OUTER HOUSE, COURT OF SESSION

[2011] CSOH 194

P606/10

OPINION OF LORD BRAILSFORD

in Petition of

SIDEY LIMITED

Petitioners;

for

Judicial Review of a decision by Clackmannanshire Council to award a contract for their 2009/10 Kitchen and Bathroom Replacement Programme (Reference 2286(a)) to Pyramid Joinery and Construction Limited

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Petitioners: Johnston, Q.C.; MacRoberts

Respondents: Findlay; Ledingham Chalmers

24 November 2011

[1] The petitioners are a company having its registered office at 19 Feus Road, Perth. The respondents are a local authority constituted under the Local Government (Scotland) Act 1994. In this petition the petitioners seek:

(i) declarator that in deciding to award a contract for their 2009/10 kitchen and bathroom replacement programme to Pyramid Joinery and Construction Limited (hereinafter "Pyramid") the respondents acted irrationally and in error of law, *et separatim* in breach of their implied duty in contract *et separatim* their duty of care to the petitioners, and failed to follow proper procedures;

(ii) declarator that in deciding to award the contract for their 2009/10 kitchen and bathroom replacement programme to Pyramid, the respondents acted in breach of their general Community obligations and in breach of regulation 8(21) of the Public Contracts (Scotland) Regulations 2006;

(iii) payment by the respondents to the petitioners of the sum of £382,000 with interest thereon at the rate of eight per cent per annum from 2 July 2009 until payment.

(iv) such further order, decree on orders (including an order for expenses) as may seem to the court to be just and reasonable in all the circumstances of the case.

The case called before me for a first hearing.

[2] There was no material dispute between the compearing parties as to the factual background. In January 2009 the respondents issued an "Invitation to Tender and Notice" in relation to a proposed contract to carry out the replacement of kitchens and bathrooms in 286 council houses and kitchens only in a further 87 council houses in Alloa and Tillicoultry. The notice was published on the Public Contract Scotland website. The approximate cost of the works was stated as £2,500,000. The Invitation to Tender constituted a pre-qualifying stage. Prospective contractors were invited to express interest as part of a selection process to pre-

qualify to go forward to the tendering processing. A pre-qualification questionnaire was provided for contractors wishing to be considered to go forward to the tendering process. The respondents also provided "Guidance Notes for Completion Tender Questionnaire", which document made it clear that a maximum of six contractors would be selected to go forward to the tender process. The petitioners entered the pre-qualifying stage and were one of four contractors selected to go forward to the tendering stage. As one of the selected tenderers the petitioners were issued with "Tender Documents", which they duly completed and submitted in the form of a tender to the respondents on 23 April 2009. Three other contractors also submitted tenders. The Tender Documents which the petitioners and other tendering contractors required to complete made it clear that the "... contract will be awarded on the basis of a quality/price assessment. The quality/price ratio shall be 70/30." The contract was split, in terms of the tender, into two phases. The work duration for phase 1 of the contract was between 27 July 2009 and 12 March 2010. The work phase for phase 2 was between 4 January 2010 and 12 March 2010.

[3] After the submission of tenders these documents were evaluated by officials employed by the respondents. That process had been completed by 19 June 2009 on which date the respondents decided to accept one of the other contractor's tenders. On that date the official responsible for the administration of the contract prepared a letter to be sent to the petitioners informing them that they had been unsuccessful in their tender. That letter gave a summary of the petitioners score in the evaluation process together with comments purporting to explain how that score had been reached. It was intended that this letter be sent to the petitioners by way of fax on the said date. In fact in error the letter was faxed to an incorrect telephone number. This mistake only came to light on 29 June when an employee of the petitioners telephoned the respondents and enquired about the progress of the tender. In response to this telephone conversation, and realising that an error had been made, the letter dated 19 June was faxed to the petitioners, this time at a correct telephone number. It was accordingly only on 29 June 2009 that the petitioners became aware that their tender had been unsuccessful. Before that date the petitioner had received no information about the result of the procurement process or the date on which a decision in respect thereof would be pronounced. Notwithstanding the events of 29 June on 2 July the respondents wrote to one of the other tenderers, Pyramid, and accepted the tender submitted by that contractor. The respondents did not inform the petitioners that it had done so. The petitioners' response to the letter of 19 June was to write to the respondents on 3 July 2009, formally appealing the award decision and setting forth cogent and argued reasons as to why the valuation of the tenders carried out by the respondents had been in error. The respondents replied to that letter on 7 July 2009, acknowledged receipt of the appeal and confirmed that "Progress on the contract has been halted". The letter of 7 July also informed the petitioners that their appeal would be investigated and that they would receive a response within 20 days. The respondents' letter of 7 July did not however inform the petitioner that, as aforesaid, by letter dated 2 July 2009 the respondents had accepted the tender submitted by Pyramid. The respondents in fact intimated the results of their investigation to the petitioners by letter dated 11 August 2009. In that letter the respondents stated:

