

**THE HIGH COURT  
COMMERCIAL**

[2022] IEHC 221

**Record No. 2019/895 JR**

**IN THE MATTER OF O. 84 A OF THE RULES OF THE SUPERIOR COURTS, AND COUNCIL  
DIRECTIVE 92/13/EEC, AS AMENDED BY DIRECTIVE 2007/66/EC  
AND IN THE MATTER OF DIRECTIVE 2014/25/EU OF THE EUROPEAN PARLIAMENT  
AND OF THE COUNCIL OF 26 FEBRUARY 2014 ON PROCUREMENT BY ENTITIES  
OPERATING IN THE WATER, ENERGY, TRANSPORT AND POSTAL SERVICES SECTORS  
AND IN THE MATTER OF THE EUROPEAN UNION (AWARD OF CONTRACTS BY UTILITY  
UNDERTAKINGS) REGULATIONS 2016 (S.I. NO. 286 OF 2016)**

**BETWEEN**

**ENERGOINVEST REACH ACTIVE LIMITED**

**APPLICANT**

**- AND -**

**ELECTICITY SUPPLY BOARD**

**RESPONDENT**

**Judgment of Mr. Justice Quinn delivered the 8th day of April 2022 (leave to amend Statement of Grounds)**

1. This judgment concerns an application by the Applicant for an order pursuant to O. 84 A, r. 8 of the Rules of the Superior Courts, allowing it to amend its Statement of Grounds.
2. The proceedings as initiated are a challenge to a Pre-Qualification Questionnaire (PQQ) issued by the Respondent on 27 August 2019. The PQQ related to an intended framework agreement referred to as the Electrical Distribution Substation Framework ("the Framework"). The Framework was intended to replace an existing framework agreement, referred to in this judgment as the "ISP2 Framework", entered into in January 2008 which related to the planning, design, building/upgrading and refurbishment of high voltage substations in the Republic of Ireland. The ISP2 Framework had been due to expire on 31 December 2011, but had been extended from time to time.
3. In the Originating Notice of Motion the Applicant seeks orders in the following terms: -
  - (a) *An order pursuant to Regulation 9 (1) (a) of the European Communities (Award of Contracts by Utility Undertakings (Review Procedures) Regulations 2010 (SI 131 of 2010), as amended (the "Remedies Regulations") and/or Regulation 9 (5) of the Remedies Regulations, setting aside and/or permanently suspending the Pre - Qualification Questionnaire ("PQQ") issued by the Respondent on 27 August 2019.*
  - (b) *An order directing the Respondent to conduct the tendering process for the CON378-WV-110KV Electrical Distribution Substation works under a multi - framework contractor Framework Agreement (the Electrical Distribution Substation Framework) in full compliance with the Respondent's obligations pursuant to European Union law and pursuant to national law.*
  - (c) *A declaration that in publishing the PQQ for the Electrical Distribution Substation Framework on or about 27 August 2019, the Respondent had failed to comply with the requirements of public procurement law and in particular the requirements of*

- i) *The European Communities (Award of Contracts by Utility Undertakings) Regulations 2016 (S.I. No. 286 of 2016) (the "Utilities Regulations"); and/or*
  - ii) *Directive 2014/25/EU of European Parliament and of the Council Co-ordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors ("the Utilities Directive"); and/or*
  - iii) *The Remedies Regulations; and/or*
  - iv) *Council Directive 92/13/EEC on the co-ordination of the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66/EC and amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedure concerning the award of public contracts (the Remedies Directive"); and/ or*
  - v) *the general principles of European Union law including but not limited to equal treatment, non – discrimination, transparency, competition, proportionality, objectivity, good administration and effective judicial protection (the "General Principles").*
- (d) *A declaration that the PQQ for the Electrical Distribution Substation on or about 27 August 2019 is ultra vires, invalid and of no legal effect on the grounds inter alia that it is manifestly discriminatory and fails to comply with the principles of transparency and equal treatment.*
- (e) *If necessary, a Declaration that any further steps taken pursuant to the PQQ are invalid and unlawful and should be set aside.*
- (f) *If necessary, an Order pursuant to Regulation 9 (5) of the Remedies Regulations suspending any consequential steps pursuant to the PQQ.*
- (g) *If necessary an alternative penalty pursuant to Regulation 9(1) and/or Regulation 13 of the Remedies Regulations including the termination or shortening of the duration of any contract concluded between the Respondent and other tenders; and/or*
- (h) *Damages.*
4. The Applicant is already a party to four framework agreements with the Respondent as follows: -
- (i) The ISP2 Framework;

- (ii) A framework entered into on 3 March 2015 referred to as the Trench and Ducting Framework;
  - (iii) A framework entered into on 19 February 2016 referred to as the Overhead Lines Framework Agreement and;
  - (iv) A framework agreement entered into on 16 March 2017 referred to as the Substation Commissioning Framework Agreement.
5. In separate proceedings between the same parties (2009 680 JR) the Applicant alleges that the Respondent has excluded it from being awarded work under these frameworks by the application of award criteria it alleges were not disclosed when those frameworks were being tendered. In those proceedings it seeks certain declarations, damages and other reliefs.

