Case No: HT-2020-000183

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 18 (TCC)

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 7th January 2021

Before:

HH JUDGE EYRE QC

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Between:

BROMCOM COMPUTERS PLC	**Claimant**
- and -	
1) UNITED LEARNING TRUST	**Defendants**
2) UNITED CHURCH SCHOOLS TRUST	

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- -

Alan Bates (instructed by **JMW Solicitors LLP**) for the **Claimant**
Joseph Barrett (instructed by **Stone King LLP**) for the **Defendants**

Hearing date: 9th December 2020

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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.

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 7th January 2021 at 10:00am"

HH Judge Eyre QC:

Introduction.

1. The First Defendant is a subsidiary of the Second Defendant and operates a number of academy schools. The distinction between the Defendants is not relevant to the matters I have to consider and I will refer to them jointly throughout. In October 2019 the Defendants commenced a procurement exercise for a three-year contract to supply a cloud-based management information system for fifty-seven existing schools and for others which might join during the period of the contract.

2. The Claimant provides specialist software for use in schools and it was one of two bidders who were invited to supply final tenders in the procurement exercise. The Claimant put in a final tender but was unsuccessful and the contract was awarded to Arbor Education Partners Ltd ("Arbor").

3. On 18th May 2020 the Claimant commenced proceedings alleging breaches of the Public Contract Regulations 2015 ("the Regulations"). The matter came before me on the Defendants' application for the striking out of all or parts of the claim pursuant to CPR Pt 3.4(2)(a) as not disclosing reasonable grounds for bringing the claim alternatively for summary judgment. The Defendants contended that the proceedings had not been commenced within the thirty-day period provided for in the Regulations namely within thirty days of the date when the Claimant knew or ought to have known that it had grounds for starting the proceedings.

The Law.

4. The parties are agreed that the procurement exercise was governed by the Regulations. The provisions of relevance for current purposes are as follows:

5. Regulation 18 (1) which provides that:

> "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."

6. Regulation 30 (19) requires that the contracting authority shall:

> "assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document."

7. Regulation 86 requires a contracting authority to send each candidate and tenderer a notice communicating its decision to award the contract. Regulation 86 (2) provides that such a notice is to include:

> "(a) the criteria for the award of the contract;
> (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
> (i) the tenderer which is to receive the notice; and
> (ii) the tenderer—
> (aa) to be awarded the contract, or
> (bb) to become a party to the framework agreement,
> and anything required by paragraph (3);
> (c) the name of the tenderer—
> (i) to be awarded the contract, or
> (ii) to become a party to the framework agreement; and

> (d) a precise statement of either—
> (i) when, in accordance with regulation 87, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies, or
> (ii) the date before which the contracting authority will not, in conformity with regulation 87 enter into the contract or conclude the framework agreement."

8. By virtue of Regulation 89 the duties set out above were owed to economic operators and Regulation 91 provides that any breach of such a duty is actionable by "any economic operator which, in consequence, suffers, or risks suffering, loss or damage.",

9. The relevant time limits are set out as follows in Regulation 92.

> …
>
> "(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
>
> "(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods:—
> (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—
> (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
> (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
>
> …
>
> "(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued."

10. Regulation 92 (4) gives the court power to extend the time limits imposed by the Regulations where there is "good reason" to do so but in the current case there has been no application for such an extension.

11. Here the claim form was issued on 18th May 2020 and the day thirty days before that date was 18th April 2020. The latter is, accordingly, the relevant date for the purposes of regulation 92 (2) with a central matter of dispute here being whether the Claimant knew or ought to have known before that date that it had grounds for starting the proceedings.

12. In *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156, [2011] 2 CMLR 32 the Court of Appeal set out the approach to be taken in determining both the matters of which knowledge is required for the purposes of regulation 92(2) and the degree of knowledge required. The majority of the Court approved the test formulated by Mann J at first instance namely:

> "the standard ought to be knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement".

13. I derive assistance in applying that test from the context of its approval and adoption by the Court of Appeal. Thus at [22] and [23] Elias LJ referred to the range of degrees

of confidence which a potential claimant may have in its prospects. It may know variously that it has "an arguable case, a reasonably arguable case, a strongly arguable case, or even a certain case". At [30] Elias LJ rejected the contention that time did not run until a claimant knew that it had "a real likelihood of success". He drew a distinction between knowledge of "the detailed facts which might be deployed in support of the claim" and of "the essential facts sufficient to constitute a cause of action" indicating that knowledge of the latter rather than the former would be sufficient to start the 30 day period. It was in that context that Elias LJ drew attention to "the principle of rapidity" which is "at the core" of the timetable laid down by the Regulations.

14. It is also important to note that the members of the Court of Appeal were agreed that the starting point was the test laid down by the ECJ in *Uniplex (UK) Ltd v NHS Business Services Authority* [2020] 2 CMLR 47 at [30] – [31] namely that time runs from when a claimant has:

> "…come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings."

15. The division between the members of the Court of Appeal was as to whether any elaboration or clarification of that test was needed. Arden LJ took the view that elaboration was not required. The other members, however, concluded that the test as formulated by the ECJ did not of itself explain "what degree of knowledge is sufficient to provide that informed view that a legal claim lies" (per Elias LJ at [23]) or "how well informed the informed view has to be" (per Rimer LJ at [92]). So it is to be remembered that the test formulated by Mann J and approved by the majority of the Court of Appeal is a test for the purpose of determining the degree of knowledge necessary to form that informed view.

16. It follows that what is needed is knowledge of material which does more than give rise to suspicion of a breach of the Regulations but that there can be the requisite knowledge even if the potential claimant is far from certain of success. Answering the question whether the facts of which a potential claimant was aware were such as to "apparently clearly indicate" a breach of duty by the contracting authority will require consideration of the nature of the procurement exercise; of the nature of the particular breach alleged; and of the nature and extent of the particular factual material.

