The plaintiff responded and told the defendants he was accepting their offer. However, the defendants informed him that this would not be possible as someone else from the plaintiff's department had already signed up and they could not spare him also. Nonetheless the plaintiff signed up for the Defence Forces anyway and subsequently sued for half of his salary. Maguire J. in the High Court held that the notice was clear and unconditional and thus went beyond a mere statement of intention. It was a unilateral offer and acceptance was completed when the plaintiff signed up to the Defence Forces.

[2:19] In the US case of *Leftkowitz v Great Minneapolis Surplus Store* [1957] 86 NW 2d.689, the defendants placed an advert for fur stoles in a Minneapolis newspaper, stating that on a specified day it would sell the remaining stoles (worth \$139.50) for \$1 each on a first-come, first-served basis. The shop refused to sell a stole to the plaintiff, Mr Leftkowitz, on the basis that the advert was only intended for women. However, the court was of the opinion that the advert was sufficiently 'clear, definite and explicit' and 'left nothing open for negotiation'. Thus, it constituted a valid offer.

## Display on Goods

[2:20] It is well established that in this situation the display of the goods generally does not constitute an offer to sell, but rather an invitation to treat. As noted by Ryan "[i]f a display were deemed to constitute an offer, the shop could potentially find itself liable to an unlimited number of potential buyers, despite the fact that its stocks of the product are depleted."<sup>3</sup>

[2:21] In *Minister for Industry and Commerce v Pim* [1966] IR 154, for example, a shopkeeper displayed a coat in a shop window, together with a notice indicating that credit terms were available. Under statute, it was an offence to offer goods for sale on credit terms without those terms being fully set out together with the offer. The shopkeeper was prosecuted, and the question presented was whether, by displaying the coat, he had offered it for sale.

[2:22] It was held that he had not: notwithstanding that in the ordinary sense of the word, he had clearly offered the coat for sale. The term offer was given the meaning that it had in the

<sup>3</sup> Fergus Ryan, *Contract Law* (Thomson Roundhall, Dublin 2006), p.11.

context of contract law, and in this context it could not be said that he had made an offer capable of being made binding by acceptance.

[2:23] This rule is supported by consideration of the possible results if the display of goods were to be treated as an offer: if so, it would be an offer to each passer-by, so that a shopkeeper might find that the offer is accepted by a number of different people when he has only one item in stock. In this case, the shopkeeper might find himself contractually bound to a number of people but incapable of honouring his contractual obligations to them.

[2:24] When we move inside the shop, it is clear that the position remains the same. In *Pharmaceutical Society v Boots Cash Chemists* [1953] 1 QB 401 the defendant sold goods in a self-service store. It was prosecuted for selling pharmaceuticals other than under the supervision of a qualified pharmacist. This charge presented the issue of when the sale was concluded. Was it when the shopper put the goods into his basket, or when the cashier took payment for the goods? If the latter time, then no offence was committed, since the transactions at the cashier were supervised by a pharmacist.

[2:25] The prosecutor argued that the display of goods constituted an offer to sell, which was accepted by the shopper taking the goods from the shelf and putting them into the basket: at this point, it alleged, the contract was complete. The Court of Appeal rejected this argument: the display of goods, it held, constituted an invitation to treat, and the consumer offered to purchase the goods by bringing them to the cashier. To hold otherwise, the court noted, would mean that the shop could insist that a shopper pay for goods which he had picked up and then returned to the shelf: a result at variance with the commonly accepted practice in self-service shops.

## Auctions

[2:26] In Ireland the position with regard to auctions is to some extent governed by statute, with section 58(2) of the Sale of Goods Act, 1893 providing that a sale by auction is complete when the auctioneer announces its completion. It is quite clear, therefore, that the bids by purchasers amount to offers, which are accepted when the auctioneer brings down the hammer. This has two consequences: the auctioneer is not obliged to accept any bid, and any bid may be withdrawn before accepted.

