



Neutral Citation Number: [2018] EWHC 831 (TCC)

Case No: HT-2017-000058

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/04/2018

Before :

MRS JUSTICE O'FARRELL

Between :

(1) COLAS LIMITED
(2) VOLKERHIGHWAYS LIMITED
(3) AECOM INFRASTRUCTURE &
ENVIRONMENT UK LIMITED
(formerly URS Infrastructure & Environment UK
Limited)
(together acting as an unincorporated joint venture
"CVU")

Claimants

- and -

TRANSPORT FOR LONDON

Defendant

David Streatfeild-James QC & Patrick Clarke (instructed by **Fenwick Elliott LLP**) for the
Claimants

Adrian Williamson QC (instructed by **Eversheds Sutherland (International) LLP**) for
the **Defendant**

Hearing dates: 5th & 6th December 2017

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

.....
MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell :

1. On 15 April 2013 the claimants (“CVU”) entered into a framework agreement with the defendant (“TfL”) for the provision of highway maintenance services in central London (“the Framework Agreement”).
2. The Framework Agreement made provision for the parties to enter into call off contracts in respect of the services to be carried out by CVU during the eight-year term of the Framework Agreement.
3. One of the call off contracts (reference no: tfl_scp_000253_co001) was entered into by the parties on 15 April 2013 (“the Call Off Contract”).
4. The Call Off Contract provides for CVU to carry out core maintenance and repair works. It also empowers TfL to issue instructions (“Task Orders”) requiring other specific works to be carried out by CVU.
5. The core services are generally priced as lump sums. The Task Order works are priced against rates and prices, adjusted by uplift or discount percentages where appropriate, in the schedule of rates agreed pursuant to the Framework Agreement (“the Schedule of Rates”).
6. Clause 27 of the Call Off Contract Conditions of Contract that are set out at Schedule 7 to the Framework Agreement, clause 155AR of the Service Information (Common) (a contract specification document), the Traffic Management Act 2004 and the London Permit Scheme (“LoPS”) impose on CVU an obligation to obtain permits before carrying out any works instructed by Task Orders. Under the LoPS, TfL is entitled to attach conditions to the permits, such as limited working hours and other constraints, to ensure safety of road users, minimise inconvenience to the public, and to protect the structure of the street and integrity of the apparatus in it.
7. CVU’s case is that it based the rates and uplifts in the Schedule of Rates on the working conditions set out in the contractual service information. The limitations on working hours imposed by TfL in the permits for the Task Order works are more restrictive than the working hours provided in the service information. Such restrictions are not deemed to be included in the rates and uplifts in the Schedule of Rates. In such circumstances, CVU is not bound by the Schedule of Rates and is entitled to submit prices on the basis that no item, rates or lump sums in the contractual Price List corresponds to the work or services for the task.
8. TfL’s position is that the rates and uplifts in the Schedule of Rates are deemed to be the full inclusive value of the task work, including any limitations or restrictions on working conditions imposed by the permits. Clause 107SR of the Service Information expressly provides that the normal permissible working hours set out in clause 138AR do not remove the obligations to comply with permits as set out in clause 155AR. Therefore, CVU is bound by those rates and uplifts in responding to Task Orders and in carrying out the task works.
9. The declarations sought by CVU are as follows:

- i) On a proper interpretation of the Call Off Contract, restrictions to the working window periods set out in clause 138AR of Volume 2 of the Service Information arising from the operation of LoPS are not included or deemed to be included for by CVU in the rates entered by CVU in the Schedule of Rates and in CVU's tendered Uplifts in the Schedule of Percentage Adjustments.
 - ii) In the event that TfL issues a Task Request that is subject to time restrictions in excess of the restrictions provided for in the Service Information (Common) then CVU is not bound to submit prices with its Task Response in accordance with the Schedule of Rates and may submit prices on the basis that no item, rates or lump sums in the price list corresponds to the work or services for the proposed task.
 - iii) Insofar as the foregoing matters were decided by the Adjudicator contrary to the foregoing then the parties are no longer bound by the Adjudicator's decision of 26 September 2014.
10. TfL seeks an alternative declaration, namely, that CVU is not entitled to submit prices within its Task Responses on the basis that no item on the price list corresponds to the work or services for the proposed task, insofar as the relevant Task Request is subject to restrictions in accordance with (inter alia) clauses 107AR, 138AR and 155AR of the Service Information (Common).
 11. The issue for determination by this court is the contractual allocation of risk between the parties in respect of restrictions imposed by the permits required for task works on a proper construction of the Framework Agreement and the Call Off Contract against the background regulatory scheme.