17. At [36] – [38] Elias LJ explained that a breach by a contracting authority of its duty of transparency will not prevent the start of the thirty-day period if the potential claimant has sufficient knowledge notwithstanding that breach. Conversely if the withholding of information by the contracting authority means that a potential claimant does not have the requisite knowledge then time will not begin to run. In that regard and generally it is to be remembered that the focus is to be on what the potential claimant knew at the relevant time "and not on what it did not know" (per Elias LJ at [75]).

18. At [88] – [89] Elias LJ concluded that it was not necessary in *Sita* to resolve the question of whether the effect of the decision in *Brent LBC v Risk Management Partners Ltd* [2009] EWCA Civ 490 was that the Regulations imposed only a single duty (namely to comply with the required procedure). At [89] he addressed the situation where there are multiple allegations and drew a distinction between the situation where the allegations are of breaches of the same duty and that where "a number of distinct duties can be spelt out of the procurement obligations". If the allegations are on proper analysis

different breaches of the same duty then a potential claimant has the requisite knowledge when it knows or ought to have known of facts clearly indicating a breach of that duty. The time period is not extended simply by the potential claimant learning at a later stage of further separate breaches of the same duty even if they occurred "before or after the breaches already known". If, however, the potential claimant learns of facts indicating a breach of a different duty then it may be the position that time begins to run anew in respect of a claim alleging a breach of that duty.

19. Mr. Barrett for the Defendants contended that, at least for the purposes of the current claim, the Regulations created a single duty namely the duty imposed by regulation 18 to "treat economic operators equally and without discrimination and [to] act in a transparent and proportionate manner" with the provisions at regulation 30 as to the conduct of a competitive dialogue operating to define what that duty required in particular circumstances. Mr. Barrett submitted that references to the making of a manifest error by a contracting authority did not refer to breaches of a separate duty lawfully to evaluate tenders by the authority but rather to the standard which the court applies in assessing whether the authority had in fact broken the duty under the Regulations.

20. On behalf of the Claimant Mr. Bates argued that the judgment of Elias LJ in *Sita* was to be read in the context of the facts of that case. There the claim concerned the defendant's failure to reopen negotiations with the claimant after there had been a fundamental change in the nature of the competing preferred bidder's proposal. That was a single matter and so it was not surprising that the position was characterised as being one of a single duty with a number of instances of breach of that duty.

21. Mr. Bates contended that for the purposes of the time limit imposed by regulation 92 (2) there could be separate breaches in respect of which a claimant could have knowledge at different dates with the thirty-day period running from those different dates even if they were breaches of the same duty and happened at about the same time. He said that this proposition was not precluded by the words of Elias LJ when those were seen in their context and in the light of the facts of *Sita*. Mr. Bates also referred to the case of *Riverside Truck Rental Ltd v Lancashire CC* [2020] EWHC 1018 (TCC) where, he said, my judgment envisaged multiple breaches of the same duty giving rise to separate proceedings. It is, however, to be noted that this argument was not at the forefront of Mr. Bates's submissions which understandably and sensibly focused on his contention that the Claimant had no sufficient knowledge of any breach whether of single or multiple duties until after 18th April 2020.

22. I do not accept the proposition advanced by Mr. Bates. There is a difference between cases where challenges are made to separate decisions taken at different stages in a procurement exercise and those where a challenge is mounted to a single decision (typically the outcome of the exercise). The passages in *Riverside Truck Rental* at [39] – [42] and [60] – [61] to which Mr. Bates referred were contemplating the circumstances in which there could be separate challenges to the various decisions taken at a number of stages in a procurement process. As Fraser J explained in *SRCL Ltd v National Health Service Commissioning Board* [2018] EWHC 1985 (TCC), [2019] PTSR 383 the nature of the procurement process is typically such that there will be distinct acts or omissions at different stages in the process each of which could be susceptible of a separate challenge under the Regulations. That is why it is possible to have a number of claims issued in relation to the same procurement exercise. In such

circumstances time will begin to run at different dates and the period under regulation 92 (2) will expire at different dates in relation to the different claims. That is not the position where the challenge is to a single decision or to a single aspect of the process even if it involved a number of related acts or omissions over a period of time. Thus in *Sita* various allegations were made as to acts or omissions at different dates but as Elias LJ noted "they all went to the failure to reopen the bidding process." In those circumstances the effect of Elias LJ's judgment is that the particular breaches are, at the very lowest, unlikely to be separate causes of action but will normally fall to be seen as particulars of the same infringement even if occurring at different times. The court has to consider whether distinct breaches of separate duties are alleged. However, if the allegations are in reality of breaches of the same duty in respect of the same decision (as Elias LJ's words indicate they are likely to be) the effect of *Sita* is that time does not start to run afresh when a potential claimant learns of further breaches of the same duty in relation to the same decision. Here the challenge is to a single aspect of the procurement exercise namely the evaluation process which led to the contract being awarded to Arbor rather than to the Claimant and that is the context in which the assessment of whether the allegations are of breaches of separate duties or of a number of breaches of the same duty in relation to the same matter has to be undertaken.

23. As in *Sita* it is not necessary for me to determine whether as a matter of law there can only ever be a single duty under the Regulations in relation to a single decision. It is to be remembered the matter is before the court on the Defendants' application for the striking out of the claim alternatively summary judgment. If at this stage the breaches alleged are on a proper analysis tenably put forward as breaches of separate duties then it will be appropriate to consider the date of knowledge separately in respect of each such duty.

The Claim.

24. At [28] the Particulars of Claim assert that the Defendants owed the following duties:

> "28.1. A duty to comply with the PCR 2015 and any enforceable Community obligation in connection with the procurement.
>
> 28.2. A duty to treat all tenderers equally and fairly, and to act transparently, in a non-discriminatory manner, proportionately, rationally and/or in accordance with the principle of good administration, including by evaluating tenders by means of an evaluation process and arrangements complying with the principle of transparency.
>
> 28.3. A duty to evaluate tenders diligently, fairly, correctly, with transparency and/or without making manifest errors.
>
> 28.4. A duty to identify as the successful tender the one that is the most economically advantageous tender as ascertained in accordance with rules of the competition set out in advance.
>
> 28.5. A duty to advertise public contracts in accordance with the PCR 2015 including in particular Regulation 49 as read together with Part C of Annex 5 to the Directive."