[2:27] The difficulty arises not with the sale itself, but rather with issues surrounding the sale. Suppose an auction is advertised but ultimately does not happen. Can the advertisement be taken as an offer that goods will be sold, which is accepted by the purchaser attending on the day? It is clear that this is not the case: see *Harris v Nickerson* (1873) LR 8 QB 286, where the plaintiff failed to recover damages for loss suffered in travelling to an auction which was ultimately cancelled, on the basis that a “mere declaration of intention” could not be taken to be an offer capable of acceptance so as to form a binding contract.

### *Exception to the General Rule*

[2:28] Suppose that an advertisement states that an auction will be held “without reserve”. Can this be taken as an offer to sell to the highest bidder? It seems that in Irish law it can: *Tully v Irish Land Commission* (1961) 97 ILTR 174. In that case property was auctioned on the basis that the highest bidder should be the purchaser, although it was indicated that there was a reserve price. A dispute arose as to who had made the final highest bid. The High Court (Kenny J.) in addressing the dispute held that the contract of sale was complete when the property is knocked down, whether by the traditional hammer or otherwise; and independent of the contract of sale itself, there is a separate contract between the vendor and all persons who by bidding at the auction accept the conditions of sale which have been advertised:



“When conditions of sale are read, those relating to the conduct of the auction (such as Clause 2) amount to an offer and the bidding is an acceptance.” (at 176)

Kenny J. went on to cite with approval the following statement:

“[I]t seems to us that the highest bona fide bidder at any auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think that the auctioneer who puts up a property for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest bona fide bidder; and, in case of a breach of it, that he has a right of action against the auctioneer.” (at 177, citing *Warlow v Harrison* (1859) 1 E & E 309)

[2:29] This position would also appear to prevail in England, where in *Warlow v Harrison* (1859) 1 E & E 309 the *obiter dictum* cited above was followed by consideration of precisely when a contract was concluded and with whom. In the view of the court, there were two distinct contracts to be considered. The advertisement that an auction would be without reserve was of no effect as regards the contract of sale itself, being merely an invitation to treat in respect of the goods to be sold. However, the statement that a sale was without reserve constituted a separate offer, to the effect that the goods would be sold to the highest bidder, and this offer was capable of acceptance by bidding, at which point it would form a separate and binding contract. Breach of the promise that the sale would be without reserve, as by withdrawing the goods from sale, was therefore a breach of contract as against all parties who have bid. However, the only party to suffer any loss would be the highest bidder, who would, therefore, be the only party capable of suing on foot of the breach.

[2:30] *Barry v Davies* [2000] 1 WLR 1962, also concerned a sale at auction without reserve. The auctioneer was obliged by virtue of a collateral warranty to sell to the highest bidder. Accordingly, where the auctioneer withdrew items at the auction, without reserve, because he considered that the only bid received was too low, the bidder was entitled to recover against the auctioneer the difference between the contract price and the market price of the goods. The highest bid could not be rejected simply because it was not high enough.

## Tenders

[2:31] Friel suggests that “[t]enders are little more than written auctions where people are invited to tender an offer to undertake some work or purchase some goods.”<sup>4</sup> The mere advertisement of a tender constitutes an invitation to treat. When a supplier puts in a bid in response, this constitutes an offer capable of acceptance. Suppose, however, that an advertisement indicates that the purchaser will accept the lowest tender, and that the purchaser subsequently fails to do so. Just as in the case of auctions, such an advertisement will generally be treated as a separate offer, capable of acceptance by submitting a bid, which will then form a separate contract in which the purchaser undertakes to accept the lowest bid.

[2:32] The *locus classicus* in this area is the case of *Spencer v Harding* (1870) LR 5 CP 561 an English contract law case concerning the requirements of offer and acceptance in the formation of a contract. The case established that an offer inviting tenders to be submitted for the purchase of stock did not amount to an offer capable of acceptance to sell that stock, but rather amounted to an invitation to treat. The Defendants sent out a circular containing the following wording:

“28, King Street, Cheapside, May 17th, 1869. We are instructed to offer to the wholesale trade for sale by tender the stock in trade of Messrs. G. Eilbeck & Co., of No. 1, Milk Street, amounting as per stock-book to 2503l. 13s. 1d., and which will be sold at a discount in one lot. Payment to be

<sup>4</sup> R.J. Friel, *The Law of Contract* (Roundhall, Sweet & Maxwell, Dublin, 2000), p. 31.