**The Framework process**

6. The process for the establishment of the new Framework was commenced on 17 February 2017 by the publication of a general qualification system notice in the Official Journal of the EU and on the E – tenders website.
7. The PQQ issued in August 2019 was summarised in the Statement of Grounds as specifying a number of matters including the following: -
- (a) That drawdown contracts are intended to be awarded under the Framework as a direct award or on the basis of a mini tender and that further details in relation to the call off contracts under the Framework would be set out in the request for tender document ("RFT");
  - (b) That the Framework agreement would be provided to the pre – qualified applicants at the RFT stage;
  - (c) That the Framework agreement would be awarded on the basis of most economically advantageous tender ("MEAT");
  - (d) That in submitting a response to the PQQ it would be implied that each applicant fully understands and accepts all provisions of the PQQ.
8. The statement of Grounds alleged that the PQQ provided that the Respondent would operate a Contractor Safety Grading System ("CSGS") for the duration of the Framework and that the effect of a safety grade on the allocation of work, was set out in Appendix 11 to the PQQ.
9. It was alleged that it was apparent from the publication of the PQQ and Appendix 10 that it was intended to incorporate the CSGS into the Framework when awarded and that the contractor's grade under the CSGS would affect the allocation of work under the Framework.

10. Following the publication of the PQQ, the Applicant raised queries and supplemental queries to which the Respondent replied. When the proceedings commenced the RFT had not yet been published.

**Statement of Grounds**

11. In describing the Respondent's alleged infringements the Applicant referred to Regulations 35 and 50 of the Utilities Regulations, Article 36 and 51 of the Utilities Directive, and the General Principles. The Applicant made the following particular allegations in para. 20: -
- "d. *the Respondent has purported to use the CSGS as a selection criterion for the Electrical Distribution Substation Framework. This is manifestly unlawful and contrary to the General Principles and/or Utilities Directive for the reasons set out below in paras. 21 – 25" (which contain the Applicant's complaints concerning the substance of the CSGS, to which I refer in more detail below).*
  - "e. *The Respondent has failed to ensure the equal treatment of all contractors who may be eligible to participate on the Electrical Distribution Substation Framework".*
  - "f. *The Respondent has adopted a selection criterion for the Electrical Distribution Substation Framework, namely the CSGS, which is likely to prevent, restrict or distort competition among potentially eligible operators".*
  - "g. *The Respondent has adopted a selection criterion for the Electrical Distribution Substation Framework, namely the CSGS, which facilitates the award of work in a manner that is not transparent", and,*
  - "h. *The Respondent has adopted a selection criterion for the Electrical Distribution Substation Framework, namely the CSGS, which discriminates against multi framework contractors such as the applicant".*
12. In essence, the Applicant's complaint is that utilising the CSGS as a selection criterion for the Framework is: -
- (i) Contrary to the General Principles and/or the Utilities Directive;
  - (ii) Fails to ensure the equal treatment of all contractors who may be eligible to participate in the Framework;
  - (iii) Is likely to prevent, restrict or distort competition among potentially eligible operators;
  - (iv) Facilitates the award of work in a manner that is not transparent;
  - (v) Discriminates against multi framework contractors.

13. The Applicant complains that the respondent had refused to provide the RFT until after the pre – qualification stage of the procurement process and then only to pre – qualified applicants.

#### **The CSGS**

14. The central feature of the Applicant’s complaint regarding the CSGS is the manner in which it takes account of a contractor’s record of serious safety incidents (“SSIs”). It says that under the CSGS, the total number of SSIs a contractor has on its record on all work types is counted against each work type. Each incident counted has the effect of reducing the overall score by 3%. It says that applying the SSI score discount across all divisions of a tenderer’s activity disadvantages contractors who stand appointed on more than one framework, such as the Applicant, and is not reflective of the actual safety performance per division in any contracting company. It is said that a single framework contractor now tendering for the Framework could have more SSIs than a multi – framework contractor in the same sector and yet could receive a higher score in the CSGS and be recognised as safer in that sector despite having what the Applicant says will be an inferior safety record relevant to the sector or division.
15. The Applicant says that in circumstances where the total number of SSIs on all work types is counted against each work type the CSGS is discriminatory in failing to take account of the inherent differences between work types and that the probability of an SSI can vary between work types as a consequence of the nature of the work, the environment in which the works are performed and the accuracy of information provided by the Respondent to the contractor.
16. The Applicant complains also that the CSGS is discriminatory insofar as it fails to take into account the volume of work carried out by a contractor when counting SSIs and potentially disadvantages contractors with larger work volumes notwithstanding that it could have less SSIs per thousand man – hours than a contractor with lower work volumes.

#### **Opposition**

17. As a preliminary objection the Respondent states that in circumstances where, at least as at the time of the delivery of the Statement of Objections, the Applicant had not submitted an application to the PQQ, and was not successfully appointed to the proposed Framework and had not been assessed for the purpose of the CSGS in the context of the Framework any challenge to the use of the CSGS in the context of the Framework was premature.
18. The Respondent says that the application is fundamentally misconceived because it is premised on a misunderstanding of the role of the CSGS and the manner in which it will operate. It says that the CSGS is not a selection criterion for the Framework and will not play a role in the determination of what contractors will be appointed to the Framework. It says that the CSGS will only play a role in the award of work on the Framework once operational. Therefore the grade at which the Applicant is assessed pursuant to the CSGS

has no role in the selection of applicants to the Framework and is not a criterion for pre – qualification under the PQQ.

