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Judgment: approved by the Court for handing down | *Delivered:* **21/6/2016**

(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

2010 No. 41557

BETWEEN:

F P McCANN LIMITED

Plaintiff;

-and-

THE DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant.

_____

COLTON J

The Issue

[1] The plaintiff is a civil engineering contractor based in Magherafelt. It carries on business on a wide range of contracts for the public and private sector. Balfour Beatty Civil Engineering Limited ("Balfour Beatty") is a large civil engineering contractor registered in England with a wide experience in the design and construction of highways throughout the United Kingdom. It is an agency subsidiary of Balfour Beatty Group Limited.

[2] As part of a joint venture with Balfour Beatty the plaintiff submitted a tender for the contract to design and construct the A8 dual carriageway between Belfast and Larne. In this judgment I shall refer to the joint venture as BBMC.

[3] The defendant, through the Roads Service, was responsible for the public procurement of the contract. Although the joint venture bid was the lowest under the commercial submission in the tender the defendant decided not to award the contract to that consortium on the grounds that it had submitted an "abnormally low tender".

[4] The plaintiff's case is that BBMC ought to have been awarded the contract and the decision not to do so was unlawful. The plaintiff seeks damages for the loss and damage it has allegedly suffered as a result of that refusal.

[5] The defendant contends that at all times it acted lawfully and that the plaintiff's claim should be dismissed.

The legal context to the tender process

[6] The contract was to be procured in accordance with the restricted procedure under the Public Contracts Regulations 2006 ("the Regulations"). These Regulations implement certain EU Directives in Northern Ireland, the principal one for the purposes of this case being Directive 2004/18.

[7] In terms of the Directive some useful principles are set out in the preamble:

> *"(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only; 'the lowest price' and 'the most economically advantageous tender'.*
>
> *To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation – established by case law – to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and relevant weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. ….*
>
> *Where the contracting authorities choose to award a contract to the most economically advantageous tenderer, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole must make it possible to determine the most economically advantageous tenderer for the contracting authority."*

The fundamental principle is set out in Article 2 as follows:

> *"Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."*

This finds expression in Regulation 4 of the Regulations as follows:

> *"4. – ….*
>
> *(3) A contracting authority shall (in accordance with Article 2 of the Public Sector Directive) –*
>
> *(a) treat economic operators equally and in a non-discriminatory way; and*
>
> *(b) act in a transparent way."*

[8] For the purposes of this case the plaintiff is an "economic operator" under Regulation 4. Furthermore again for the purposes of these Regulations the defendant is a "contracting authority" under Regulation 3 of the Regulations.

[9] The culmination of a process such as this conducted under the Regulations is provided for in Regulation 30. This states:

> *"30. – (1) ….. A contracting authority shall award a public contract on the basis of the offer which –*
>
> *(a) is the most economically advantageous from the point of view of the contracting authority; or*
>
> *(b) offers the lowest price.*
>
> *……*
>
> *(3) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents or, in the case of a competitive dialogue procedure, in the descriptive document."*

[10] The issue of abnormally low bids is dealt with in Article 55 of the Directive as follows:

"55(1) If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authorities shall, before it may reject those tenders request in writing details of the constituent elements of the tender which it considers relevant.

These details may relate in particular to:

(a) The economics of the construction method, the manufacturing process or the service provided;

(b) The technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

(c) The originality of the work, supplies or services proposed by the tenderer;

(d) Compliance with the provisions relating to employment protection and working conditions in force at the place where they work service or supply has to be performed;

(e) The possibility of the tenderer obtaining State aid.

(2) The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied."

[11] This finds expression in Regulations 30(6) and (7) which provide:

"(6) If an offer for a public contract is abnormally low the contracting authority may reject that offer but only if it has –

(a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;

(b) taken account of the evidence provided in response to a request in writing; and

(c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator.

(7) Where a contracting authority requests an explanation in accordance with paragraph (6), the information requested may, in particular, include –

(a) the economics of the method of construction, the manufacturing process or the services provided;

(b) the technical solutions suggested by the economic operator or the exceptionally favourable conditions available to the economic operator for the execution of the work or works, for the supply of goods or for the provision of the services;

(c) the originality of the work, works, goods or services proposed by the economic operator;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the contract is to be performed; or

(e) the possibility of the economic operator obtaining State aid."

[12] Finally in terms of the Regulations, Regulation 47 deals with the enforcement of the obligations. The relevant parts are as follows:

"47. – (1) The obligation on –

(a) a contracting authority to comply with the provisions of these Regulations …and with any enforceable Community obligation in respect of a public contract, framework agreement or design contest …

is a duty owed to an economic operator.

……

(6) A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court.

…..