*made in cash. The stock may be viewed on the premises, No. 1, Milk Street, up to Thursday, the 20th instant, on which day, at 12 o'clock at noon precisely, the tenders will be received and opened at our offices. Should you tender and not attend the sale, please address to us sealed and inclosed, 'Tender for Eilbeck's stock.' Stock-books may be had at our offices on Tuesday morning. Honey, Humphreys, & Co."*

[2:33] The Defendants did not promise to sell the stock to the highest bidder for cash. The Claimants sent a tender to the Defendants which, following the submission of all tenders, was the highest tender. The Defendants refused to sell the stock to the Claimants. Willes J. held that the circular was not an offer, but merely an invitation to gather tenders, upon which the Defendants were entitled to act. No obligation arose as a result of the notice.

### ***Exceptions***

[2:34] Similar to the exceptions outlined in the case of auctions held "without reserve", tenders may subsequently be transformed from invitations to treat to offers.

The leading English case on this point is *Harvela Investments Ltd v Royal Trust Co of Canada Ltd* [1986] AC 207. In that case, the first named defendants decided to dispose of shares by way of sealed competitive tender. They wrote to two parties by telex, both of whom were existing substantial shareholders, stating that:

"We confirm that if the offer made by you is the highest offer received by us we bind ourselves to accept such offer provided that such offer complies with the terms of this telex."

The plaintiff bid \$2.175m. The second named defendant bid \$2.1m or "\$100k in excess of any other offer you may receive which is expressed as a fixed monetary amount, whichever is the higher". The first named defendant accepted the offer of the second named defendant.

[2:35] The House of Lords held that the first named defendant was not entitled to do so. In the first place, the telex constituted an offer to accept the highest bid which was made, such offer being accepted by the submission of a bid. Secondly, the terms of the resulting contract were such that only bids of a fixed monetary amount could come within its terms. Referential bids such as that made by the second named defendant did not fall within the terms of the contract: accordingly, for the first named defendant to accept such a bid constituted a breach of this contract.

[2:36] In the Irish authority of *Howberry Lane v Telecom Eireann* [1999] 2 ILRM 232. In this case, the plaintiff claimed that the tendering process had been unfairly carried out in that: a new round of bidding was started after what should have been the final bids were submitted; the defendant disclosed all the other bids to the tenderers at this stage, in breach of the duty of confidentiality; the plaintiff was not given full information as to the bids which had been submitted by the other tenderers; and, the time given to lodge new bids was unreasonably short. The plaintiff claimed that this took place in breach of terms as to fair dealing to be implied into the contract formed by the tender itself. However, Morris P. rejected that argument, holding that cases from other jurisdictions where such terms were implied turned on special circumstances in each case; moreover, Morris P. held that under the law in this jurisdiction, no such implied term as to the conduct of the tender could come into existence. Finally, it was held that, in any event, an implied term would be inconsistent with the express wording of the call for tenders.

[2:37] Looking at this decision, it is perhaps surprising that it holds that no terms can be implied at the tender stage. Certainly, this is a departure from the authorities in other jurisdictions. A better approach might be to view this case as turning on the wording of the call for tenders, particularly the fact that the defendant retained the right to withdraw from the tender process, which express term would leave no room for any implied terms. In any event, however, the decision does seem to accept in principle that an implied contract can govern the conduct of the tender.

[2:38] In the recent case of *Smart Telecom Plc t/a Smart Telecom v Radio Telefis Eireann & Anor* [2006] IEHC 176 the Defendant had indicated that the weather forecast was available for sponsorship at a price of €1.25 million per annum for a period of two years. Four parties indicated a willingness to sponsor the forecast on those terms and so RTE invited the parties to submit an offer in the form of a sealed bid. The parties were clearly asked to state the price they would commit to for the contract and RTE indicated that the contract would be awarded to the highest bidder. The parties were also informed that in the event of more than one highest identical offer, RTE would enter into a second-round offer with these companies only. While Glanbia submitted a fixed offer of €1,595,500, Smart submitted both a fixed offer of €1,510,000 and a referential bid of '5% above the highest priced bid received by you'. The contract was awarded to Glanbia and Smart sought specific performance of the contract to award the contract or alternatively damages. Kelly J in the High Court approved *Harvela* to the effect that a referential bid will only be valid where it is expressly permitted by the terms of the request for tenders.