"... having investigated the position in relation to the award of this contract, I consider that the points you have raised have been substantiated. As a result, I propose to recommend that the contract be awarded to Sidey Limited."

It is apparent from the terms of that letter, and in fact has been the position of the respondents throughout the entirety of the current proceedings, that they erred in the evaluation process. There is no dispute that but for that error the petitioners would have been evaluated as the successful bidder in the aforesaid tender process and would have been awarded this contract. The other fact which is plainly proven from the aforesaid narrative of events is that the error in relation to faxing the letter of 19 June 2009 deprived both the petitioners and the respondents of the benefit of the ten day "Standstill Period" which it had been the intention of both parties to have followed the decision as to the successful tenderer. Had the letter of 19 June been faxed, as was the respondents' intention, to the petitioners on that date then it is probable that the error in evaluation would have been appreciated at an earlier date before the contract was in fact awarded.

[4] At this juncture I should give some indication of the procedural background to the First Hearing. On 18 September 2009 the pursuer commenced proceedings against both the present respondents and Pyramid in the Commercial Court. In that action the petitioner sought an order in terms of Regulation 47(8)(b)(i) of the Public Contracts (Scotland) Regulations 2006 (SSI 2006 No 1) (hereinafter referred to as the "Scottish Regulations") to set aside the decision to award the contract to Pyramid. The petitioner also sought suspension and reduction of the purported contract between the respondents and Pyramid. There was a further conclusion seeking damages against the respondents in the event that the contract was not reduced and awarded to the petitioner. A debate on the pleadings was heard before the Lord Ordinary, following which decree was pronounced reducing the contract between the respondents and Pyramid. That decision was reclaimed and by decision dated 5 March 2010 the First Division held that the proceedings by way of commercial action were incompetent and that any challenge to the decision to award the contract to Pyramid should have been brought by way of Judicial Review (*Sidey* v *Clackmannanshire Council* 2010 SLT 607). The present petition was presented after this decision.

[5] Consideration of the relevant regulatory framework to this process commences with Directive 2004/18/EC ("Directive"). This Directive provides the general Community obligations which pertain to the award of public works contracts, public supply contracts and public service contracts. It is not disputed that the contractual process with which this judicial review is concerned fell within the ambit of this Directive. The preamble to the Directive states that in awarding contracts of this nature, local authorities are subject to the principle of equal treatment, the principle of non-discrimination and the principle of transparency. Article 2 provides that "Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way." Article 7 stipulates certain threshold amounts relative to public contracts. It is not disputed that the indicative contract sum in the present case (£2.5 million) was below the threshold amount for public contracts. Article 28 made provision for the restricted procedure in tenders of this sort.

[6] Directive 2004/18/EC was given effect to in this jurisdiction by the Scottish Regulations. Regulation 2(1) defines "restricted procedure" as "... means a procedure leading to the award of a contract whereby only economic operators selected by the contracting authority may submit tenders for the contract". Again it is not a matter of dispute that it was this procedure which was adopted in the tendering process in the present case. Regulation 8 provided for "Thresholds" and in particular regulation 8(1) provided:

"These regulations do not apply to the seeking of offers in relation to a proposed public contract, framework agreement or dynamic purchasing system, where the estimated value of the contract (net of Value Added Tax) at the relevant time is less than the relevant threshold."