(8) Subject to paragraph (9), but otherwise without prejudice to any other powers of the Court, in proceedings brought under this regulation the Court may –

……

(b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with paragraph (1) or (2) –

…….

> *(ii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach;*
>
> *(9) In proceedings under this regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into."*

The Witnesses

[13] During the course of the hearing I heard evidence from the following witnesses, Hugh McCann, the Operations Director within F P McCann Limited; Mr John Crawley, a Director of J C Construction Services Limited, who prepared the tender for BBMC and dealt with clarification requests from the defendant; Dr Robert Peden, an employee of Tenant's Bitumen, a supplier of bitumen products in Northern Ireland; all of whom were called by the plaintiff.

[14] On behalf of the defendant I heard from Mr John White, who during the relevant period was the Director for Strategic Programmes in the Department for Regional Development who was responsible for the planning and delivery of the A8 duelling project that is the subject of the litigation; Mr Colin Hutchinson, a Civil Engineer employed by the DRD, Mr Chris Caves, an Associates Director with Arup, who prepared the technical evaluation report in relation to the A8 project; Mr Ian Morris, a partner in Chandler KBS who created and prepared the commercial assessment model and who had a lead role in the CEP; Mr Eamon Scullion, an associate with Chandler KBS who had a key role in assessing the tenders and dealing with the clarifications under the tender.

[15] I also heard evidence from Forensic Accountants in relation to financial loss from Ms Alison Holywood of PWC on behalf of the plaintiff and from Mr Jeremy Harbinson of Harbinson Mulholland on behalf of the defendant.

[16] I do not propose to set out their evidence in detail but will refer to specific extracts which have led to my conclusion. Taking their evidence as a whole it is possible to set out the history of the contract and tender process followed by the procurement process in the following sections of the judgment.

The contract and tender process

[17] It is important to understand the nature of the contract which was involved in this case. In summary there were to be two phases in the completion of the work. In Phase I of the project the successful bidder was to be the consultant under a Professional Services Contract on the standard terms of the NEC3 Professional Services Contract, Option E. During this phase the contractor is required to design

the new road and progress through to a public inquiry. Under the contract, the consultant under Phase I becomes the contractor under Phase II on completion of Phase I but subject to a number of conditions precedent. One such condition which is important in the context of this case is the agreement of a target cost for Phase II. A fresh contract for Phase II is then executed on the basis of this new agreement which includes a target cost based on agreed prices. The Phase II construction contract is to be on the NEC3 Engineering and Construction Contract Option C basis with amendments. There are a number of important features of this contractual structure which are relevant in this case.

[18] During the course of the contract interim payment would be made on the basis of "defined costs" which were equivalent to the actual costs incurred by the contractor plus a specified fee. At completion the price paid for defined costs is compared to the target costs which are the total of the prices in the agreed activity schedule which is intended to encompass all the necessary work on the contract.

[19] The defined costs are subject to a "pain/gain" cost sharing mechanism which sets a cap on the financial recovery of the contractor. In the event that the defined costs were less than the target costs, the contractor shared in the savings. In the event that the defined costs exceeded the target cost the contractor shared in the additional expense. The mechanism operated in such a manner that the defined costs could not exceed 111.25% of the final target cost in place at the completion of the contract, therefore significantly reducing the risk of financial exposure to the Department.

[20] The only means of altering the target cost is by effecting a change to the agreed prices by reason of a "compensation event" under Clause 60 of the contract. That clause expressly deleted a number of the usual compensation events provided in the standard form contract to the extent that they could only be claimed in circumstances connected with the giving of instructions by the project manager or wilful or involuntary obstruction on the part of the contractor.

[21] There are a number of features of the contract which I set out at this stage to provide further context. The contract had an estimated value between £80m and £100m. It was to be awarded on the basis of the most economically advantageous tender. The tender process is set out in the Instructions to Tenderers ("ITT"). The tender evaluation and award procedure included a quality submission (65%), presentation (15%) and commercial submission (20%). The quality submission is the section of the bid in which the tenderer sets out how it will do the work for which it receives marks for quality. The commercial submission is the section of the bid in which the tenderer sets out its prices. The commercial submission sought prices and output estimates for specified areas of work. These areas of work did not represent the totality of the work which would be required to construct the road as the final design of the road would not be known until Phase I was completed. The Department chose the specific areas of work on the basis that they were central to the project and represented the areas in which most variation in price was likely.