### ***Privilege Clauses***

[2:39] McDermott defines a privilege clause as "...a clause in the tender document that permits the person placing the advertisement to disregard a tender altogether."<sup>5</sup> In *Howberry Lane*, Morris P. held that the existence of a privilege clause meant that the inviter was not obliged to sell to the plaintiff regardless of whether or not the plaintiff could establish that the only bid higher than its own was invalid. However, in *MJB Enterprises v Defence Construction* [1951] Ltd (1999) 1 SCR 619 the Supreme Court of Canada was required to consider a privilege clause that stated that "[t]he lowest or any tender shall not necessarily be accepted". The court held that the inclusion of a privilege clause stating that the lowest of any tender would not necessarily be accepted did not allow the respondent to disregard the lowest compliant bid in favour of any other tender, including a non-compliant one. Iacobucci J stated that: "A review of the tender documents, including the privilege clause, and the testimony of the respondent's witnesses at trial, indicates that, on the basis of the presumed intentions of the parties, it is reasonable to find an implied obligation to accept only a compliant tender. I do not find that the privilege clause overrode the obligation to accept only compliant bids, because on the contrary, there is a compatibility between the privilege clause and this obligation ... however, the privilege clause is incompatible with an obligation to accept only the lowest compliant bid. With respect to this latter proposition, the privilege clause must prevail. McDermott is of the opinion that the Canadian approach is preferable, particularly given the "... risks and costs of bidding in circumstances where the invitor is free to accept non-compliant bids and to act unfairly."<sup>6</sup>

### ***What is a 'Standstill' or 'Alacaet' Letter?***

Standstill letters apply to public procurement contracts and is a letter which is sent at the conclusion of a public procurement process to unsuccessful tenders. It was first regulated by Regulation 32 of the Public Contracts Regulations 2006 and was amended by the Remedies Directive 2007/66. Standstill letters only apply to contracts subject to European Procurement Legislation.

A Standstill letter informs unsuccessful tenderers of the following information:

1. The Award Criteria
2. Where appropriate the unsuccessful tenderers score against those criteria
3. Where appropriate the winning score
4. The name of the successful bidder

<sup>5</sup> *Supra*, n.2, p. 24.

<sup>6</sup> *Supra*, n.2, p. 25.



The Remedies Directive 2007/66 contains a requirement for a mandatory standstill period between notification of the contract award and conclusion of the contract, to allow for an effective challenge to the award decision before the contract is concluded. The basic standstill obligation is set out in Article 2a of the 2007/66 Directive.

This provides that following a decision to award a contract the contract may not actually be concluded until a certain period of time has elapsed after the contract award decision is notified to those concerned.

Recently the High Court have provided clarification regarding what reasons are to be included in Standstill Letter in *RPS Consulting Engineering Ltd v Kildare County Council* [2016] IEHC 113

This case involved a challenge by RPS about the adequacy of the reasons given by Kildare County Council (the “Council”) in the standstill letter provided to RPS notifying it that it had been unsuccessful in a tender process. In his judgment, Mr Justice Humphreys has drawn a number of fundamental conclusions in relation to the requirements set out in the Procurement Regulations regarding the obligation to give reasons to unsuccessful bidders. This judgment is likely to have a significant impact on the information which contracting authorities are obliged to provide in standstill letters and indeed in response to requests for further information and may impact on when time is deemed to run for the purpose of both valid standstill periods and time limits for procurement challenges more generally. In this respect, this judgment is likely to have far reaching practical consequences for both public authorities and bidders. It would not be surprising if there is an appeal to the Court of Appeal.

RPS Consulting Engineering Limited (“RPS”) instituted proceedings against the Council complaining about the inadequacy of the reasons provided by the Council to RPS where RPS was unsuccessful in a tender process. RPS was significantly cheaper than the preferred tenderer but lost out on the qualitative criteria.