As already noted, there is no dispute that the contract with which this case is concerned fell below the threshold value. Regulation 8(21) provides:

"When a contracting authority proposes to award a public contract which has an estimated value for the purpose of paragraph (1) which is below the relevant threshold, or where a proposed public contract is otherwise exempt from the requirement for prior publication of a contract notice, the contracting authority shall, if required by its general Community obligations, for the benefit of any potential economic operator, ensure a degree of advertising and follow a practice which leads to the award of the contract which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non-discrimination and transparency."

Regulation 47 imposes an obligation on a contracting authority to comply with the provisions of the Regulations and that arising therefrom "... is a duty owed to an economic operator". There is no dispute that the petitioners fall within the definition of an "economic operator". Regulation 47(6) provides that a breach of duty owed in accordance with the Regulations "... shall be actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage ..." The remedies available in relation to this breach of duty are stipulated by regulation 47(8) and include the power to "... award damages to an economic operator which has suffered loss or damage as a consequence of the breach".

[7] The approach to interpretation of this regulatory framework has been considered by the European Court of Justice ("ECJ") in two cases: The first case is *Teleaustria Verlags GmbH* v *Telekom Austria AG* [2001] ECR 1-10745 [see paragraphs 60/62]. The gravamen of this authority is that providing the contract in issue falls within the field of a cross-border contract, the contract will give rise to issues of Community Law and that Community Law with therefore require to be complied with in such contracts. The second case is *ECAD* v *Comune di Torino*[2008] ECR 1-03565 where the ECJ expressed its views on the applicability of Community Law to below threshold contracts in the following terms (at paragraphs 20 and 21):

"[20] That does not mean, however, that contracts below the threshold are excluded from the scope of Community Law ... According to the established case law of the court concerning the award of contracts which, on account of their value, are not subject to the procedures laid down by Community rules, the contracting authorities are nonetheless bound to comply with the fundamental rules of the Treaty and the principle of non-discrimination on the ground of nationality in particular ....

[21] However, according to the case law of the court, the application of the fundamental rules and general principles of the Treaty to procedures for the award of contracts below the threshold for the application of community directives is based on the premise that the contracts in question are of certain cross-border interest ...".

This authority plainly reiterates that for a Community obligation to arise in below threshold contracts there must be a cross-border interest.

[8] Against this regulatory framework and the interpretation placed thereon by the ECJ the petitioners first submitted that there was a cross-border interest in this contract. In support of this submission the petitioners drew attention to the value of the contract. They also drew attention to features of the tender documentation, such as the requirement to submit audited accounts in English and in UK Sterling; and the request for information from tenderers to whom United Kingdom employment law did not apply. Reference was also made to the respondents' Contract Standing Orders which state that the EC Treaty applies to all procurement activities, regardless of value, including contracts below the threshold at which EU advertising is required and including contracts which are exempt from applications of the EU Directive. It was further submitted that the decision not to award the contract to the petitioners bore expressly to have been made "in accordance with the Public Contracts (Scotland) Regulations 2006". Having regard to all these factors, it was submitted that there was plainly a cross-border interest in this contract. If that was correct then Treaty obligations require to be complied with. This had not been the case and accordingly a remedy in damages arose as a matter of Community Law.

[9] The second argument for the petitioners was that they had a legitimate expectation that the procedures stipulated by the respondents of equal treatment and transparency would be adopted in the tendering process. The petitioners submitted that the respondents did not treat the tender submitted by the petitioners and the successful tenderer, Pyramid, equally. The respondents' application of their scoring procedure was said to be "manifestly lacking in transparency" to the extent that the respondents themselves were unable to see that they had made errors in their scoring. That this is the case is evident from the respondents' acceptance that they had made errors in their scoring. Further, the award of the contract to Pyramid resulted from an error on the respondents' part and the respondents' further error in intimating the decision to the petitioners which, as already noted, resulted in the delay of ten days before the petitioners learned the outcome of the procedure. This delay deprived the petitioners of the opportunity to scrutinise the procedure and the possibility of seeking effective review of the decision. In this way a legitimate expectation of the petitioners had been defeated. Reference was made to *Shetland Island Council* v *Lerwick Port Authority* [2007] CSOH 5 at paragraph [151], paragraph [154] and paragraphs [160-162].