19. Without prejudice to its statement that the CSGS is not a selection criterion. The Respondent denies that that the CSGS discriminates against multi – framework contractors.
20. The Respondent says that it is entitled to use the CSGS as a criterion for the award of work and therefore to operate it in the manner envisaged by Appendix 10 to the PQQ. It says that the use of the CSGS as a criterion for the award of work reflects the importance placed by the Respondent on the ability of a contractor to carry out and complete works in a safe manner and in accordance with appropriate codes of practice. It says that the use of CSGS as a criterion for the award of work is clear, transparent and would be applied objectively and uniformly to all contractors appointed to the Framework.
21. The Respondent says that the CSGS will be operated in a fair and transparent manner. It says that it is entitled to have regard to serious safety incidents, including those which occur on other frameworks in carrying out an assessment under the CSGS.
22. The Respondent denies that applying serious safety incident scores across all divisions disadvantages contractors on more than one framework. It says that the distinction suggested by the Applicant regarding different types of works as between the frameworks is misconceived and that it is incumbent on the Respondent to ensure that any works ordered under any framework can be carried out in a safe and secure manner.
23. The Statement of Grounds and Statement of Opposition engage as to a number of other issues regarding the fairness or otherwise of the CSGS as a method of safety grading contractors. It is not necessary on this application to elaborate further on these save to note that the Applicant states that on 24 September 2019 the Respondent published the grading of the applicant pursuant to the CSGS in respect of the four framework agreements to which the Applicant was then a party. In this assessment, the Respondent graded the applicant as a “Bronze” contractor. The Respondent says that this grading only applied to the operation of the existing four frameworks. For the new Framework only a CSGS grading after its commencement would apply.
24. It is clear from the Statement of Grounds and the Statement of Opposition that the kernel of the dispute between the parties was twofold. Firstly, the question of whether and/or to what extent the CSGS was relevant to the selection of contractors to be admitted to the Framework. Secondly, whether the CSGS itself was discriminatory, unlawful and non – compliant with the Utilities Regulation and Directive and the General Principles.

#### **Changes made by the Respondent**

25. Following the initial exchange of pleadings and affidavits, the Respondent made revisions to the CSGS and to the PQQ. As regards the CSGS itself the Respondent says that its consultant Mr. Niall O’Donovan of Assure Health and Safety Consultants, who swore an affidavit in opposition to the substantive claim, had identified and recommended one

change which the Respondent has adopted. This is a revision arising from the fact that the original CSGS considered serious safety incidents as a number and not as an incident frequency rate. The Respondent says that following Mr. O'Donovan's review and based on this advice, amendments have been made to provide for the inclusion of an incident frequency rate. Other amendments were made regarding the definition of a "serious safety incident" and these revisions were also incorporated into a revised CSGS.

26. In June 2020, revisions were made to the PQQ itself and a revised PQQ was issued on 15 June 2020.
27. On 12 September 2020, the Respondent published the revised PQQ for the Framework which included the revised CSGS.
28. On 14 September 2020 Mr. John Mulvaney, Manager of the "Contacting Parties Group" of the Respondent swore his second affidavit in the proceedings. Mr. Mulvaney exhibited the revised PQQ and the draft Instructions to Tenderers dated 12 September 2020. He said that the Respondent had recently been engaged in the finalisation of the Instructions to Tenderers to be published, which would include the criteria for the award of work on the Framework. He explained that: -

*"it is no longer intended for the CSGS to be used as a criterion to be considered in the award of work under the proposed ... Framework. .... The CSGS will continue to be used as a contractor management tool through which the Respondent will manage the safety performance of contractors operating on its Frameworks."*

29. Mr. Mulvaney continued

*"As the CGGS will not now be used as a criterion in the award of work under the proposed... Framework, the central issue in the proceedings has resolved and there no longer remains a dispute between the parties."*

30. The Applicant asserts that the safety grading system appended to the revised PQQ still offends the principles of non – discrimination, transparency, and equality. The Respondent stands over the fundamental fairness of the system.
31. The applicant refers also to a document referred to as the Contractor Management Standards ("CMS13"), which was provided by the Respondent as part of the draft RFT.

#### **Correspondence after the change**

32. The issue by the Respondent of the revised PQQ, draft Instructions to Tenderers and the CMS 13 and the contents of Mr. Mulvaney's Second Affidavit gave rise to new correspondence between the parties. In its letter of 25 September 2020 the Respondent stated that the CSGS was not now being used as a criterion in the award of work under the proposed Framework and that the proceedings are moot. The Applicant rejected that proposition and by letter dated 6 October 2020 stated : -

*"Having considered your client's most recent affidavits, the RFT documents and the revisions to the CSGS, it is by no means clear that the central issue in these proceedings has been resolved and there remain many significant questions regarding the intended role of the CSGS under the proposed Electrical Distribution Substation Framework and how it will affect the award of work".*

33. The Applicant outlined its concerns in relation to the revised PQQ, the Instructions to Tenders and the Contractor Safety Regulations and sought clarification on seven points. The first of the seven points was a question concerning "the precise role of the CSGS under the proposed Electrical Distribution Substation Framework, including whether or not ESB now considers the CSGS to be a selection criterion or a contractor performance criterion". It raised six further questions concerning the status of CMS 13 and other aspects of the safety grading provisions of the PQQ.
34. The Applicant referred to the revised form of the CSGS itself stating that, subject to certain clarifications sought, it was of the view that many of the same issues which it had originally identified in the proceedings remain with the CSGS.
35. Further letters were exchanged in which the Respondent repeated its view that the proceedings were moot. In a letter of 7 October 2020 Messrs Maples on behalf of the applicant notified the Respondent that its client "may also need to amend its Statement of Grounds in light of the actions very recently taken by your client".
36. In a letter of 13 October 2020, the Respondent stated that the queries raised in the applicant's letter of 6 October 2020 were queries which related to the operation of the grading system and of the proposed Framework and that any information relating to those ought to have been sought in the normal way in the context of the Framework and not by such correspondence. They addressed the first question by stating that the CSGS would not be used as a selection criterion for the Framework, or as a criterion for the award of work under the Framework, but would continue to be used as a "contractor management tool" through which the Respondent manages the safety performances of contractors.
37. Arising from yet another round of correspondence the Respondents stated that although queries numbers 2 to 7 did not concern the proceedings, they would treat them as having been raised as matters for clarification in the context of the PQQ, and therefore responses to those queries would issue to all applicants. On 19 October 2020, the responses to clarifications including questions 1 to 7 were published on the e – Tenders portal.
38. By letter dated 2 November 2020 the Applicant stated a number of further concerns arising from the publication of the revised PQQ, amended CSGS and the draft Instructions to Tenders which accompanied the draft RFT. It referred to the seven requests for clarification which it had sought and stated its view that arising from the responses provided on 19 October 2020 it was the Applicant's position that the Respondent: -