25. As will be seen the allegation at [28.5] is not material for the purposes of the present application but it will become necessary to consider whether the duties alleged at [28.1] – [28.4] are in truth separate duties or different formulations of the same duty.

26. At [30] – [45] the Claimant pleads what are said to have been “breaches in relation to the Price section of the evaluation”. Three breaches are alleged namely:

> “1. Miscalculation of Legacy Fees relating to Arbor’s proposal.
>
> “2. Improperly adding extra costs when calculating the TCO [Total Cost of Ownership] of the Claimant’s proposal.
>
> “3. Failing to adjust Arbor’s costs model and/or to project higher Legacy Fees in relation to Arbor’s proposal to take account of the extent to which its mobilisation plan was unrealistic and/or inconsistent with the guidance given to bidders by way of the Revised Program.”

27. At [46] – [65] the Claimant sets out five further breaches which are said to have been “breaches in relation to the Quality section of the evaluation”. They are:

> “4. Failure to evaluate tenders by means of an evaluation process meeting the requirements of transparency and/or in accordance with the rules of the competition set out in the ITCD [Invitation to Continue Dialogue].
>
> “5. Favouring Arbor by scoring its responses taking account of the evaluators’ knowledge of, or in relation to, Arbor’s status as the Defendants’ incumbent MIS [Management Information Systems] supplier in relation to other schools.
>
> “6. Scoring tenders by reference to undisclosed criteria.
>
> “7.Manifest error in scoring Arbor’s response under Appendix C.
>
> “8. Other manifest errors or breaches.”

28. At [66] – [71] of the Particulars of Claim the Claimant alleges that there had been breaches of the Regulations by a failure properly to identify the contracting authority for the purpose of the procurement exercise together with relating breaches arising out of alleged misdescription of the contracting authority. This is put forward as a breach of the duty alleged at [28.5]. The Defendants had originally sought striking out or summary judgment in respect of those parts of the Particulars of Claim but it was accepted before me that these paragraphs at least arguably alleged a breach of a different duty and that a claim in respect of that breach had at least arguably been brought within the prescribed time period. Accordingly, the Defendants did not pursue their application in respect of these parts of the claim. This had the additional consequence that the question of which defendant was properly to be seen as the contracting authority for the purpose of the Regulations was not relevant for the purposes of determining the Defendants’ application.

29. At [72] – [74] of the Particulars of Claim the Claimant alleges that its participation in the procurement exercise had given rise to a tender contract with terms mirroring the obligations imposed by the Regulations and that there had been a breach of those terms. The Defendants said that the assertion of an implied tender contract was untenable in the light of the decision of the Court of Appeal in *JBW Group Ltd v Ministry of Justice* [2012] EWCA Civ 8. The Claimant accepts that the alleged contract adds nothing to the obligations under the Regulations. Mr. Bates said that the Claimant was content to “withdraw” this part of the claim and did not concede but did not resist its striking out. In those circumstances it is appropriate for those parts of the Particulars of Claim to be struck out.

The Issues.

30. As I have already noted the proceedings were commenced on 18th May 2020 and if the Claimant had the requisite knowledge before 18th April 2020 the proceedings would have been commenced outside the thirty-day period provided for in regulation 92 (2). The Defendants say that the Claimant had that knowledge by 3rd or 4th April 2020 and so the allegations at [30] – [65] fall to be struck out in their entirety. As an alternative they say that the Claimant had the requisite knowledge about elements of the claim and that those elements are to be struck out. The Claimant says that it did not have the necessary knowledge until 22nd April 2020 at the earliest.

31. Mr. Barrett said that for present purposes no distinction was to be drawn between striking out and summary judgment because the time limit imposed by regulation 92 (2) was to be seen as a jurisdictional requirement with the effect that a claim commenced out of time was, in the absence of an extension having been granted, both one which did not show reasonable grounds for bringing the claim and one which had no real prospect of success. I agree with that analysis which was not disputed by Mr. Bates.

32. It follows that there are two issues to be addressed. The first is whether the claim alleges multiple breaches of the same duty or breaches of separate duties. This is relevant because of the distinction drawn by Elias LJ in *Sita* at [89] and to which I have referred at [18] and following above. The second is when the Claimant knew or ought to have known that it had grounds for commencing proceedings either in relation to a breach of a single duty or in relation to breaches of separate duties depending on the outcome on the first issue.

The History.

33. On 30th March 2020 Bruce Wilson of the Defendants sent an email informing the Claimant that its bid had not been successful and saying that a "formal feedback letter" would follow and that there would be an opportunity on 1st April 2020 for a "feedback call" to take place by way of MS Teams at 2.00pm. The feedback letter came the following day and consisted in substance of a table contrasting the points which the Claimant and the preferred bidder had obtained under four heads. The Claimant responded to this by an email of the same day asking for "a detailed breakdown of marks against each scorable item". Initially the Defendants replied through Mr. Wilson saying that this would be addressed on the call but the Claimant then pressed for the information to be given in advance of the call. The Defendants provided a further table at 12.42pm on 1st April in which one of the four initial headings was broken down into five elements for which the respective scores of the Claimant and Arbor were given.

34. The first oral debriefing took place on 1st April 2020 as arranged two days earlier. It took place by MS Teams and was recorded by the Claimant. The Defendants were unaware that the session was being recorded and only learnt of that on seeing the Claimant's evidence. However, that has meant that it has been possible for transcripts to be prepared of the debriefing sessions. Those were put before me and were relied upon by the Defendants.

35. Mr. Wilson and Alexandra Wood took part on behalf of the Defendants with Simon Lewin, Sara Marsh, Ali Gruyel, and Huseyin Guryel attending on behalf of the Claimant. The session lasted fractionally over 45 minutes.