[10] The petitioners' third argument was that the respondents had failed to apply their own procedures correctly or rationally. This occurred because of a failure to check the petitioners' tender application in accordance with their own procedures. Had the respondents checked the scoring of the petitioners' tender,

they would have appreciated that the petitioners' tender was the preferred bid. The respondents would not, accordingly, have awarded the contract to Pyramid. In these circumstances the respondents decision to award the contract to Pyramid was unlawful and irrational. It was also submitted that the failure to insert a ten day period following the despatch of the notices dated 19 June 2009 was also irrational and resulted in the contract being wrongly placed.

[11] The petitioners' fourth argument was that by instituting a process of competitive tendering on the basis set out in the tender documentation, a contract came into existence whereby the respondents impliedly agreed to consider all tenders in accordance with the principles of fairness and equality and, further, if they awarded a contract at all they were obliged to award the contract to the person submitting the most economically advantageous tender. Authority for this proposition was said to be found in *Blackpool and Fylde Aeroclub* v *Blackpool Borough Council* [1990] 1 WLR 1195 (Bingham L J at page 1189); *Fairclough Building Limited* v *Port Talbot Borough Council* (1992) 33 CLR 24 (Parker L J at page 28, Nolan L J at page 33); *Harmon CFEM Facades (UK) Limited* v *Corporate Officer of House of Commons* (2000) 2 LGLR 372 (paragraphs [206], [214] and [216]); *Pratt Contractors* v *Transit New Zealand* (2003) 100 CLR 29 (paragraph [44], [47] and [49]); *J and A Developments* v *Edina Manufacturing Limited* [2006] NIQB 85 (paragraphs [4], [38] and [50]). On the basis of these authorities counsel for the petitioners accepted that in circumstances such as those in the present case a contract was not lightly to be implied but, relying on the foregoing authorities, and in the circumstances of this case, the necessary requirements for an implied contract existed. It was submitted that on the basis of the documents provided by the respondents it was plain that an implied contract in the terms submitted had been brought into existence.

[12] The petitioners' final submission was that separately the respondents owed the petitioners a duty to take reasonable care to see to it that their tender, submitted in accordance with the respondents' stipulated procedure, was considered in accordance with the principles of fairness and equality and in accordance with that stipulated procedure. It was fair to state that this argument was accepted very much as a fall back by the petitioners. Notwithstanding that it was contended that as a matter of general principle, arising principally out of the decision in *Caparo Industries plc* v *Dickman* [1990] 2 AC 605 such a duty existed in the circumstances of the present case. It was submitted that the ordinary requirements of a duty of care, that is foreseeability and proximity were satisfied. In these circumstances it was contended that a duty existed in the present case.

[13] In response to these arguments the respondents' position was that in order to obtain damages in judicial review proceedings there must be grounds in domestic law or under EU law upon which such damages may be awarded. The breach of a legitimate expectation did not give rise to a right in damages and gave no more to a right to a declaratory conclusion. The only basis upon which the petitioners could recover damages would be on the basis of a breach of European law arising from a failure to comply with general Community obligations which are recognised in regulation 8(21) of the Scottish Regulations. It was for the contracting authority, the respondents, to determine whether or not there is any cross-border interest, a proposition which, at least as a matter of initial assessment, the petitioners expressly accept (see statement 19 of the petition). In this case no thought was given by the relevant employees of the respondents at the time the contract was entered into of any potential cross-border interest. Affidavits of two employees were produced to vouch this position. In any event, it was contended, if any such employee had considered the issue of cross-border interest at the time the contract was entered into they would have concluded that no such interest existed. The petitioner had produced no evidential basis for their assertion that there was a cross-border interest in the contract and sought to rely only on inferences which it was said could be drawn from certain aspects of the contractual documentation. In these circumstances the remedies provided by the Directive and the Regulations were not available.