*"has committed further breaches of the Utilities Regulations, the Utilities Directive, the Remedies Regulations, the Remedies Directive, the General Principles, the common law principles of natural and or constitutional justice and as well as certain limited additional breaches".*

39. The Applicant then listed twelve such alleged breaches, by reference to the Utilities Regulations and the General Principles. Having cited the Regulations and Directives and the General Principles, it stated that the Respondent has: -
- "d. Purported to use rules and criteria for the award of contracts based on the Framework which are manifestly unlawful and contrary to the General Principles and/or the Utilities Directive"
  - "e. ESB has failed to ensure the equal treatment of all contractors who may be eligible to participate in the Framework".
  - "f. ESB has adopted rules and criteria for the award of contracts based on the Framework which are likely to prevent restrict or distort competition among potentially eligible operators, which facilitate the award of work in a manner that is not transparent, and which discriminate against multi framework contractors such as the Applicant, and which are not specified in the procurement documents for the Framework agreement".
40. The Applicant also stated that the Respondent had purported "to adopt contract performance conditions, including the CSGS and/or CMS 13, these are directly and indirectly discriminatory and are not linked to the subject matter of the specific framework".
41. The applicant then identified a number of the revisions which have been made to the CSGS and stated its view that the CSGS retained many of the issues identified by it "including without limitation the penalisation of contractors for SSIs, including SSIs included in other frameworks, and remains inherently discriminatory".
42. The Applicant expressed its view that on a proper reading of the CSGS the PQQ and the CMS 13, the "CSGS informs ESB in its determination of competency". It alleged that although the Respondent had denied that the CSGS would be used as a selection criterion or now even as a criterion for the award of work, the CSGS "will continue to have application to the treatment of contractors under the framework and their availability to be awarded work".
43. The Applicant called on the Respondent to agree to an amendment to the Statement of Grounds to reflect the above matters. On 3 November 2020 the Applicant delivered a draft amended Statement of Grounds.
44. The Respondent declined to consent to an amendment of the Statement of Grounds.

45. On 11 November 2020, the notice of motion seeking liberty to amend the statement of grounds was issued. The notice of motion includes an application "if necessary" for an order pursuant to O. 84 (A), r. 4, RSC extending the time for amending the statement of grounds.

**Time**

46. Regulation 7(2) of the Remedies Regulations provides that an application pursuant to the Regulation must be made within 30 calendar days: -

". . . after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application".

Regulation 7 of the Utilities Regulations also provides that an application must be made within 30 calendar days after the Applicant was notified of a relevant decision, "or knew or ought to have known the infringement alleged in the application."

47. O. 84 (a), r. 4 of the RSC provides that an application may be made "after the expiry of the time mentioned . . . where the court considers there is good reason to do so".
48. The Respondent says that insofar as the proposed amendments to the Statement of Grounds relate to the publication on 12 September 2020 of the revised PQQ, such application was issued on 11 November 2020 and is out of time. It submits that the Applicant possessed sufficient knowledge from 12 September 2020 to enable it to consider that it had reasonable grounds for challenge (see *Baxter Healthcare Ltd. v. Health Service Executive* [2013] IEHC 413).
49. The Applicant submits that time only began to run from 19 October 2020 when the Respondent replied to the request for clarifications.
50. It is informative to consider the seven clarifications sought by Messrs Maples in their letter of 6 October 2020 and which were replied to by the Respondent through the e Tender portal on 19 October 2020. The clarifications sought were as follows: -
- (i) Please outline the precise role of the CSGS under the proposed electrical distribution substation framework, including whether or not ESB now consider the CSGS to be a selection criterion or a contractor performance condition.
  - (ii) Please outline precisely what constitutes "concern over safety performance" (as referenced in Section 20 of CMS 13).
  - (iii) Please outline whether or not and, if so, in what circumstances a contractor's scoring pursuant to the CSGS (including its grading) may give rise to "concern over safety performance".
  - (iv) Please outline the criteria for introducing any management measures reducing the work volume and/or work type available to a contractor under the framework, as referenced in Section 20 of CMS 13.