36. In the debriefing session Miss. Wood said that £548,870 had been added to the Claimant's bid to take account of "incumbent costs" being the costs to be incurred in the period until schools took up the Claimant's system. Reference was also made to the addition of "sunken costs" of £4,405 in respect of the cost of setting up the data warehouse and to £40,850 being the estimated costs of face to face training. The Claimant's representatives questioned the amount of the incumbent costs. Miss. Wood responded saying that she would check the figures and give a further explanation. In the course of that response Miss. Wood appears to have referred to those costs as the "sunken costs" although at an earlier stage she appears to have used that term solely for the costs of setting up the data warehouse. Miss. Wood then gave an explanation of the moderation process which the Defendants had adopted resulting in the scoring of the quality evaluation but it is apparent that the Claimant's representatives had some difficulty following the explanation which was being given.

37. It is apparent from the transcript that the exchanges included instances of two or more participants talking at the same time and of interruptions of what others were saying. The session was time-limited in part because Mr. Wilson had another meeting to attend and participants from both sides made reference to the time pressures. Towards the end of the debriefing Miss. Wood said that the Defendants' feedback in the session had not been as "robust" as it would normally have been and that "there's been a lot of discussion and we haven't had a real chance to go through it in a methodical way for you, which I think you deserve".

38. The parties agreed that there should be a further session and Mr. Wilson sent an email the following day pointing out that the Defendants had agreed to reflect on questions put by the Claimant's team in the debriefing and to provide a further response. The email attached two documents a "Cost Evaluation Process Clarification" which was said to be "an explanation of the methodology applied in calculation of the total cost of ownership fairly and transparently across both bidders" and a table giving a "breakdown of the weightings applied to the elements that made up the Quality score". Mr. Wilson offered a further Teams debriefing session for 3rd April 2020. Miss. Marsh replied on behalf of the Claimant accepting the invitation for a further debriefing and asking further questions. Mr. Wilson replied by email pointing to the further material which had been provided by email and saying that the questions would also be addressed in the further debriefing.

39. The email exchanges on 2nd April 2020 are revealing as to the nature of the 1st April session. Thus when offering the further debriefing Mr. Wilson echoed the comments which Miss. Wood had made towards the end of the debriefing and said that "we spent a large amount of the first call with your team talking and asking questions at pace. This did not give the opportunity for us to offer the constructive feedback you've requested." It was because of that that Mr. Wilson said that only two representatives of the Claimant were to attend the further session and that it was to be limited to 45 minutes. In her response Miss. Marsh thanked Mr. Wilson for the time which had been given and said "I know it was a passionate session…". I take the reference to a "passionate session" as a diplomatic indication that the exchanges had been heated. In that regard the transcript does not reveal the tone used in making comments and the exchanges were polite but it is apparent that the Claimant's team were robustly questioning the information they were given and that the Defendants' representatives were responding sometimes at length but at other points in quite short terms. It follows that the participants in the

debriefing appear to have been agreed that it had been a heated session in which there had not been a structured dispassionate explanation of the outcome of the procurement process. As will be seen Mr. Barrett invited me to compare the transcripts of the oral debriefings with the contents of the letters of 22nd and 23rd April to which I will refer shortly. In undertaking that comparison account will have to be taken of the exchanges the following day and I will have to bear in mind that the nature of the debriefing sessions is to be discovered not just by reading the words on the paper of the transcripts but also by noting the way in which those present described that first session on the following day.

40. The further oral debriefing took place on 3rd April 2020. This lasted 53 minutes but was again limited because Mr. Wilson had a further meeting following it. Mr. Wilson and Miss. Wood again represented the Defendants with Mr. Lewin and Mr. Ali Gruyel representing the Claimant. This session appears to have been less disjointed than the first probably because of the reduction in the number of participants but there were again instances of participants talking over each other and points when a participant lost sound temporarily. The bulk of this session was taken up with discussion of the quality evaluation. However, the last 10 minutes consisted of exchanges about the addition of the sum of £548,870 to the Claimant's bid. In those exchanges the Claimant's representatives pressed to be told the equivalent figure which had been added to Arbor's bid and Mr. Wilson and Miss. Wood declined to provide that information.

41. On 7th April 2020 Mr. Lewin wrote to Mr. Wilson. He said that there remained "one area in which I am left with a lack of the expected clarity and that is the evaluation of our Cost Model." Mr. Lewin pressed the Defendants to provide details of the extra costs which the Defendants had added to Arbor's bid. He said that it was "highly unusual" for a hidden cost to be added to each bidder's total price and he sought the figure so that it would be possible to establish the total cost of the bid which Arbor had made. Mr. Lewin stated that the Claimant was not seeking "any detail of [Arbor's] pricing proposal … just the calculated single lump sum."

42. Exchanges followed on 8th April 2020. In these the Defendants declined to provide the further information saying that providing this would enable the Claimant "to calculate the raw price submitted by [Arbor]" and that to do so would prejudice Arbor's legitimate commercial interests and "might further prejudice fair competition between economic operators". Mr. Lewin unsuccessfully pressed further emphasising that the figure which was being sought was the amount added to Arbor's bid. He pointed out that this was not a figure contained in Arbor's submission. That was correct but, as Mr. Lewin's email of the previous day had indicated, deduction of from the total cost of Arbor's bid would enable the Claimant to know the figure which Arbor had put forward (a figure which the Claimant contended it was entitled to know).

43. On 14th April 2020 the Claimant's solicitors wrote to the Defendants. This letter recorded that during the debriefing on 1st April 2020 the Claimant had been told that extra costs had been added to its bid and that these consisted of three elements: the cost of face to face training; a charge for implementing a data warehouse interface; and a charge for SIMS licences required for the period until the schools adopted the Claimant's system. The letter explains that the Claimant had been told that the extra charge for that last element was £548,870. The letter stated that this figure had "a significant impact on the overall cost figure used in the cost evaluation". It said that

the Claimant wanted to know why the figure was significantly higher than it had expected and how it compared to the figure for Arbor saying "these extra charges … could have had [a] significant impact on the overall outcome of the procurement exercise". It then asked for the following information:

- "exactly how UL evaluated and attributed the extra deployment costs,
- how the extra charge for the SIMS licences was calculated and notes of the evaluation meetings,
- the extra deployment costs attributed to Bromcom,
- the extra deployment costs attributed to the preferred bidder, and
- the relative characteristics or advantages of the preferred bidder's deployment plan."