The agreed facts

12. The parties agreed the following facts for the purpose of these proceedings, by reference to worked examples (produced for illustrative purposes only).
13. In 2013 TfL entered into framework agreements for the maintenance of roads with four different contractors, including CVU, known as the London Highways Alliance Contracts (LoHAC). The Framework Agreement with CVU was entered into on 15 April 2013 and provided, amongst other things, for conditions, rates and prices for the carrying out of various highways maintenance works across Greater London. The Framework Agreement was to facilitate and govern the entering into of call off contracts for highways works between CVU and various possible employers.
14. In the event CVU and TfL entered into the Call Off Contract on 15 April 2013 for works to the highways network for which TfL is responsible.
15. Any works to the highways where the carriageway width is restricted can only be carried out where permitted by the relevant highways authority. TfL operates a permit scheme known as the London Permit Scheme ("LoPS") that all or any contractors must comply with.
16. TfL is the Permit Authority responsible for operating LoPS on the Transport for London Road Network ("the TLRN"), with which works promoters (including

LoHAC contractors and statutory undertakers) must comply. LoPS was introduced in 2010 pursuant to the Traffic Management Act 2004 and the Traffic Management Permit Schemes (England) Regulations 2007. The stated purpose of LoPS is to allow highways authorities in London to fulfil their duties to manage their road network, pursuant to Section 16 of the 2004 Act and to co-ordinate works of all kinds on the highway pursuant to Section 59 of the New Roads and Street Works Act 1991. LoPS was developed between a number of highways authorities in London, including London boroughs and TfL. LoPS has a single set of rules which each London highway authority operating the scheme applies independently to its own roads, subject to cross boundary liaison and co-operation.

17. LoPS requires promoters to obtain a permit in order to carry out any “registerable activity”. Broadly speaking, registerable activities are road and street works which will impact on traffic flow i.e. reducing the width of the carriageway at traffic sensitive times, closing a lane of the carriageway or cycleway or suspending pedestrian crossings and street lighting.
18. It is a criminal offence for a works promoter to carry out works to the highways without a permit. Where a permit is issued, conditions may be applied by the Permit Authority. In particular, the Permit Authority is able to impose conditions, limiting the days and times of day when the works may be carried out, wherever the Permit Authority considers it necessary and appropriate to do so in accordance with LoPS.
19. TfL is the Permit Authority in respect of all works requiring a permit to be carried out under the Call Off Contract. As Permit Authority, TfL deals with LoPS applications relating to CVU’s works through its network management directorate, which operates in accordance with LoPS and the relevant statutes. For minor tasks under the Call Off Contract, the procedure for CVU to obtain a permit under LoPS is as follows:
 - i) CVU raises a permit application for consideration by TfL, as Permit Authority. The application includes CVU’s proposed permit conditions (based on either discussions with TfL and other stakeholders as to what will be granted and/or, in an effort to mitigate delays in the process, based on what has traditionally been granted by TfL), including intended days of work and start and finish times.
 - ii) TfL, as the Permit Authority, then assesses the permit application. As Permit Authority, TfL carries out an impact assessment to consider the effect of the works on traffic flow and will ensure effective coordination with other activities. TfL, as Permit Authority, then grants the permit, requests CVU to make a modification to the permit application or refuses the permit application.
 - iii) The responses that TfL acting as Permit Authority may issue to any permit application under LoPS are limited to a number of specific codes and reasons. CVU has an opportunity to challenge if a permit is refused or if TfL requires modifications to a Permit Application. As Permit Authority, TfL may reject the challenge (and insist on the modification) or accept the challenge. This is usually resolved by escalating to senior management of the works promoter to agree a way forward to balance delivery of the works with compliance with LoPS.

20. There is a different process for applying for a permit relating to Scheme Task Orders which might result in a significant and adverse impact on the TLRN. In these cases, before submitting the permit application, CVU is required to obtain pre-approval as follows:
- i) Several months in advance of the works commencing, CVU submits a Traffic Management Act Notification (“TMAN”) to TfL as Permit Authority in respect of the works for approval in accordance with LoPS. As part of the TMAN process, CVU must consult with various stakeholders including TfL – the restrictions that are likely to be placed on CVU are included within this TMAN. At the end of this process provisional dates and times for the works are agreed.
 - ii) Three months in advance of the works commencing, in line with the previously submitted TMAN, CVU submits a provisional advanced authorisation (“PAA”) to TfL as Permit Authority for approval in accordance with LoPS. If successful, this effectively reserves the road space for the works.
21. Following those approvals CVU submits the permit application, including the conditions required by the TMAN and PAA approvals, and this is considered as described at paragraph 19(ii) above.
22. The process for TfL’s LoHAC Contract Management Team (“LCMT”) to instruct works varies according to the type of works required. The process for instructing a Scheme Task Order is broadly as follows:
- i) For scheme works, several months in advance of the works commencing, TfL’s LCMT issues a ‘P’ Task Order to cover preliminary tasks such as trial holes, exploratory works, feasibility studies or preliminary designs.
 - ii) If, following completion of any preliminary tasks, TfL wishes to proceed to detailed design stage, TfL’s LCMT issues a ‘D’ Task Order instructing CVU to carry out detailed design.
 - iii) At this point, CVU liaises with TfL, as Permitting Authority, to seek permission to access the network for the build works.
 - iv) CVU draws up a design, traffic management plans and phasing diagrams which will inform the permit application process. A stakeholder meeting (or several meetings) may be arranged and attended by all relevant stakeholders to consider CVU’s proposals.
 - v) CVU submits to TfL’s LCMT a Task Response including a task price.
 - vi) TfL’s LCMT issues a ‘B’ (Build) Task Order, based on the agreed task price, requiring CVU to carry out the site works.