- (v) Please clarify whether or not the removal of the PSCS function from a contractor pursuant to Section 20 of the CMS 13 precludes that contractor from access and/or the award of work under the framework, having regard to the requirement for approval of PSCS as part of the "ESB Approved Contractor Resource Availability".
  - (vi) Please outline the basis for assessing a contractor for approval as PSCS under the framework.
  - (vii) Please confirm whether or not ESB may seek to award a contract pursuant to a mini tender by reference to rules and criteria which are not currently set out in the ITT".
51. The PQQ was first issued by the Respondent on 27 August 2019. On 12 September 2020 it issued a revised PQQ. The Applicant immediately sought clarification of the revised PQQ and related documents, including the Instructions to Tenderers and CMS13. The requests for clarification it submitted on 6 October 2020 clearly arise from the altered position of the Respondent. The Respondent initially declined to respond to six of the seven requests, but later agreed to provide clarifications through the portal on 19 October 2020.
52. In its letter of 7 October 2020 the Applicant stated that "... subject to your client's response to the clarifications sought, our client may also need to amend its Statement of Grounds in light of the actions very recently taken by your client." The Respondent submits that this letter evidences that the Applicant had by that time sufficient information to formulate an amended Statement of Grounds and to then initiate this application within 30 days of 12 September 2020 and failed to do so. In circumstances where the Respondent initially declined to give six of the seven clarifications requested and later agreed to do so and provided them on 19 October 2020, I find that taken together with the overall timeframe from the commencement of the process by the Respondent on 27 August 2019, the Applicant had good reason to persist in its requests before commencing this application.
53. On 2 November 2020, Messrs Maples identified the amendments which they intended to make to the Statement of Grounds and repeated their request for consent to the amendments.
54. On 3 November 2020 the Applicant delivered the draft amended Statement of Grounds.
55. In *Newbridge Tyre and Battery Company Ltd. v. Commissioner of An Garda Siochana & Ors.* [2078] IEHC 365, Baker J. considered this question, albeit in the context of an examination of the date from which the time limit commenced to run, as distinct from an application for an extension of time. In particular, she identified the inefficiency to the conduct of such litigation if parties considered themselves compelled to commence proceedings, or in this case amend their grounds, before a proper evaluation is carried out as to whether they are justified or reasonably likely to succeed. She continued: -

*"Litigation chaos, the commencement of poorly pleaded, unjustifiable, or unstateable proceedings are not desirable in the interests of the proper*

*administration of justice, and while procedures exist for the bringing of an application to strike out proceedings which do not meet the necessary standard, such applications engage court time and are costly for the parties. It is in general not desirable that proceedings be instituted in circumstances where an applicant or plaintiff has not sufficiently assessed the nature of the claim or the prospects of success, or does not have requisite information to adequately plead”.*

56. Although a revised PQQ was issued in June 2020, it was not until September 2020, a full year after the original PQQ, that the Respondent presented a new suite of documents which altered its initial position regarding the safety criteria applying to the Framework. I am satisfied that, even if the document of 12 September 2020 provided sufficient information for the Applicant to identify grounds for amendment, these were good reasons to extend the time for doing so as required by Order 84A, Rule 4.

**The proposed amendments**

57. At paragraphs 11 to 16 I have identified the core elements of the claim made in the original Statement of Grounds.
58. The central feature of the infringements described is that the Respondent has purported to use the CSGS as a selection criterion for the Framework and that the CSGS is inherently unlawful because it is likely to prevent, restrict or distort competition among potentially eligible operators, facilitates the award of work in a manner that is not transparent and discriminates against multi-framework contractors such as the Applicant.
59. The first proposed amendment which features throughout the draft amended Statement of Grounds is the description of the PQQ issued on 27 August 2019 as “*the Original PQQ*”.
60. The second set of amendments is a recital at para. 13 of the issue on 12 September 2020 of a revised PQQ, referred to thereafter as the “Revised PQQ”. It is said that the Revised PQQ included a revised CSGS which included significant amendments to the version of the CSGS included in the Original PQQ.
61. The third amendment is a recital of the publication on 12 September 2020 of a draft Request for Tender, “RFT” which included draft Instructions To Tenderer (ITT).
62. Fourthly in paras. 15 to 23 inclusive the Applicant refers to and quotes specific provisions of the draft ITT.
63. In para. 16 it quotes from section 3.25 of the draft ITT and refers to the “Contractor Management Standards (CMS)” Contractor Safety Regulations (“CMS 13”) which accompanied the draft RFT. In the following paragraphs it quotes extensively from CMS 13, as follows: -

*“17. The scope of CMS 13 stipulates that it provides information about the Respondent’s health and safety requirements over and above that required by legislation.*

18. Section 9 of CMS 13 provides that contractors will be assessed and graded annually "to promote the highest safety performance" in accordance with the assessment process which is further outlined at Annex B. Annex B provides the findings can be used to assess a contractor's safety performance and a formal review and feedback will be coordinated.

19. Section 20 of CMS 13 states as follows:

*'Where there is concern over safety performance ESNB may introduce a variety of management measures to ensure improvement. This may include, but is not limited to, the requirement for the Contractor to enter into the On Watch process (CPG Framework Contractors), produce a safety improvement plan that is updated to demonstrate improvement, the removal of the PSCS function and reduction in work volume and type etc.'*

64. In para. 21 of the draft amended statement the applicant asserts the following: -

*"According to s. 3.25 of the ICT all participating framework Contractors will be initially assessed in order to meet the ESB Approved Contractor Resource Availability requirements. After the assessment all contractors who are deemed to have appropriate ESB Approved Contractor Resource Availability will have access to the works. Works are then assigned under the following four categories [Categories then described]."*

65. One of the categories is referred to as 'Pilot Project Work' which is described by the Applicant as follows:

*'These works are to facilitate initial on-site assessment or re-assessment for the purpose of PSCS, PICW or annual Contractor Safety Grading System (CSGS) assessment and may be awarded without taking commercial ranking into consideration.'*

66. The applicant refers to the requests for clarification and replies of 6 October 2020 onwards, culminating in the responses published on the e-Tenders portal on 19 October 2020 and refers to further clarifications which were sought on 2 November 2020.

67. In para. 35 reference is made to the publication of the revised PQQ and "a significantly revised version of the CSGS as composed to the version included in the Original PQQ".

**Paragraph 39: the infringements**

68. Paragraph 39 replaces paragraph 20 of the original Statement of Grounds. It is particularly informative in terms of the Applicant's description of the alleged infringements. At the outset reference is made in general terms to a failure to comply with the provisions of the Utilities Regulations, the Utilities Directive, the Remedies Regulations, the Remedies Directive and the General Principles.