44. Solicitors responded on the Defendants' behalf on 20th April 2020 in an email saying that they were taking instructions on the Claimant's request and that each bidder was being asked what parts of their bids they regarded as "commercially sensitive or confidential". In that email the Defendants' solicitors also said that the Defendants were "considering issuing a fresh regulation 86 notice to your client and as such a fresh standstill period will be given to allow your client more time before the contract is concluded."

45. A fresh regulation 86 notice was indeed issued on 22nd April 2020 under cover of an email saying that the letter of 31st March 2020 was to be disregarded. The 22nd April notice contained the table of scores which had been provided previously but this was accompanied by two detailed pages comparing the positions of the Claimant and Arbor under the heading "characteristics and relative advantages of the successful tender". This was followed on 23rd April 2020 by a document containing four pages of detailed explanation of how the additional charges had been calculated. The Claimant accepts that the further material fulfilled the requirements of regulation 86 and gave it sufficient information to know whether or not it had grounds for bringing proceedings. The Defendants say that the further correspondence did not add materially to the information which had been provided in the oral debriefings and that to the extent that additional information was given no new essential facts were disclosed.

Does the Claimant's Case allege Breaches of a Single Duty or Breaches of Different Duties?

46. At [28] of the Particulars of Claim the Claimant sets out five duties which are alleged to have been owed by the Defendants. [28.5] relates to the breach alleged at [66] – [71] and so is not relevant for current purposes.

47. [28.1] simply asserts a general duty to comply with the Regulations and any relevant Community obligation and adds nothing to the more narrowly particularised duties which follow. On analysis the duties alleged at [28.3] and [28.4] are encompassed in the duty alleged at [28.2]. Thus at [28.2] a comprehensive duty is alleged emphasising the Defendants' obligations to treat tenderers equally and fairly; to act transparently; and to evaluate the tenders by a transparent process. [28.3] asserts a duty to evaluate tenders "diligently, fairly, correctly, [and] with transparency". That duty is a repetition of the obligations alleged at [28.2] albeit focusing more narrowly on the evaluation process. [28.3] adds that the Defendants are to evaluate the tenders "without making manifest errors". However, Mr. Barrett is right to say that the Regulations do not impose a separate duty on a contracting authority to act without making manifest error rather

the presence or absence of manifest error is the standard used by the court in assessing whether there has or has not been a breach of the underlying duty. Similarly the duty alleged at [28.4] to identify the successful tenderer as being the tenderer who submitted the most economically advantageous tender is one aspect of the duty set out at [28.2] in respect of the process as a whole. It follows that a single duty is alleged in [28.1] – [28.4].

48. This conclusion is reinforced when the eight breaches alleged are considered. They all relate to the conduct of the evaluation process. The Claimant is challenging a distinct part of the procurement exercise namely the evaluation process and its conclusion. That aspect of the procurement exercise involved a number of elements but it was a single exercise. The breaches alleged are all respects in which it is said that the Defendants' duty in relation to that exercise was breached. The characterisation applied by Elias LJ in *Sita* is also applicable here. This is not a case where a number of distinct duties have been spelt out of the procurement obligations but one where the separate breaches are breaches of the same duty and particulars of the same infringement.

49. It follows that the relevant parts of the Particulars of Claim assert breach of a single duty.

When did the Thirty-Day Period for Commencing Proceedings start?

50. The answer to this question depends on determining when the Claimant knew or ought to have known that it had grounds for starting proceedings for breach of the single duty which I have concluded is alleged.

51. Eight breaches are alleged in the Particulars of Claim but a number are clearly supplementary or makeweight. Indeed Mr. Bates described some as "placeholders" which the Claimant intended to supplement when fuller information became available upon disclosure. Thus in respect of Breach 5 it is said, at [56], that the Claimant "suspects and alleges" that Arbor was advantaged by the evaluators' knowledge of its incumbent status but it is accepted that the Claimant has no knowledge of the evaluators' comments. Breach 6 alleging that scoring was by reference to undisclosed criteria is also based on suspicion rather than any matter of substance. Breach 7 alleges a manifest error in the scoring of Arbor's Appendix C response but is also based on suspicion. Finally, Breach 8 alleges "other manifest errors or breaches" on the basis that the scores allocated to the Claimant "appear likely to be erroneous".

52. It follows that the core allegations are those which challenge particular elements of the evaluation exercise. Thus:

Breach 1 relates to the understating of the Legacy Fees which would be incurred if Arbor were to be engaged.

Breach 2 contends that in addition to Legacy Fees other extra costs were improperly added to the Claimant's bid in particular in respect of the costs of face to face training.

Breach 3 contends that there was a failure properly to adjust the costs of Arbor's model to take account of the extent to which its mobilisation plan was unrealistic.

Breach 4 challenges the mechanics of the evaluation exercise in relation to quality with particular reference to the scoring of responses only to certain elements of the quality evaluation and to the use of an averaging approach.

53. Those are the core allegations and so the question becomes one of when the Claimant knew or ought to have known facts which apparently clearly indicated breaches in those regards or in one of them so as to be in a position to come to an informed view on the appropriateness of commencing proceedings.