The Framework Agreement

23. Under the Framework Agreement, CVU was appointed as the Framework Contractor for the Central London Area for the period 15 April 2013 until 31 March 2021.

24. The scope of the framework was the performance of highways maintenance and improvement schemes across London, including the TfL network and borough roads.
25. Clause 2.1 sets out the purpose of the Framework Agreement, namely to:
 - “2.1.1 provide a mechanism whereby an Employer and the Contractor may enter into a Call-Off Contract;
 - 2.1.2 provide the framework to administer each Call-Off Contract; and
 - 2.1.3 allow for common monitoring of Call-Off Contracts.”
26. Clause 2.2 provides that the Framework Agreement does not impose any obligation on TfL to enter into any Call-Off Contract or to require any works or services to be provided by CVU.
27. Clause 6 contains the procedure for entering into the Call-Off Contracts:
 - i) TfL identifies the services it wishes to let under the terms of the Framework Agreement and issues a Call Off Request Form to CVU.
 - ii) CVU provides a Call Off Response, including a Price List that must be submitted in accordance with clause 6.5 of the Framework Agreement. The Price List is agreed to be the Schedule of Rates (adjusted for inflation).
 - iii) Clause 6.5 of the Framework Agreement allows CVU to submit rates and prices that are lower than the contractual Schedule of Rates but does not allow CVU to submit rates that are higher than the Schedule of Rates.
 - iv) Where a Call Off Request Form requires CVU to submit a rate or lump sum price for work, services or any other activity for which there is no rate in the Schedule of Rates, the relevant rate or lump sum prices are calculated by reference to rates in the Schedule of Rates for work, services or activities of a similar character and executed under similar conditions.
 - v) Where a Call Off Request Form requires CVU to submit a rate or lump sum price for work, services or any other activity for which there is no rate in the Schedule of Rates, and there are no rates in the Schedule of Rates for work, services or activities of a similar character and executed under similar conditions, the relevant rates or lump sum prices are calculated by reference to the Shorter Schedule of Cost Components plus the Fee.
28. The Schedule of Rates is defined in the Framework Agreement as:

“the schedule of rates and other prices tendered by the Contractor and set out at Schedule 1.”
29. Schedule 1 provides that the Schedule of Rates is set out in Volume 4 of the Framework Agreement.
30. Clause 42.1.1 states that:

“this Framework Agreement and all documents referred to in this Framework Agreement, contain all of the terms which the Framework Parties have agreed relating to the subject matter of this Framework Agreement and such documents supersede and extinguish any prior drafts, agreements, undertakings, representations, warranties and arrangements of any nature whatsoever, whether or not in writing.”

The Call Off Contract

31. The Call Off Contract was entered into by the parties on 15 April 2013 for the provision of Core Services (listed in Section 4 of the Service Information) and any work instructed by a Task Order (provided for in Section 5 of the Service Information) in respect of TfL’s highways and assets within the Central London Area.
32. The terms and conditions of the Call Off Contract were the NEC3 Term Service Contract (first edition, June 2005) as amended by Schedule 7 to the Framework Agreement.
33. Clause 20.1 of the conditions sets out CVU’s obligations:

“The Contractor provides the Service in accordance with the Service Information, each instructed Task Order and Statutory Requirements, and the Contractor ensures that the Service satisfies any requirement in the Service Information, (where relevant) each instructed Task Order and this Contract.”
34. Clause 29.2 of the conditions sets out the procedure by which task works are ordered. A Task Request is issued by TfL, a Task Response is submitted by CVU and, if TfL wishes to proceed with the works, it issues a Task Order.
35. Clause 29.2.4 provides that, when preparing a task Price List for a proposed task:
 - “the Prices are built up from the rates and lump sums in the Price List in accordance with the Schedule of Rates Supplementary Information
 - the *Contractor* may use rates and lump sums that are less than those in the Price List but does not use any rates and lump sums which exceed those in the Price List
 - where there is no item in the Price List that corresponds to an item of work or services for the proposed Task, the relevant prices are calculated by reference to the rates and lump sums in the Price List for works or services of a similar character and executed under similar conditions
 - where there is no item in the Price List that corresponds to an item of work or services for a proposed Task and

there are no rates or lump sums in the Price List for works or services of a similar character and executed under similar conditions, the relevant prices are calculated by reference to the Shorter Schedule of Cost Components ...”