69. The most significant amendments sought are illustrated by para. (d) which, as marked up to show the amendments, reads as follows:

*"The Respondent has purported to use the CSGS as a selection criterion for the rules and criteria for the award of contracts based on the Electrical Distribution Substation Framework this is which are manifestly unlawful and contrary to the General Principles and/or the Utilities Directive for the reasons set out in paragraphs, 40 to 57."*

70. Similarly, paras. (f), (g) and (h) contain the deletion of the phrases "selection criterion" and "namely the CSGS" which are replaced with a reference to "rules and criteria for the award of contracts".

71. The essential differences in these paragraphs are firstly the deletion of the reference to selection criterion and secondly deletion of the reference to CSGS.

72. Paragraphs 39 (i) and (j) are entirely new: -

*"i. Insofar as the Respondent has purported to adopt contract performance conditions, including the CSGS and/or CMS 13, these are directly and indirectly discriminatory, are not linked to the subject matter of the specific framework and are not in accordance with Article 87 of the Utilities Directive.*

*j. the Respondent intends to adopt rules and criteria for the award of contracts based on the Electrical Distribution Substation Framework which are not specified in the procurement documents for the framework agreement.*

73. Paragraph (i) introduces as an infringement the stated adoption of "contract performance conditions" which it says are "not linked to the subject matter of the framework."

74. Paragraph (j) introduces the statement of an allegation that the Respondent intends to adopt "rules and criteria for the award of contracts, which are not specified in the procurement documents for the framework agreement."

75. Paragraphs 40-44 retain the Applicant's complaints as to the CSGS appended to the original PQQ, principally by reference to the system for counting Serious Safety Incidents.

76. In paragraphs 45 and 46 the Applicant refers to the revised CSGS as follows: -

*"45. By way of the revised CSGS included in the revised PQQ, the Respondent abandoned the deduction of 3% per Serious Safety Incident (SSI) from a contractor's score in favour of an incident frequency rating calculation which uses money (as opposed to man hours/day) notwithstanding that this is highly likely to give rise to unequal outcomes, particularly given the difference between contractor rates. Further, the basis, source and validation of the calculation inserted by the Respondent have not been made apparent, despite request by the Applicant. The*

*Revised CSGS also included an amended definition of SSI and expressly provided that SSIs prior to the commencement of the framework will not be counted.*

*46. Despite revision, the CSGS retained many of the issues identified by the Applicant including, without limitation, the penalisation of contractors for SSIs, including SSIs occurring on other frameworks, and remains inherently discriminatory.”*

77. From paragraphs 47 to 57 of the amended Statement of Grounds the Applicant refers again to the responses it received on 19 October 2020 through the e-Tenders portal. Having quoted the responses, the Applicant makes the following allegations: -

- (i) that the Respondent deliberately failed and/or refused to address the clarification sought as to whether the respondent considered the CSGS to be a contract performance condition
- (ii) *that the CSGS will continue to have application to the treatment of contractors under the Electrical Distribution Framework and that the Respondent has reserved unto itself an opaque methodology to control the competition of contractors for work or to exclude a contractor from the award of work based on its performance on the Electrical Distribution Framework and across other separate frameworks and contracts.”*
- (iii) *that there is no objective definition of “concern over safety performance” which is vague, imprecise and is left to the subjective assessment of unknown ESB personnel. (para. 49)*
- (iv) *“that the CSGS penalises multi-framework contractors for SSIs on other frameworks, ... and thereby discriminates against multi-framework contractors.” (para. 51)*
- (v) *that the method described by the Respondent for imposing management measures, “is vague and imprecise and given that the imposition of such measures could significantly affect the award of work under the framework, cannot ensure that work will be awarded in a transparent and objective manner.” (Para. 52)*
- (vi) *that responses given concerning the outlining of the basis for assessing PSCS (Project Supervision for Contract Stage of works), are “vague and contrary to the Respondent’s obligations of transparency, equality and proportionality.” (Paras. 54 and 55)*
- (vii) *that the clarification given on the question of whether it was intended to conduct mini-tenders by reference to criteria not set out in the draft ITT was “vague, evasive and runs contrary to the draft ITT, section 3.25 of which provides that the Respondent may award mini-tenders the basis of criteria which differ to those ‘envisaged’.” (Para. 57)*

78. Under the heading Relief Sought the amended Statement of Grounds contains very few substantive amendments. Notably paragraph 61 still seeks certain declarations regarding the Original PQQ and the amendments simply add that the same or similar declarations be granted in respect of the Revised PQQ issued 12 September 2020 and the draft RFT.
79. The amended Statement retains in paragraph 63 the statement that the applicant “reserves the right to plead additional infringements by filing an amended Statement”.
80. Finally, in addressing the “consequences of the allegedly unlawful acts” para. 64 is amended to read as follows: -

*“The applicant will potentially suffer loss and damage as a result of the said infringements and/or as a result of certain of the said infringements and in particular if it is penalised by the unlawful application of the CSGS which is inherently discriminatory to the Applicant, and the application of rules and criteria for the award of works which are not objective and transparent.”*