54. Mr. Bates relied particularly on the following features of the case to contend that the Claimant did not have the requisite knowledge until after 18th April 2020.

i) He pointed to the inadequacy of the letter of 31st March 2020. This patently did not comply with the requirements of regulation 86. Mr. Bates emphasised that the letter of 22nd April 2020 was issued in substitution for the earlier letter which it was said should be disregarded. Regulation 86 identified, he said, the material which an unsuccessful tenderer would need to have to be able to form an informed view on the existence or otherwise of a potential infringement and the Claimant did not have that material until 22nd or 23rd April 2020.

ii) Mr. Bates drew attention to the difficulties which there had been in the oral debriefings saying that they could not be regarded as having provided the Claimant with facts on which the Claimant could rely. By way of example Mr. Bates pointed to what was said to have been inconsistency and lack of clarity in the use of the term "sunken costs" in the first debriefing.

iii) Reference was made to the decision of Coulson J in *Roche Diagnostics Ltd v The Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC). Mr. Bates relied in particular on [20(a) and (b)] where Coulson J said that the "broad principles" governing applications for early specific disclosure in procurement cases included:

> (a) "An unsuccessful tenderer who wishes to challenge the evaluation process is in a uniquely difficult position. He knows that he has lost, but the reasons for his failure are within the peculiar knowledge of the public authority. In general terms, therefore, and always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality.
>
> (b) That this should be the general approach is confirmed by the short time limits imposed by the Regulations on those who wish to challenge the award of public contracts. The start of the relevant period is triggered by the knowledge which the claimant has (or should have) of the potential infringement. As Ramsey J said in *Mears Ltd v Leeds City Council [2011] EWHC 40 (QB)*, 'the requirement of knowledge is based on the principle that a tenderer should be in a position to make an informed view as to whether there has been an infringement for which it is appropriate to bring proceedings'".

That was, Mr. Bates said, an explanation of the difficulties which an unsuccessful tenderer faces and an enunciation of the approach which should be taken to the provision of information. That is indeed relevant as setting out the

context of claims such as this and as showing the difficulties which a potential claimant can have in assessing the prospects of a claim. However, it is to be remembered that the test of knowledge is to be applied with reference to the facts which the potential claimant did know and not by reference to what it did not know. Time does not run from the date when a defendant has provided the information which it should have provided but from the date when a potential claimant has the requisite knowledge. For that reason I was not assisted by Coulson J's identification, at [26] – [30] of the material which he concluded should be provided to the claimant in that case by way of specific disclosure. Identification of the material that is to be disclosed once proceedings are under way does not determine the material which is needed before a claimant can know facts which will "apparently clearly indicate" that there has been an infringement and that proceedings are warranted. In particular it cannot be said that an absence of the material which would be obtained on disclosure precludes knowledge of such facts.

iv) Further Mr. Bates pointed out the existence of a breach is not of itself sufficient for a claim to be brought under the Regulations but rather there needs to be a breach which has caused at least the risk of loss to the relevant economic operator. In the circumstances here he said that meant that the Claimant did not have the requisite knowledge until it knew both that there had been a breach on the part of the Defendants but also knew that the breach had had the potential to affect the outcome of the procurement exercise. Accordingly, knowledge of failings in the evaluation process was not sufficient, it was contended, without knowledge of how those had impacted on the process and the Claimant did not know that until at the earliest the receipt of the documents of 22nd and 23rd April 2020.

55. The crux of Mr. Barrett's submissions was as follows:

i) He emphasised the need to have regard to the information which the Claimant had rather than to that which it would have had if further material had been provided by the Defendants and drew attention to the distinction also drawn by Elias LJ between knowledge of detailed facts and knowledge of essential facts.

ii) It was wrong, in Mr. Barrett's submission, to have undue regard to the material which should have been provided by way of compliance with regulation 86. The position cannot be, he said, that a potential claimant cannot have the requisite knowledge until the requirements of that regulation have been met by the defendant. That would be to substitute a different test as to the running of time for that which was actually set out in regulation 92 (2). Moreover, Mr. Barrett pointed out that regulation 86 only applied in the case of final decisions to award the contract whereas claims could be brought during the course of a procurement exercise in respect of any breach of duty by a contracting authority which caused an economic operator loss or the risk of loss. Such breaches could occur and such claims be brought in circumstances where the regulations contained no requirement equivalent to that in regulation 86 but such an economic operator could still have the necessary knowledge and this showed that the existence or absence of knowledge could not be dependent on the provision of a notice complying with regulation 86.

iii) Mr. Barrett said that the manner in which the facts were conveyed to the Claimant was immaterial and that information supplied by telephone or otherwise orally was just as effective to give the requisite knowledge as would have been a letter. The question was when the Claimant knew the material facts not how it came to learn of them. In that regard Mr. Barrett laid emphasis on the transcript of the debriefing on 1st April 2020. He contended that the transcript showed that the Claimant was informed in that conversation of the amounts which had been added to its tender in respect of the incumbency costs, the costs of face to face training, and the costs attributed to implementing the data warehouse. It was also told of the way in which the evaluation had been carried out. He said that a comparison of the transcript with the letters of 22nd and 23rd April 2020 (which Mr. Bates accepted provided the Claimant with the requisite knowledge) showed the Claimant had been told in the debriefing all that was material in the letters.

iv) The extent and nature of the Claimant's knowledge was, Mr. Barrett said, demonstrated by the letters of 7th and 8th April 2020. The first of those was sent by the Claimant following the conversations of 1st and 3rd April 2020. It described those conversations as having been "helpful" and said that there remained "one area" in which there was still a lack of clarity namely the evaluation of the Claimant's Cost Model in respect of which the Claimant sought details of Arbor's bid. The Defendants declined to provide this information on the grounds of commercial sensitivity. Mr. Barrett says that the Defendants acted properly in declining to provide this information because at that stage it was possible that the award of the contract could be challenged with a consequent re-opening of the tendering process in which the Claimant would have been unfairly advantaged if it had known the figures put forward by Arbor. Moreover, the fact that the Claimant sought only one further item of information demonstrates, it is said, that the Claimant knew of at least some of the matters which it now alleges were breaches namely the mechanics of the evaluation process and the elements which were added to the costs of the Claimant's tender. It was in part in response to this argument that Mr. Bates said that the letter of 7th April 2020 was to be seen as showing that at that stage the Claimant did not know whether the Defendants' potential failings had any impact on the outcome of the procurement exercise and so did not have the information necessary for it to assess whether loss had been suffered. At first sight that is a point of some force. It is to be remembered that the question is when the Claimant knew or ought to have known that it had grounds for initiating proceedings but failings on the Defendants' part which did not affect the outcome of the bidding would not give grounds for starting proceedings. However, the force of the Claimant's contention in this regard is considerably reduced when it is noted that in the letter of 23rd April 2020 the Defendants persisted in their refusal to provide details of the costs which had been added to Arbor's bid and the Claimant accepts that the letters of 22nd and 23rd April provided it with sufficient information to decide whether to commence proceedings. Moreover, regard is to be had to the letter of 14th April 2020 to which I will now turn.