[14] It was further submitted that there was, in any event, nothing in the documents which would justify or give rise to a legitimate expectation of the sort contended for by the petitioners. Examination of the relevant documents disclosed nothing that could form the basis of a legitimate expectation. The only possible legitimate expectation would arise from the letter of 19 June 2009. It was submitted that the letter was in itself not unequivocal. Moreover there was no substantive evidence of reliance on that letter by the

petitioners before the contract was entered into by the respondents on 2 July 2009. The present case was simply one where the respondents were only under a duty to act fairly. They did so. The argument under legitimate expectation adds nothing to the duty to act fairly. It was further submitted that in any event, there being no standstill period in the contract, and therefore no expectation of a standstill period by the petitioners until they received the letter of 19 June on 29 June, there could be no scope for an argument of abuse of power by the respondents.

[15] In relation to the petitioners' arguments on irrationality the respondents submitted that even if that argument had substance, which they denied, the result of it would only be a declaratory conclusion. No right to damages existed.

[16] In relation to the argument on implied contract, the respondents accepted the line of authority laid out by the petitioners. It was, however, argued that there had been no substantive development of the law beyond that stated by Bingham LJ in *Blackpool and Fylde Aeroclub* (supra). The present case was distinguishable from that case. The cases were distinguishable because in the *Blackpool and Fylde Aeroclub* (supra) case, the tenderers were known to the authority. Further in that case there was no consideration of public law. Moreover in the present case there was no evidence available to the Court to say that the parties had intended to create a contractual relationship. More forcefully there is no material before this Court to support a contract of the sort contended for by the petitioners. On a fair reading the authorities referred to are limited to an acceptance of the possibility of an implied contract of fair dealing. There is nothing in these cases to justify going beyond that limited type of a contract. In *Blackpool and Fylde Aeroclub* (supra) the tender that had been submitted was not, as a result of an error, considered at all. The tender was not therefore considered fairly and honestly. Here the tender was considered. There is no suggestion that the tender was not considered fairly. In these circumstances the doctrine in *Blackpool and Fylde Aeroclub* (supra) does not apply to the present case.

[17] The respondents lastly submitted that, having regard to the facts of the present case, there was no scope for an argument that a duty of care existed and was owned by the respondents to the petitioners.

[18] Against that background the first issue to be determined is whether general Community obligations are applicable in relation to the contract under discussion in the present case. This question arises because, as has already been noted, it is a matter of agreement between the parties that the contract in question was a below threshold contract. That being the case the situation is, as has been expressly stated by the Inner House, "...as a matter of law, the provisions of the Directive and the Scottish Regulations had no application to it" (*Sidey Limited* v *Clackmannanshire Council and Another* [2010] SLT 607 Opinion of the court delivered by Lord Clarke at paragraph [36]). The matter does not, however, end there. The jurisprudence of the ECJ already referred to illustrates that there are circumstances where Community obligations may apply to below threshold contracts (*Teleaustria* (supra) and *Secap* (supra)). This principle has been restated in domestic law by the Inner House in the following way: "...principles of Community law may be engaged and may, therefore, require to be observed by contracting authorities in the public procurement activities involving below threshold contracts" (*Sidey Limited* (supra) at paragraph [36]). Beyond observing that contracting authorities have, in the first place, to make an assessment as to whether Community principles are engaged because there may be a cross-border interest in the contract in question, the court in *Sidey Ltd* (supra) gave no guidance as to how a court should approach this question, it not being a live issue for the court in that case. In these circumstances it seems to me that I require to answer the question on the basis of an assessment of such factual information as I have relevant to the contract in issue.

[19] Proceeding on that basis I would observe that the petitioners are correct to draw attention to the fact that certain features in the tender documentation might be capable of being construed as suggestive of cross-border interest in this contract. Equally, there are features in the respondents' Standing Orders which are clearly present because of the requirements of European Law. I am not however persuaded that these features are necessarily conclusive of an inference that there was an appreciation of potential for a cross-border interest in this contract. I consider that such features in the tender documentation and the Standing