Service Information

36. Services are defined in the Framework Agreement as the work and/or services to be provided by CVU pursuant to a Call-Off Contract.
37. Service Information is defined in the Framework Agreement as the service information set out in Schedule 3 and any additional service information provided by TfL. The relevant documents are the TfL Service Information and Service Information (Common).
38. The Service Information (Common) is set out in Volume 2 of the Framework Agreement. It identifies the range of services that may be requested by TfL under the Framework Agreement and contains a general specification for the works.
39. Clause 107SR of the Service Information (Common) sets out general restrictions on the execution of works:

“Site Extent and Limitations on Use

1. Existing traffic and pedestrian flows are to be maintained at all times except where allowed for in the contract or agreed with the *Employer*. The *Contractor* shall comply with the noticing and permitting requirements as set out in Clause 155AR.
 2. Normal permissible working hours are set out in Clause 138AR, however these do not remove the obligations on the *Contractor* to comply with the noticing and permitting requirements as set out in Clause 155AR. The granting of a permit is deemed to take precedence over the normal permissible working hours.”
40. Clause 109SR of the Service Information (Common) imposes restrictions in relation to the control of noise and vibration:

“General

2. The *Employer* shall have the right to instruct the *Contractor* to cease using any items of plant insufficiently silenced or generating noise levels in excess of those specified. In such circumstances, the *Contractor* shall change the method of performing the works at his own cost and shall have no claim against the *Employer* in this matter.

Noise Control

7. Whenever possible, quieter techniques or machinery shall be used...
10. Acoustic screens or barriers shall be used to shield noisy operations wherever possible ...
11. Good relations with people living and working in the vicinity of the works are important. No breakers shall be used between 2230 hrs and 0800 hrs...
12. Where the works are located in noise sensitive areas, such as close to residential properties, hospitals, schools or offices, then the *Contractor* shall supply the following information to the *Employer*...

Where it is not possible for the works to be complete by midnight, the *Contractor* shall provide acoustic screens or barriers ...

14. The installation of sheet piling with a diesel or air driven impact or drop hammer in noise sensitive areas shall be avoided ...”
41. Clause 128AR of the Service Information (Common) sets out CVU’s responsibility for obtaining all necessary permits for the execution of the works:
- “The *Contractor* shall be responsible for obtaining all permits, consents, licences, agreements, wayleaves and the like necessary for the efficient and effective undertaking of the works...”
42. Clause 138AR of the Service Information (Common) sets out normal working hours:
- “1. Normal working hours shall be Monday to Saturday between 0800 hrs and 1800 hrs, with no working on Sunday or Public Holidays.
 2. The *Contractor* shall not work outside these normal working hours except in an emergency, when directed by the *Employer*, or with the written permission of the *Employer*...
 3. On Strategic Routes and other traffic sensitive roads, any works which require any reduction in carriageway width will not be allowed between 0630 hrs and 1000 hrs and between 1600 hrs and 1930 hrs Monday to Saturday, unless otherwise stated in the *Employer’s* Service Information.

4. Unless otherwise agreed or instructed by the *Employer*, no traffic management measures shall be allowed on the carriageway of a Strategic Route or other traffic sensitive road, or on a Prestige Walking Zone from 12 noon on the Friday prior to a Bank Holiday to 12 noon on the Tuesday following.
 5. Further restrictions to working times for particular streets or activities might be imposed by the Police, local Environmental Health Departments, or the *Employer* through the issuing of permits.”
43. Clause 155AR of the Service Information (Common) imposes on CVU obligations to comply with the Traffic Management Act 2004 and LoPS:
- “1. The *Contractor* shall comply with the following:

Traffic Management Act 2004 ...

The Transport for London Lane Rental Scheme.
 2. In addition to and notwithstanding the above, when undertaking works or services within an area in which the highway authority operates a permit scheme, the *Contractor* shall comply with the requirements of the London Permit Scheme for Road Works and Street Works ...
 4. The responsibility for raising and issuing ... Permit Applications ... rests with the *Contractor* in accordance with the London Permit Scheme, Traffic Management Act 2004 and the New Roads and Street Works Act 1991 ...
 5. The *Contractor* shall adhere to all notice/permit requirements and conditions.
 6. The responsibility for sending all Traffic Management Plans, Works Activity Footprints, TMAN Notifications, and EToN Notifications ... to the relevant highway authority rests with the *Contractor*.”
44. The Call Off Contract Data Part Two provides:
- “the Price List is the Framework Agreement Schedule of Rates (Volume 4) and the TfL Specific Rates and Lump Sum prices (attached).”
45. The Preamble to the Schedule of Rates and employer specific rates and prices provides as follows:

“a) The Schedule of Rates – each individual item shall have a rate entered against it, expressed to 2 decimal places. These rates shall relate to the following conditions:

- i) Task Orders carried out during Normal Working Hours (Clause 138AR);”
- ii) Task Orders not affecting the carriageway of a Strategic Route or other traffic sensitive street;
- iii) Task Orders not affecting a Prestige Walking Zone or a Primary Walking Zone;”
- iv) Task Orders not affecting the carriageway of a road with a speed limit of 40 mph or more;
- v) Employer not requiring a physical response at the worksite within 28 days;
- vi) for Scheme Task Orders whose value does not exceed £50,000; and
- vii) for Scheme Task Orders, programs or packages of work where programme dates have been agreed and Purchase Orders have been issued after 31 March for works to take place during that financial year
- viii) Task Orders in a non-TfL Lane Rental Area.