### **Discussion**

81. The proceedings as originally constituted relate to the Original PQQ. The fundamental of the claim was that the application of the CSGS as a selection criteria for appointment to the Framework was discriminatory because of the manner in which it recorded serious safety incidents across different types of work and different frameworks and was said by the Applicant to be discriminatory as against multi-framework contractors.
82. The intended amendments arise directly from the movement in the Respondent’s position from the original PPQ to a revised PPQ incorporating an RFT and an ITT issued in September 2020 and certain revisions to the CSGS. Those amendments relate not to selection criteria, which has been deleted in para. 39 which replaces para. 20 of the original Statement of Grounds, and replaced with the following: -
- (a) References to a set of “rules and criteria for the award of contracts”.
  - (b) References to the CSGS have been deleted with one exception.
  - (c) Assertions in para. 39(i) that the CSGS and CMS 13 have been introduced as contract performance conditions which violate provisions of the Utilities Directive and Regulations.
  - (d) The introduction of a new allegation that the respondent “intends to adopt” rules and criteria for the award of contracts which violate the Utilities Directive and Regulations.
83. None of the pleas contained in the amended Statement of Grounds could have been made earlier than September 2020 when the PQQ was revised and when the Respondent announced that the CSGS would not be a selection criterion. Therefore this is not a case in which the court has to consider whether the proposed amendment introduces grounds which were known to the Applicant when commencing the proceedings. Nor can it be said



that that the amendments are a clarification either of facts or law arising from the decision the subject matter of the proceedings as initiated.

84. As regards the reliefs sought it is remarkable that the amended Statement of Grounds still includes certain declarations as against both the original PQQ and the revised PQQ together.
85. The Applicant complains that the CMS 13 incorporates features of the CSGS which, although revised from the original CSGS, are discriminatory, such as the manner in which Serious Safety Incidents are counted and applied against scoring. Whilst not accepting that the CSGS is no longer a selection criterion, its principal allegation now is that the offending features of CSGS will inform the allocation of work under the Framework.
86. The Applicant submits that these proceedings were never limited to the role of CSGS as a selection criterion, and that they have always related to the conduct of the entire process for the establishment of the Framework, which they says is "one process". It submits that only by permitting amendments which arise from the Revised PQQ and other documents such as the ITT and RFT can the issues in controversy between the parties be properly determined. It submits that all of the amendments arise directly from the amendments made by the Respondent.
87. The parties have each referred the court to the judgment in *Keegan v. Garda Siochana Ombudsman Commission* [2012] IR 570 and is *Copymore v The Commissioner of Public Works in Ireland* [2014] IR 786.
88. In *Keegan*, Fennelly J. identified the principle that
- "amendment may be more likely to be permitted where it does not involve a significant enlargement of the applicant's case. To the extent that leave has already been granted, the public interest in the certainty of a decision is already under question. As additional ground may not make any significant difference, particularly if it is based, as in the present case, on a pure matter of law. A court might take a different view of the new ground were likely to give rise to further exchange of affidavits relating to the facts."*
89. I have no doubt that in this case the amendments are a significant enlargement of the case. It is one thing to challenge the PQQ by reference to allegations of a flawed criterion for selection to the Framework. It is an entirely different case to challenge the manner in which the Framework will be operated, in the future, whether in the context of awards of work to contractors in the Framework or in the context of applying performance conditions to those contractors.
90. In *Copymore*, Charleton J. adopted this passage from the judgment of Fennelly J. and said: -

*"An amendment should not be permitted, however, without an explanation that is sufficient to tilt the balance of rights in litigation in favour of considering the proposed new ground for seeking judicial review or for opposing it."*

91. Charleton J. continued: -

*"a late application or a late amendment to include a new ground not previously pleaded requires "good reason". That must take into account the factors listed by the trial judge, but these are not the only factors. One of the most important factors is the public interest and another is the conduct of the parties. As to the first, there is a clear public interest in the disposal of controversies involving multiple suppliers of goods to the State within a prompt time frame. There is also, however, an interest in ensuring that such points as can be argued and which are applicable to other situations are considered and ruled on by the High Court."*

In that case Charleton J. found that adding the point the subject of a proposed amendment would assist in the final disposal of the controversy and would not cause any delay and had not caused any prejudice.

92. These judgments were considered by Costello J. in *Word Perfect Formulation Services Limited v. The Commissions of an Garda Siochana* [2015] IEHC 668, where she identified the following principles:

- a) *The onus is on the applicant to satisfy a court that there were good reasons to explain why the amendment now sought was not set out in the proceedings as originally drafted;*
- b) *The courts are reluctant to introduce what amounts to a claim for an entirely new relief;*
- c) *The courts are reluctant to introduce what amounts to a challenge to a different decision;*
- d) *If the amendment amounts in essence to a question of pure law and if it does not significantly enlarge the case, the amendment is likely to be permitted;*
- e) *If the amendment is likely to involve new affidavits and new facts then the courts may be less inclined to allow the amendment sought;*
- f) *An amendment is likely to be permitted if adding the point will assist in the final disposal of the proceedings. Conversely, if it will not, the courts may be less inclined to permit the proposed amendment;*
- g) *The courts will ask whether the issue arises naturally or by implication out of the existing proceedings. If it does not, the courts may be less inclined to permit the proposed amendment;*

- h) If the proposed amendment is likely to cause delay, the courts may be less inclined to permit the proposed amendment. There is a public interest in the swift disposal of public procurement litigation and there are special and stricter statutory rules applying to this area for that very reason;*
- i) In considering a proposed amendment the courts will have regard to the prejudice likely to be caused not only to the respondent but also to third parties who may have incurred interests in the intervening period between the impugned decision and the proposed amendment to the existing pleadings; and*
- j) If an applicant has acquiesced in the situation arising from the decision he later seeks to challenge, this is a factor a court may take into account in deciding whether or not the plaintiff has established good reasons to justify a court permitting the proposed amendment.*

93. The proposed amendments undoubtedly allege new infringements and seek new relief. They flow directly from the alteration of the Respondent's position when issuing the Revised PQQ. The Applicant cannot be faulted for not having pleaded the amended case before that alteration. The question is whether that of itself would justify permitting the amendments, even where the case sought to be made is a challenge to a new, Revised PQQ. It is therefore a challenge to a new decision of the Respondent or, at the very least, a significant enlargement of the original case.