Orders are equally explicable by a draftsman inserting provisions from some style without sufficient consideration as to whether or not these conditions were required for the precise contract in issue. In my view the attitude of the respondents' employees responsible for placing the contract is a more likely guide to whether or not there was any cross-border interest, albeit I accept that such opinion has to be viewed cautiously given the potential for subjectivity on the part of those persons. It seems clear that the respondents' relevant employees did not in fact consider the question of cross-border interest. That of itself is, in my view, quite telling. It seems to me that such employees familiar both with the nature and scope of the contract in question and with the placing of contracts of this sort in general would be likely to be aware whether or not a contract had the potential to generate any cross-border interest. Failure to consider the issue is in my view likely to be indicative of, in a pragmatic sense, lack of potential for cross-border interest. This view is strengthened by a consideration of both the nature of the contract and the value thereof. This was a contract for, in commercial terms, a relatively modest, contract price. It involved work of a fairly labour intensive nature in a relatively large number of local authority houses where it would be necessary to have local staff on the ground. When these facts are considered I do not find it surprising that the respondents' employees responsible for the contract, whilst conceding that they did not consider the matter at the time of issuing the contract documents, did not consider that the contract would have generated cross border interest. Looked at as objectively as I can I have therefore formed the view that the position of the respondents is correct and that there is no question of cross-border interest in this contract. That being the case I do not consider that the European Directive and the Regulations are engaged in the circumstances of this case.

[20] The second strand of the petitioners' argument was that the respondents acted in such a way that they created an expectation in the petitioners that the procedures of equal treatment and transparency would be adopted in the evaluation of their tender. The law in relation to legitimate expectations was considered in depth by Lord Reed in *Shetland Islands Council* v *Lerwick Port Authority* [2007] CSOH 5 paragraphs [151] - [170]. In its current state of development for a party to establish that they had a legitimate expectation in a particular course of conduct by a respondent that party would require to show that there had been made to it a clear and unambiguous representation, that the representation was relied upon and, further, that reliance was to its detriment.

[21] In the present case the respondents were, plainly, the authors of the tender documentation which required to be completed by the petitioners when tendering for this contract. The tender documentation was both lengthy and detailed. There was, from the standpoint of a prospective tenderer, no scope for departure from the rigours of the tender documentation. The petitioners, as tenderers, complied with the stipulations and requirements of the tender documentation and the tender process. It is, in my view, difficult to see having regard to the detailed nature of the tender document that it had any real purpose if, in a valuation, the process is not followed through by the party wishing to place the contract. To that extent it appears to me tolerably clear that any party, such as the petitioner, completing this documentation would expect, and more importantly be entitled to expect, that the evaluation process would be completed in accordance with the stated process. From that analysis I conclude that the respondents, in issuing the tender documentation in the form it did, made what amounted to an unambiguous representation that the tender process would be followed by them. The next stage is to consider whether there was reliance, and for that matter detrimental reliance, by the petitioners on the unambiguous representation made by the respondents. I have little difficulty in concluding that that requirement is satisfied in the present case. It is difficult to see why any potential tenderer would submit to becoming involved in the work plainly necessary to complete the tender documentation if they did not reasonably expect the potential contracting party to comply with the tendering requirements. Failure to comply with that process by the party seeking to place the contract could, as is probably the case in the present instance, result in the costs incurred by the prospective tenderer preparing the tender being wasted. To that extent detriment is also, in my view, easily established.

[22] It follows from the foregoing that I am satisfied that in the circumstances of the present case the petitioners did have a legitimate expectation that the respondents would apply the principles of equal treatment and transparency to their evaluation of the tender documents. It is plain on the facts presented to me, none of which are disputed, that this course was not followed in the present case. In fairness to the

respondents as I understand the argument presented to me there was an acceptance that they had failed to apply theses principles in the evaluation of the petitioners' tender. There was an acceptance by the respondents that the petitioners were entitled to a declarator albeit not necessary a declarator in the precise terms sought by the petitioners. I shall indicate the terms of the declarator to which I consider the petitioners are entitled at the conclusion of this opinion.

[23] Similar considerations apply to the petitioners' second public law argument; that the respondents failed to apply their procedures correctly or rationally. The factual basis for this argument is, essentially, the same as that advanced in support of the petitioners' argument under the heading of legitimate expectations. I consider that there is substantial merit in the petitioners' argument in relation to this head.