For all conditions other than the above, the *Contractor's* tendered percentage adjustments shall be applied to the Schedule of Rates.”

b) The *Employer* specific rates and lump sum prices – the *Contractor* provides an annual lump sum price to match those activities selected by the *Employer*...

Contractors are required to provide a breakdown of each of their lump sum prices into the constituent items as set out in the pricing document.”

46. Paragraph 1.2 states:

“The sub-headings and item descriptors in the Schedule of Rates identify the work covered by the respective items and should be read in conjunction with the matters listed against the relevant headings in “Item Coverage” in this document.”

47. Paragraph 1.3 states:

“The *Employer* specific rates and lump sum prices and the rates entered in the Schedule of Rates shall be deemed to be the full inclusive value of the work including the following, unless expressly stated otherwise:

- “i) Labour, supervision and all associated costs in connection therewith.”
- ii) The supply of materials, goods, storage and costs in connection therewith ...
- iii) Procurement, hire, delivery, storage...
- iv) Fixing, erecting and installing or placing of materials and goods in position.
- v) Temporary works...
- vi) The effect on the phasing of the works or any element of the works to the extent set forth or reasonably implied in the documents on which the tender is based.
- vii) Statutory and general obligations...
- viii) Establishment charges, overheads and profits.
- ...
- xvi) Awaiting approvals and consents.
- ...
- xviii) All series 100 preliminary items except those specified in clauses 101, 106, 108, 117, 120, 125, 165, 169, 172, and 180, for which item rates are listed in the Series 100 Schedule of Rates.
- ...
- xx) Compliance with the Traffic Management Act 2004 and any associated permits, consents, etc and the payment of all associated charges, fees, rates and penalties.
- xxi) Compliance with the special requirements of statutory bodies and other third-party organisations and obtaining and payment for any necessary permits, consents, licences, agreements, way leaves, easements, etc ...

xxvi) Normal Working Hours, being Monday to Saturday 0800 hrs to 1800 hrs (Clause 138 AR). However, the *Contractor* may specify percentage uplifts (pricing document 1) to be applied to Task Order Schedule of Rates items instructed to be carried out on a Sunday or Bank Holiday, and another percentage uplift to be applied for tasks instructed to be carried out between 1800 hrs and 0800 hrs. Other restrictions on working will apply on certain routes (clause 138 AR) and, for environmental and traffic related reasons, certain activities will not be permitted during some Normal Working Hours which shall be deemed to be included for, within the rates.

...

xlii) Complying with any limitations and constraints on the use of a work location. However, the *Contractor* may specify percentage up lifts (Pricing Document 1) to be applied to Task Order Schedule of Rate items affecting the carriageway of a Strategic Route or other traffic sensitive Street, or affecting a Prestige or Primary Walking Zone, in recognition of the restrictions likely to be imposed by the *Employer*.

...

xlvi) All *Contractor*-owned risks.

xlix) Any item that is not a Compensation Event.”

48. Paragraph 1.16 states:

“Any information, details or prices not completed by the *Contractor* in either the Schedule of Rates or *Employer* specific rates and lump sum prices at the time of tender shall be deemed to be included in those prices which are provided by him.”

49. Section 2 of the Schedule of Rates provides for a series of percentage adjustments (uplifts and discounts) in respect of specified circumstances, including:

- i) “For Task Orders affecting the carriageway of any road with a speed limit of 40mph
- ii) For Task Orders affecting the carriageway of any road with a speed limit greater than 40mph

- iii) For Task Orders affecting the carriageway of a Strategic Route
- iv) For Task Orders affecting the carriageway of any other traffic-sensitive street
- v) For Task Orders affecting a Prestige Walking Zone or Prestige Cycle Route located on the footway
- vi) For Task Orders affecting a Primary Walking Zone or Primary / Secondary Cycle Route located on the footway
- vii) For Task Orders instructed by the *Employer* to be carried out between the hours of 1800 and 0800
- viii) For Task Orders instructed by the *Employer* to be carried out on a Sunday or Bank Holiday
- ix) For Task Orders requiring a response on Site within 7 calendar days or less
- x) For Task Orders requiring a response on Site within 28 calendar days or less
- xi) For Scheme Task Orders whose value exceeds £50,000 ...”

50. Paragraph 2.1 states:

“For the purpose of items 1 to 6 above, “affecting” shall mean:

- For items 1 and 2, “affecting” shall mean a physical narrowing of the carriageway for either operational or safety reasons and the deployment of traffic management measures in accordance with Clause 117SR of the Service Information (Common),
- For items 3 to 6, “affecting” shall mean any works or services, the timing of whose implementation within Normal Working Hours has been restricted by the *Employer* beyond those restrictions set out in Specification Clause 138AR.3 of the Service Information (Common).”