In order to understand the judgment, it is useful to get a sense of the reasons that were provided by the Council to RPS in the standstill letter:

- In response to criterion A1, the reasons provided were as follows “*your response to this criterion was of a good standard. However, compared to the successful tenderer, it lacked sufficient specific detail on new studies and reports that would be required going forward.*”
- In respect of criterion A2, RPS was told “*Your response to this criterion was of a very good standard. However, the successful tenderer provided more relevant and specific experience/lessons learned in recent public works contracts.*”
- On Criterion A3, RPS was told “*Your response to this criterion was of a good standard. However, the successful tenderer offered a more comprehensive approach to ABP oral hearings and measures to maximise the chance of a successful outcome.*”
- The balance of the comments followed in a similar vein, namely that RPS were told whether their response was good, very good or excellent which reflected a scoring methodology which the Council applied to the marking of tenders (this methodology was not disclosed to tenderers as part of the tender documents) and then some reference to why the preferred bidder’s tender was considered better than the tender from RPS.

The Court noted that similar commentaries had been provided to the third and fourth placed unsuccessful bidders in this tender process. The Judge was critical of the information provided, describing it variously as “*largely content free platitudes*” and as “*a flimsy and threadbare attempt to explain the decision*” and the application of a “*bland, anodyne, bureaucratic, uninformative formula*”.

Mr Justice Humphreys set out the standard to be applied regarding feedback to unsuccessful tender processes as follows:

- Where the award turns on quantitative criteria such as price, it may be sufficient to give the scores alone in relation to such quantitative criteria.
- Where the award turns on qualitative criteria, there is a heightened obligation to give reasons, particularly where the unsuccessful tenderer offers a more competitive price. In such situations, scores are not sufficient reasons.
- Contracting authorities must give reasons as to the relative advantages of the preferred tenderer. That involves a comparison between the preferred tender and the particular unsuccessful tender. There is a legal requirement for a bespoke statement of reasons.
- While brief statements or succinct comments may be sufficient in particular circumstances, it does not follow that because a statement is succinct it will therefore be sufficient.
- The contracting authority's comments must be sufficiently precise to enable unsuccessful tenderers to ascertain the matters of fact and law on the basis of which the contracting authority rejected their tender and accepted that of another bidder.
- In order to set out the characteristics and relative advantages of the successful tender, the contracting authority must at least mention the matters which should have been included in the applicant's tender or the matters contained in the successful tender. The statement of reasons must therefore be sufficiently detailed to explain how the preferred tender was advantageous by reference to particular matters, respects, examples or facts supporting a general assertion of relative advantage.

### **Key significance from judgment**

This judgment is of critical importance to public authorities and bidders in a number of respects:

1. It sets out a standard of information which contracting authorities are required to provide to unsuccessful tenderers. The level of detail/quality of information required appears to be of a high standard.
2. Stating that contracting authorities are obliged to respond to requests for additional information (even where a valid standstill letter has issued) represents a fundamental change to the manner in which contracting authorities currently conduct tender processes.

### **Other Scenarios**

Certain scenarios can give rise to offers. The scenarios being: Examinations; Quotations; and Lotteries.

#### **Examinations**

[2:40] In the case of *Tansey v College of Occupational Therapists Ltd* [1995] 2 ILRM 601, the plaintiff failed her Psychiatry exams twice and claimed that the defendant had a contractual relationship with the plaintiff. The defendant published a manual that provided the examination details and that stated that two re-sit examinations were permitted. The defendant later amended its rules to only allow one examination re-sit in a given period. Details of this amendment were included in some, but not all, of the course materials distributed in the year that the plaintiff enrolled. The amendment was sent by the defendants to St Joseph's College, who operated a preparatory course for the defendant's Diploma examinations, as well as the notice of amendment being posted on a notice board in the college during the year. The amendment was also pointed out to students undertaking the preparatory course. Murphy J. accepted that an examination board could make a unilateral offer, however, the plaintiff had not been aware of any offer made by the defendant when she enrolled in respect of examination re-sits.