#### **Mootness**

94. I have been urged by the Respondent to find that the claim as originally made has become moot. The Respondent says that because the CSGS will not now be used either as a selection criterion for appointment to the Framework or as an award criterion, the central issue has been resolved. It submits that the Applicant is seeking to maintain the existing proceedings by grafting on to them amendments which challenge the Revised PQQ and draft ITT.
95. The Applicant contends that far from becoming moot the claim has become more important because the clarifications furnished and which it says gave rise to the amendments create greater uncertainty as to the manner of operation of the Framework. The Applicant submits that I should not make a finding of mootness on this application, with the implications which such a finding would have, not least regarding the matter of costs.
96. The court has been informed that since the hearing of this application the Respondent has notified the Applicant that it has been successful in tendering for the Framework. At one level, that would suggest that the issues raised by the proceedings as initiated, and which I have identified as relating to the selection criteria for the Framework, had become moot and there would likely be consequences in costs. However, I accept the Applicant's submission that I should not make a determination concerning mootness of the action on this application, partly now because I should first hear the parties as to effect on this question of the recent development of the Applicant's appointment to the Framework.

**Prejudice**

97. The Applicant submits that no prejudice will be suffered if the amendments are permitted. The principle prejudice referred to in the replying affidavit of Ms. Davis on behalf of the Respondent is costs. The Respondent also refers to the potential for delay if the amendments were permitted and it submits that the amendments envisaged a “rolling” challenge to the conduct of the Framework into the future, which it says would render the functioning of the Framework unworkable.
98. In the affidavits which were exchanged in the substantive proceedings prior to the revision of the PQQ and before this application was made, arguably the most significant feature was evidence by experts for each of the parties as to the substance of the CSGS and in particular its treatment of multi-framework contractors.
99. Certain revisions are said to have been made to the CSGS insofar as it is alleged to be incorporated in the CMS 13. It is clear that if the amendments were permitted, much of the focus of evidence at the trial would still be on the question of whether the scoring system for measuring safety complied with the obligations of the Respondent regarding equal treatment of contractors. Nonetheless there is a substantial difference between examining the question of whether the CSGS was a selection criterion and if so whether it was discriminatory or otherwise unlawful, and a more ‘multi layered’ examination firstly of the extent to which the original CSGS or its allegedly offensive features have been retained and secondly to then examine those remaining features to establish whether they offend the Directives and Regulations in the context of the future operation of the Framework. Therefore, whilst some of the evidence and expert reports may still be relevant, there would be extensive further evidence, including expert evidence, and in all likelihood a wider scope of discovery required were the amendments permitted.
100. Noting that the draft amended Statement of Grounds retains the reservation that the Applicant reserves the right to plead “additional infringements ... if necessary”, the Respondent submits that permitting the proposed amendments would open the prospect of having to manage the ongoing procurement process and being exposed to “rolling amendments ... challenging that process.” In that regard the court’s attention has been drawn to the extant proceedings between the same parties in respect of the operation of the existing four framework agreements. ( *Energoinvest Reach Active Limited v Electricity Supply Board* [2019] 680JR ).
101. This is a valid submission. I am satisfied that if these proceedings are amended in the manner proposed the scope of the issues would deviate from the substance of the case as originated to such an extent as to not only enlarge the case by a multiple of features, but would open the path to a “rolling” enquiry as to the future operation of the Framework. Such an open ended enquiry is not appropriate for an amendment of these proceedings

**Conclusion**

102. The amendments now sought could not have been sought any earlier, and are explained by the material alteration in the position of the Respondent when it issued the Revised PQQ on 12 September 2020 and delivered its second affidavit on 14 September 2020.

103. There were good reasons why the Applicant did not commence this application within 30 days of the revised PQQ, namely the request for clarifications to which the Respondent replied on 19 October 2020.
104. The proceedings as initiated were grounded on an allegation that the use of the CSGS as a selection criterion for the Framework was unlawful and contrary to the Utilities Directive and the General Principles and was likely to prevent, restrict or distort competition among potentially eligible operators and discriminated against multi-framework contractors. The proposed amendments, whilst retaining prayers for relief as against the original PQQ allege that the Respondent has
- (a) adopted rules and criteria not for selection to the Framework but for the award of contracts, which may include in part the allegedly offending CSGS, which are unlawful and contrary to the Utilities Directive and the General Principles and which are likely to prevent, restrict or distort competition among potentially eligible operators and to discriminate against multi-framework contractors
  - (b) that insofar as the Respondent has purported to adopt contract performance conditions, including the CSGS and/or CMS13, these are discriminating and are not linked to the subject matter of the specific framework and are not in accordance with Article 87 of the Utilities Directive.
  - (c) that the Respondent intends to adopt rules and criteria for the award of contracts based on the Framework which are not specified in the procurement documents for the Framework.
105. I am required to balance the fact that the amendments flow from the changes in the Respondent's position a year after the commencement of the proceedings against the fact that the proposed amendments are a challenge to a new decision and a wide ranging enlargement of the case. I have a measure of sympathy for the Applicant which has been faced with a "moving target" in the form of the revised PQQ. Nonetheless I have concluded that the extent of the proposed amendments are such as to enlarge the case to a degree which should not be permitted. I therefore refuse the relief sought.
106. The court having been informed of a recent development, namely that the Applicant has been successful in tendering for the Framework, I shall not determine the question of mootness of the action until after the parties have considered this judgment and if necessary made further submissions.