Impact of the permit conditions

- 51. The court is not required to make any findings as to the impact of any permit conditions on works carried out under Task Orders. However, working examples have been provided to indicate the nature and scope of the pricing dispute that has arisen in respect of the works carried out.
- 52. CVU’s case is that it based its pricing for the Framework Agreement on the normal working hours set out in the contract documents. Clause 138AR of the Service Information (Common) provides for normal permissible working hours of between

0800 and 1800 hours Monday to Saturday, although work may be instructed to be performed between 1800 and 0800 hours. There are further restrictions on works to traffic sensitive and strategic routes providing that works are not allowed between 0630 and 1000 hours or between 1600 and 1930 hours. Therefore, on traffic sensitive roads and strategic routes, the normal working hours are limited to 1000 to 1600 hours and any night-time work (i.e. work outside normal working hours) must take place between 1930 and 0630 hours. However, the permit conditions that have been imposed by TfL have seriously curtailed the permitted periods of working.

53. Further, clause 109SR provides for restrictions on works close to residential properties, hospitals, schools or offices and for acoustic barriers to be erected around any noisy works after midnight. CVU's position is that all works are close to residential properties, hospitals, schools or offices and that it is impractical to isolate acoustically the surrounding area from noisy roadworks. As a result, CVU contemplated that there would be a window for night-time noisy works of 4.5 hours between 1930 and 0000 hours. However, in practice this has been severely curtailed by permit conditions.
54. CVU's case is that those restrictions have delayed and prolonged the execution of the works, and necessitated additional shifts (at additional cost). The implementation of such restrictions is different from the position that CVU contemplated under the Framework Contract. Therefore, CVU is entitled to claim for the financial consequences of the same through revised rates and prices.
55. TfL's response is that the likely imposition of permit conditions was a fact known to both parties when they entered into the Framework Contract and is deemed to be included in the contractual rates. Task Orders carried out during normal working hours (0800 to 1800, Monday to Saturday) are covered by the rates, which are the full inclusive value of the matters set out at clause 1.3 of the Preamble. Those not affecting the carriageway of strategic routes are covered by the rates. Those affecting the carriageway of strategic routes are covered by the uplifts. Those instructed between 1800 and 0800 hours are also covered by the uplifts.

Legal principles

56. A clear summary of the principles applicable to the interpretation of commercial contracts is set out in *Wood v Capital Insurance Services Limited* [2017] UKSC 24 per Lord Hodge at paragraphs [10] to [13]:

“10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties'

contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1988] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, *A new thing under the sun? The interpretation of contracts and the ICS decision* Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

“11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

“12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

“13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of

contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.”

CVU's submissions

57. Mr Streatfeild-James QC, on behalf of CVU, submits that, for the purpose of pricing the Schedule of Rates, CVU was aware that the normal permissible working hours were set out in clause 138AR, subject to further restrictions that might be imposed through the granting of a permit, and that CVU was required to comply with the permitting requirements as set out in clause 155AR. The Framework Contract did not seek to identify exclusively the hours within which work would be permitted to take place but identified the principles applicable, subject to identified exceptions, and subject to the LoPS which could impose further limitations.
58. Mr Streatfeild-James submits that, as a result of these “known unknowns”, there was a lack of any clear contractual definition of the hours within which work would take place and uncertainty as to the basis on which CVU could price the works. The Schedule of Rates provided for individual Task Order items to be priced based on identified assumptions set out in paragraph 1.1 (a)(i) to (viii). Paragraph 2 of the Schedule of Rates required CVU to submit percentage adjustments to the basic rates to reflect the additional costs or savings involved in specified circumstances.
59. It follows from this that the process of pricing rates under the Framework Agreement consisted of proceeding on the basis of a number of assumptions to establish standard or base rates for the carrying out of physical work, together with the provision of percentage adjustments to be applied in defined circumstances.

60. It does not follow that the pricing scheme required allowances to be made, either in the standard or base rates, or in the percentage adjustments to them for the identified assumptions or conditions, for the possibility of conditions being imposed in permits which might be required in some areas in some circumstances.
61. It is accepted by CVU that: (i) it was aware that permits would be required for certain works; (ii) it was responsible for applying for and obtaining those permits; (iii) it was responsible for the cost of the process; and (iv) it was aware that the permits might restrict working times. However, CVU was not required or deemed to have priced for any additional costs of complying with the permit conditions. At tender stage, CVU did not, and could not, know the extent to which permits would be necessary, the nature of the conditions which would be imposed, or the effect of any conditions in any permit required on the costs of performing the works. Such uncertainties could not be priced in a realistic or satisfactory manner, either in the base rates or in the percentage mark ups.
62. The commercial purpose of the Framework Agreement and Call Off Contract structure was to provide consistency across Greater London, coupled with transparency and cost-efficient highways work. The pricing mechanism was intended to achieve these goals by way of a standard, or basic, rate with identified enhancements in particular circumstances. The parties should be taken to have deliberately decided not to make any allowance in the pricing provisions for the possible costs of conditions imposed by permits because of their uncertainty.
63. CVU's case is that it priced the Schedule of Rates on the basis of the assumptions set out in the contractual documents. It is entitled to provide a quotation outside the Schedule of Rates for Task Work that is subject to restrictions that change the circumstances in which the work must be executed. TfL is not obliged to accept such a quotation and it may instruct other contractors for the work. However, CVU is not tied to the rates and prices set out in the Schedule of Rates. Clause 29.2.4 of the Call Off Contract provides for the valuation of Task Orders, including those affected by unspecified restrictions. This is predominantly by reference to the base or enhanced rates but, where there is no item that corresponds to the relevant task, by using the rates and prices for similar work or the Shorter Schedule of Cost Components, as applicable.