[24] The petitioners had a further argument based on an alleged breach of an implied contract. That contract was said to come into existence when the respondents instituted a process of competitive tendering on the basis of the tender documentation whereby they impliedly agreed to consider all tenders in accordance with the principles of fairness and equality and, further, if they awarded a contract at all they were obliged to do so to the person submitting the most economically advantageous tender. This argument appears to be founded upon the decision of the Court of Appeal in *Blackpool and Fylde Aeroclub* (supra). In the end of the day parties were, insofar as I understood it, in general agreement that despite consideration in a number of cases since that decision, there had been no advance from the proposition stated by the court therein. That being the case it is plain, in my view, that if the petitioners are to succeed on this line of argument they must be able to demonstrate that the present case falls within the ratio in *Blackpool and Fylde Aeroclub* (supra). It is plain, again in my view, that consideration of that case leads to the conclusion that the ratio is narrow and is set forth in the opinion of Bingham L.J. (as he then was) at 202F-G in the following terms:

"I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for."

From this I take it that if the petitioners are to succeed in the present case they must be able to demonstrate from the tender documentation and any other evidence which may be competently adduced that there was an intention on the part of both the petitioners and the respondents to create a contract in the terms contended for by the petitioners.

[25] It may not be difficult to conclude that the first part of the contract contended for by the petitioners, that is consideration of tenders in accordance with principles of fairness and equality, was indeed the intention of both parties. That conclusion must, almost inevitably, flow from my consideration of the public law remedies sought by the petitioners. It is less clear that the second part of the contract contended for by the petitioners, that is if awarding a contract at all to award the contract to the person submitting the most economically advantageous tender, would automatically have been accepted by both parties at the outset as something to which they would have intended themselves to be contractually bound. The argument as originally presented by the petitioners did not contain the qualification "if they awarded a contract at all". This was only added by counsel for the petitioners when, during the course of argument, it became plain that the implied contract they contended for could be easily rebutted by the respondents simply contending that they might not wish to award a contract at all. I am not, however, persuaded that the elaboration or adaptation of the term contended for by the petitioners materially advances their position. There are, in my view, in the second part of the test simply too many potential imponderables to elevate the proposition to the position where either party would, if asked the question, have conceded at the outset that this was a term which they intended to be impliedly bound by. "Economically advantageous" is a term which is highly likely to be dependent upon the subjective stance of the party considering the question. I would find it difficult to see that parties in the position of the petitioners and respondents would agree on such a subjective term without further definition and qualification. It follows that I consider the second part of the term contended for by the petitioners to lack the necessary degree of precision to qualify as an implied term. I shall accordingly reject the petitioners' argument on implied contract.

[26] The last argument advanced by the petitioners was that the respondents owed the petitioners a duty to take reasonable care to see to it that the tender was considered in accordance with stipulated procedure. As already observed this argument was advanced by counsel for the petitioners as a fall back position. It was not elaborated upon at any length. The duty to take reasonable care was said simply to arise out of the decision in *Caparo Industries Plc* (supra). Consideration of that case does not persuade me that the relationship of the parties to the present petition, in the context of the tender procedure with which this petition is concerned, gives rise to the necessary degree of proximity to create a duty of care incumbent upon the respondents. In my view the proposition that such a duty existed ignores the relationship in which the parties stood to each other. This was a commercial transaction at which the respective parties were at arms length to each other. Whilst, as is clear from my consideration of the public law issues, certain duties were incumbent upon the respondents in relation to their evaluation process I do not consider that this could extend so far as to protect all the potential interests of the tenderer. To suggest that would be, in my view, to extend the scope of the duty beyond that sanctioned in *Caparo Industries Plc* (supra). For this reason I reject this argument.

[27] I shall accordingly sustain the petitioners third, fourth and fifth pleas in law and pronounce decree of declarator that the respondents acted irrationally and in error of law in awarding the 2009/2010 kitchen and bathroom replacement programme. *Quoad ultra* I will repel the petitioners first, second and sixth pleas in law. There remains unresolved issues in relation to the petitioners seventh and eighth pleas in law. I will order the case to appear By Order to discuss with parties the implications of this order on these pleas.