v) Mr. Barrett placed weight on the letter of 14th April 2020 from the Claimant's solicitors. He said that this showed that the Claimant had understood the information provided orally on 1st and 3rd April 2020 and that by 14th April 2020

the Claimant had sufficient knowledge to instruct solicitors and for those solicitors to take issue with the extra costs added to the Claimant's bid and to say that those extra charges could have had an impact on the outcome of the process. That was significant as showing sufficient knowledge of both a breach and of the potential for that breach to have an impact and so to cause at least a risk of loss. Mr. Barrett said that the letter of 14th April 2020 was a formal pre-action letter and, as such, was a potent indication that the Claimant had the necessary knowledge by 14th April 2020. He said that the position was analogous to the issue of a statutory letter such as had been required as a precursor to proceedings under the Public Services Contracts Regulations 1993 (the predecessor of the Regulations) and in respect of which in *Sita* at [33] Elias LJ had said:

> "… On any view, a claimant who issues a statutory letter intending it to be a genuine statement of his belief that there has been a breach of the regulations and that he is proposing to commence proceedings, will find it difficult to deny that he had sufficient knowledge to start time running, at least as regards the breach or breaches identified in the letter."

In my judgement it is not right to characterise the 14th April letter as a pre-action letter and it is not closely analogous to a statutory letter under the previous regulations. Such a letter was a formal and necessary step in the commencement of proceedings and so would only be sent by a party who was stating in terms that there had been a breach and that proceedings were contemplated. By sending such a letter a potential claimant was expressly asserting that there had been a breach and that proceedings were appropriate. It is not surprising that in such circumstances it would not be open to the sender subsequently to contend that it did not know at the time of the letter that it had grounds for starting proceedings. The letter of 14th April did not in terms threaten proceedings. Rather it was a request for information and was a response to the Defendants' refusal on 9th April 2020 to disclose the details of the amount added to Arbor's bid. Nonetheless the letter of 14th April is a significant document. It is a detailed and structured letter from solicitors setting out the Claimant's position. As such it demonstrates the state of the Claimant's knowledge at that date. Indeed, as it is not suggested that any further material had been provided by the Defendants after 9th April 2020 it demonstrates the Claimant's knowledge at that earlier date. The nature of that knowledge and its consequences are matters I will consider below.

56. The extent of the Claimant's knowledge is to be determined by reference to matters of substance and not form. The court is to assess what the Claimant knew rather than being concerned with what it did not know. The consequence of that is that the way in which the Claimant acquired knowledge is not conclusive. The requisite knowledge does not have to be acquired by the perusal of documents and the thirty-day period in this case began when the Claimant knew facts which "apparently clearly indicate, …, an infringement" regardless of how the Claimant came to know those facts.

57. Nonetheless the manner in which and the means by which information was provided to the Claimant are by no means irrelevant. In that regard it is to be remembered that the regulation provides that time runs from when a potential claimant knows or ought to have known "that grounds for starting the proceedings had arisen". It is too simplistic

to say that a potential claimant either knows or does not know a particular fact and that how that knowledge was acquired is irrelevant. The way in which the knowledge of a particular fact was acquired can be relevant in assessing whether in the circumstances a potential claimant ought to have known that proceedings were merited. If information is provided in writing then it is likely to better structured and more readily understood than information which is given only orally. There will normally be more opportunity for a potential claimant to assess and to reflect upon documents than upon information provided solely orally. The risk that there will be misunderstanding or that matters will be overlooked or their significance missed is very much less if material is provided in writing than if it is simply stated orally. I have noted at [39] above that the exchanges on 1st April 2020 were heated and that the following day the participants agreed that the session had not involved structured or methodical feedback. That is an inherent risk when there are oral exchanges in which one set of participants will be likely to feel aggrieved that their bid has been rejected and the other set will be seeking to justify that rejection. It is also relevant that regulation 86 provides for an unsuccessful tenderer to be given particular details and for those to be given in writing. Mr. Barrett is right to say that a potential claimant can have the requisite knowledge even without a regulation 86 notice but it is of note that the scheme of the Regulations does not contemplate that as being the normal position in the case of an unsuccessful tenderer (as opposed to a potential claimant asserting breaches in the course of an as yet unconcluded procurement exercise). Thus the standstill period imposed in regulation 87 runs from the date of the regulation 86 notice and not from the date of knowledge.

58. I revert to the point that the requisite knowledge is of facts which "apparently clearly indicate, though they need not absolutely prove, an infringement". That knowledge is needed so that a potential claimant can be in a position to "come to an informed view as to whether there has been an infringement … and as to the appropriateness of bringing proceedings." An informed view is one which is a considered one and potentially one formed with the benefit of advice. The clarity of the indication given by particular facts is likely to be greater if those facts are presented in a structured manner and in writing than if they are given orally. Similarly, a potential claimant is likely to be more readily able to come to an informed view on the basis of structured written information than on the basis of oral comments. Regard is to be had to "the principle of rapidity" and focus must be on the facts which a potential claimant knew but the manner in which the facts were communicated will be relevant when assessing whether a potential claimant did or ought to have regarded them as clearly indicating an infringement.

59. In the present case the initial letter of 31st March 2020 was sketchy. By substituting for it the letter of 22nd April 2020 and saying that the earlier letter was to be disregarded the Defendants accepted that it did not meet the requirements of regulation 86. The level of information and the structure of the letters of 22nd and 23rd April 2020 are significant as indicating the form and nature of the information with which the Claimant should have been provided.