TfL's submissions

64. Mr Williamson QC, on behalf of TfL, submits that CVU is obliged to comply with the restrictions imposed under LoPS. CVU is remunerated for this compliance through the Schedule of Rates. The rates entered in the Schedule of Rates are deemed to be the full inclusive value of compliance with all matters set out in paragraph 1.3 of the Preamble, including compliance with the Traffic Management Act 2004 and any associated permits. The pricing structure is comprehensive. Any and all obligations were to be priced either within the rates or within the percentage adjustments. The rates are for Task Orders carried out during normal working hours but those hours are not guaranteed or invariable and were not stated to be continuous.
65. Paragraph 1.3 of the Preamble lists a comprehensive set of items and risks that are required to be accounted for within the whole of CVU's pricing such that the collectively tendered prices reflect the full inclusive value of the work. Sub-paragraph

(xxvi) expressly provides that “*other restrictions on working will apply on certain routes (clause 138 AR) ... which shall be deemed to be included for within the rates.*”

66. CVU was aware of, and bound by, the provisions of the LoPS. This involved the possibility that hours of work might be restricted under the permits issued and might affect the conditions under which CVU was required to perform its work.
67. CVU was given the opportunity to put forward rates for working during normal working hours and to provide for percentage adjustments to those rates for night-time working and other specific types of working. They knew that those works were all-inclusive; in particular, they were to be inclusive of the need to comply with the permit requirements.
68. Clause 138 AR did not include any guarantee that CVU would have a clear run at the work within normal working hours; on the contrary, it was made clear that permitting requirements might intrude. The working hours were therefore a window within which works could take place but did not guarantee access throughout the relevant periods.
69. TfL’s interpretation accords with commercial common sense. The purpose of the Schedule of Rates was to have consistency in the cost of the works and a standard basis for pricing so that all tenderers could tender on a level playing field. The rates were to provide for all the risks and obligations of which CVU was made aware, including the risk of conditions attached to permits.

Analysis and conclusion

70. The starting point is to consider the specified permitted working hours under the Framework and Call Off Contracts. Clause 138AR.1 of the Service Information (Common) defines Normal Working Hours as Monday to Saturday between 0800 hours and 1800 hours. Working at night is not permitted, save in emergencies, where directed by TfL or with TfL’s written permission (138AR.2). Further restrictions are identified: (a) working hours are restricted to Monday to Saturday between 1000 hours and 1600 hours in respect of Strategic Routes and other traffic-sensitive roads (138AR.3); (b) extended restrictions apply to Strategic Routes, traffic-sensitive roads and Prestige Walking Zones before and after Bank Holidays (138AR.4); and (c) further restrictions may be imposed by third parties or through permits (138AR.5).
71. It is common ground that clauses 107SR and 155AR of the Service Information (Common) impose on CVU an obligation to comply with the requirements of permits issued under the LoPS, which take precedence over the Normal Working Hours set out in clause 138AR.
72. Thus, there is a general description of the normal working hours applicable under the Call Off Contract, there are defined limitations on working in respect of certain locations and/or times, and there are undefined restrictions that may or may not apply to specific works (the “known unknowns”).
73. It is then necessary to consider what CVU was required to price in respect of the Task Order works.