60. A quantity of information was provided to the Claimant orally on 1st and 3rd April 2020. That was provided in exchanges the first of which was heated and which the Defendants said at the time had not enabled "constructive feedback" as I have already noted. Nonetheless by 3rd April 2020 the Claimant knew at the least that additional costs of £548,870 had been added to its bid in respect of deployment costs and that extra costs

had also been added for the costs of face to face training and for implementation of the data warehouse. It is, moreover, apparent from the transcript of the debriefing sessions that the Claimant's team felt sufficiently well-informed to be critical of the approach being taken by the Defendants even if only to the level of saying that the Defendants were not providing adequate information.

61. The letters of 22nd and 23rd April 2020 did not alter the substance of the information which had already been provided at the oral debriefings about the way in which the evaluation had been conducted and the figures which had been added to the Claimant's bid. However, they did give considerably more detail in particular as to how the extra charges had been calculated and as to the ways in which Arbor's bid was regarded as better in terms of quality. Moreover, those letters set out the position in a structured and organised way. I have undertaken the exercise proposed by Mr. Barrett of comparing the transcripts of the debriefing sessions and comparing those with these letters to see what, if anything, more was said in the latter than in the former. However, in doing so I have been conscious of the artificiality of that exercise. I was reading the transcripts with hindsight and inevitably with knowledge of the later letters and of the proceedings. The key question is not what the transcript conveyed to a person reading it and doing so in the light of that knowledge but what would have been learnt by a participant in the debriefing taking part in real time and having to interpret what was being said without the benefits of hindsight or of a transcript. It is also to be noted that the debriefing sessions took place remotely over MS Teams. The participants were able to see and hear each other but they were not physically in the same space and their interaction was accordingly diminished to a degree.

62. The Claimant's solicitors' letter of 14th April 2020 was seeking further information but in doing so it set out the Claimant's understanding of the information which it had to that date. In particular it shows that the Claimant knew of the addition of the extra costs; that those costs included deployment costs of £548,870 together with the cost of face to face training and providing the data warehouse; and that the addition had the potential to have had an effect on the outcome of the process.

63. The question is finely balanced but I am satisfied that the Claimant did not have the requisite knowledge until its receipt of the letters of 22nd and/or 23rd April 2020. It was not until then to be expected even in the context of the urgency with which challenges to procurement exercises must be mounted to regard itself as having grounds for bringing proceedings. It was not until then that the facts in the Claimant's possession clearly indicated an infringement such that an informed view could be reached. I reach that conclusion because of the context and circumstances in which the Claimant received information about this procurement exercise. The initial letter was sketchy and inadequate and further information was provided in oral exchanges in two remote meetings conducted by MS Teams at least the first of which was a heated session in which there was no structured or methodical feedback. That combination is significant. The position might well have been different if the initial letter had been compliant with regulation 86 (or more nearly so than that of 31st March) but here the Claimant was having to assess oral information given in the circumstances I have already described supplementing a very sketchy initial notification. I am satisfied that following the oral debriefings the Claimant knew at the least that extra costs had been added to its tender and that these had included deployment costs of £548,870 and amounts for the cost of face to face training and for provision of the data warehouse. That information had,

however, been provided in the circumstances I have just noted with the consequence that the scope for proper assessment of it was very much reduced. Moreover, Mr. Bates is correct to draw attention to the need for any deficiency in the procurement exercise to have had at least a potential impact on the outcome and so to have caused loss or a risk of loss before proceedings could be commenced. The initial sketchy information and the manner in which further information had been given at the oral debriefings were such that the Claimant was not in a position reasonably to assess whether any failings on the part of the Defendants had affected the outcome of the exercise. The Claimant had sufficient information to know that there was scope for suspicion and to know that it was potentially worth pressing for further information. However, it was not, in my judgement, in possession of facts which clearly indicated an infringement such that it knew or ought to have known that it had grounds for commencing proceedings. The emails of 7th and 8th April 2020 and the solicitors' letter of 14th April 2020 were in my assessment genuine attempts to obtain further information. The test is not whether the Claimant genuinely believed it needed further information and the fact that it had such a belief is not conclusive as to whether the Claimant knew or ought to have known the requisite facts at an earlier stage. It is nonetheless a potent indication of the assessments which the Claimant was or was not able to make in the light of the information which it had. It is, moreover, telling that the solicitors' letter of 14th April 2020 elicited not a response to the effect that the Claimant already had sufficient information but an acceptance by the Defendants that the initial 31st March letter was to be "disregarded" and the provision of lengthy, detailed, and reasoned material which had not previously been set out in writing.

64. It follows that the Claimant did not have the requisite knowledge before 18th April 2020 and consequently the claim was not commenced out of time. The high point of the Defendants' case is the letter of 14th April 2020 from the Claimant's solicitors and the indications that gives as to the Claimant's knowledge. However, I am satisfied that the letter shows the position I have just stated namely that the Claimant had suspicion and believed that it might have a claim but not that it knew that an infringement was clearly indicated such that proceedings were merited. The fact that a potential claimant engaged lawyers at a particular time is not of itself an indication that it knew facts clearly indicating an infringement. It is an indication that the potential claimant believed that there were matters worthy of consideration and in respect of which professional assistance was merited but that is very different from knowing that proceedings were merited.

65. The Defendants' argument that even if the whole claim were not to be struck out particular elements should be was an alternative to its main contention and was primarily to protect against a conclusion that the breaches were to be seen separately. I have accepted the Defendants' argument that the breaches here are to be seen as having been breaches of a single duty but that has the consequence that they must stand or fall together and my conclusion that the Claimant did not have the requisite knowledge as at 18th April 2020 means that no part of the claim is to be struck out as having been commenced out of time.

Conclusion.

66. Accordingly, paragraphs [72] – [74] of the Particulars of Claim and paragraph (5) of the prayer are to be struck out but otherwise the Defendants' application fails.