74. Paragraph 1.1 of the Preamble to the Schedule of Rates stipulates that the rates relate to specified conditions, items (i) to (viii), including: (i) Task Orders for work carried out in Normal Working Hours (Clause 138AR); (ii) Task Orders not affecting the carriageway of a Strategic Route or other traffic sensitive street; and (iii) Task Orders not affecting a Prestige Walking Zone or a Primary Walking Zone street. It is not stated expressly whether the specified conditions include the other restrictions identified in clause 138AR.
75. Paragraph 1.1 of the Preamble also stipulates that for all conditions other than those listed in (i) to (viii), CVU's tendered percentage adjustments are applied to the Schedule of Rates. The table at section 2 of the Schedule of Rates Working provides for CVU to identify percentage uplifts to works including: (iii)&(iv) work affecting the carriageway of a Strategic Route or other traffic-sensitive street; (v)&(vi) work affecting a Prestige Walking Zone or Primary Walking Zone; and (vii)&(viii) work at night, or on Sundays and Bank Holidays.
76. Paragraph 2.1 of the Preamble clarifies that the percentage uplifts in respect of works affecting the carriageway of a Strategic Route or other traffic-sensitive street, Prestige Walking Zone or Primary Walking Zone only apply in respect of restrictions beyond those set out in clause 138AR.3. This indicates that the restrictions in clause 138AR fall within the conditions for the base rates as specified in paragraph 1.1.
77. The conditions identified in paragraph 1.1 and those identified in paragraph 2 do not expressly address the potential restrictions that might be imposed by third parties or through the permit system. However, it is necessary to consider whether there is any contractual provision deeming those restrictions to be included in the base rates or percentage uplifts.
78. Paragraph 1.3 of the Preamble provides that the rates in the Schedule of Rates: "*shall be deemed to be the full inclusive value of the work including the following, unless expressly stated otherwise.*" On a plain and natural reading of those words, the rates are deemed to include for any restrictions imposed by permits issued under LoPS. That interpretation is supported by the provisions that follow.
79. Firstly, sub-paragraph (xx) in paragraph 1.3 provides that compliance with the Traffic Management Act 2004 and any associated permits shall be deemed to be included within the rates. There is nothing to indicate that this excludes the conditions that can be attached to permits under the LoPS.
80. Secondly, sub-paragraph (xxvi) provides that restrictions on working during Normal Working Hours shall be deemed to be included within the rates. It is stated that working at night, on Sundays or Bank Holidays is deemed to be included within the rates, subject to the identified percentage uplifts to the rates. The words "*other restrictions*" after the reference to working at night or on Sundays and Bank Holidays indicate that these restrictions must be in addition to such working. The reference to the working restrictions in clause 138AR is not limited and therefore, in the absence of any express statement to the contrary, must include the further restrictions in 138AR.5 i.e. those imposed as conditions under permits.
81. Thirdly, sub-paragraph (xlii) provides that compliance with any limitations and constraints on the use of a work location are deemed to be included for within the

rates. Express reference is made to CVU's opportunity to specify percentage uplifts for restrictions on works affecting the carriageway of a Strategic Route or other traffic-sensitive street, or a Prestige or Primary Walking Zone (limited to restrictions beyond those identified in clause 138AR.3 as explained above). Therefore, all other restrictions are deemed to be included in the rates.

82. Finally, there is no express statement that the restrictions imposed by way of permit conditions are not included in the rates.
83. CVU suggests that the wording in sub-paragraphs (xxvi) and (xlii) does not make sense. I reject that submission. Both sub-paragraphs are clear that the rate for the work in the Schedule of Rates is deemed to include for the restrictions that might be imposed. Both sub-paragraphs permit CVU to specify percentage uplifts for the Task Orders identified in section 2 of the Schedule of Rates i.e. enhanced rates to cover likely restrictions in respect of such Task Orders. Therefore, to that extent, CVU is entitled to price the assessed risk of those restrictions through the enhanced rates. Subject to the specified uplifts, paragraph 1.3 is clear that the risks of any working restrictions are deemed to be included in the rates.
84. I have considered the practical and commercial consequences of the rival constructions. CVU makes a valid point that the Framework Agreement does not contain definitive hours and other conditions in which the works under Task Orders must be carried out. That introduces uncertainty as to the duration, scope and cost of work required. Any requirement by CVU to price such uncertainties would result in uncommercial high rates. There is a risk that contractors could include a premium for the risk of uncertain restrictions on working if forced to price them at the outset. However, that is balanced by the competitive tendering that applied for the Framework Agreement, and the volume and spread of works, from those at high risk of imposed restrictions to those at low risk of imposed restrictions. The inbuilt uncertainty introduced risk for both parties that could be assessed and evaluated.
85. The purpose for which the Schedule of Rates was required was to provide consistency and certainty in the pricing of the works. The use of a Schedule of Rates enabled TfL to evaluate the tenders on a fair and equal basis. The fixing of rates and prices for the Framework Agreement provides opportunity and risk for both parties. If CVU undertakes the work instructed under a Task Order in a shorter duration or at lower cost than anticipated, it will receive a 'windfall' and TfL will have 'overpaid'. If CVU incurs greater costs than anticipated, it will have to bear the loss and TfL will have made a saving. It was a matter for each party to assess the risks associated with permits issued under LoPS and to price those risks accordingly.
86. A textual and contextual analysis of the material provisions leads to the conclusion that the rates and uplifts in the Schedule of Rates are deemed to be the full inclusive value of the task work, including any limitations or restrictions on working conditions imposed by the permits. That interpretation accords with the natural and plain meaning of the words used and makes commercial sense.
87. For the above reasons, I decline to make the declarations sought by CVU and will make the declaration sought by TfL, namely, that CVU is not entitled to submit prices within its Task Responses on the basis that no item on the price list corresponds to the work or services for the proposed task, insofar as the relevant Task Request is subject

to restrictions in accordance with (inter alia) clauses 107AR, 138AR and 155AR of the Service Information (Common).