[22] However the prices submitted would be used as the basis of the target cost at Phase II of the contract. This was set out in Section 3.9 of the ITT. Of relevance to the dispute in this case Clause 4.4.2 of the ITT contained the following instructions:

> *"4.4.2 The commercial submissions will be reviewed to consider if any of the offers appear to be abnormally low. An initial assessment will be undertaken using a comparative analysis of all commercial submissions. If this analysis leads the CEP (Commercial Evaluation Panel) to consider that a tender may be abnormally low then a written explanation of the offer, or those parts which the CEP considers contributes to the offer being abnormally low, will be requested from tenderer. If the written explanation is not satisfactory then the tenderer may be rejected."*

Summary of the procurement process

[23] At this stage it is useful to set out an outline of how the tender process progressed in terms of BBMC's bid. The procurement process was initiated by a contract notice published on 24 April 2009 and described as 14 km of road improvements for the A8. BBMC applied to participate in the tender process and successfully pre-qualified. It was supplied with an "Instruction to Tenderers" document ("ITT") as referred to above. It submitted its bid in time including both a quality (technical) submission and commercial submission. The commercial submission sought rates in the following areas:

(i) Core management team;
(ii) Drainage works;
(iii) Earth works;
(iv) Pavements;
(v) Structures;
(vi) Fee.

[24] After a review of tenders Roads Service issued a clarification request to BBMC on 18 November 2009, which stated that, inter alia, a number of rates submitted by it – in relation to drainage, earth works, pavements and structures – raised a concern that they may be abnormally low. The consortium responded in writing to this request on 23 November 2009.

[25] The Roads Service issued a second clarification request on 27 November 2009 whereby further clarification was sought in respect of a number of rates, again relating to drainage, earth works, pavements and structures although this clarification did not state specifically that there were concerns that the rates submitted were abnormally low. The consortium responded in writing to the clarification on 1 December 2009.

[26] It appears that there were six tenderers in total. One of the six tenderers was rejected after the Quality Evaluation Panel (QEP) assessed the quality submission. The plaintiff emphasises that BBMC scored well in the quality submission. Specifically the defendant assessed that the plaintiff would deliver the project to budget and there was no particular concern that the consortium could not complete the works. However, the QEP did not see the CEP evaluation.

[27] The commercial tenders were being evaluated by Chandler KBS and Arup on behalf of the Roads Service. All the members of the Commercial Evaluation Panel (CEP) were employees of Chandler. Chandler KBS produced a "commercial assessment report" dated December 2009 together with an executive summary to that report. That report concluded that the BBMC's bid was abnormally low. Referring to the report it was concluded that the consortium's bid was abnormally low for the following reasons.

(i) The bid was low compared to other tenders.

(ii) The bid was low compared to the Chandler KBS benchmark.

(iii) The rates for disposal and deposition were low and based on fuel costs and plant rates below audited actual costs.

(iv) The rates for pavements were low as no allowance was made for the cost of elements of the mixing plant required.

(v) The rate quoted for bitumen was significantly lower than the current market rate.

(vi) Labour and equipment rates for structures were abnormally low compared with historic rates and rates admitted by other bidders.

(vii) Analysis of drainage, earth works, pavements and structures indicated that the plaintiff's consortium bid was priced at 79% of the second lowest price bid, and 72% of the narrow average of the tenderers.

[28] The report went on to state that there was a risk that BBMC and Roads Service would not be able to agree a target price under the contract and that the project would not therefore proceed to Phase II.

[29] It was clear that of the five remaining tenderers BBMC had the lowest bid. It is also clear from the CEP report that if the consortium's bid was not deemed to be abnormally low it would have been awarded the contract. It appears that the decision in relation to the awarding of the contract was actually taken at a meeting of the Road Service's Board on 16 December 2009 where the minutes record as follows:

> *"A8 Procurement*
>
> *The Board discussed Mr White's 14 December 2009 paper, 'A8 procurement' and having taken account of the views of the Commercial Evaluation Panel, concurred with the recommendation to award the A8 contract to the Lagan Ferrovial Costan Consortium."*

Mr White is described as the Director of Strategic Programmes and the paper appears to be the Chandler KBS report to which I have referred above.

[30] On 4 January 2010 the Roads Service notified Balfour Beatty that the plaintiff's consortium tender had been rejected as it was considered abnormally low. On 6 January 2010 the Roads Service then notified Balfour Beatty of its intention to award the contract to a consortium of Lagan Ferrovial Costan Consortium.

[31] Representatives of BBMC attended a debrief meeting on 24 January 2010 at which the reasons for the rejection of its bid were discussed. This meeting will be referred to further in the course of the judgment.

The applicable legal principles

[32] The issue in this case turns on the legality of the defendant's decision to exclude the BBMC bid. There is no real dispute as to the applicable law and legal principles. They can be distilled in the simple statement that the defendant is under a duty to act fairly to the plaintiff. That concept of fairness embraces an obligation on the defendant to ensure equality of treatment between tenders, objectivity, transparency and proportionality.

[33] An analysis of the case law indicates that a decision should not be found to be unlawful unless it is infected by manifest error. The role of the court in ascertaining whether or not there has been a manifest error has been described by Coulson J in BY Developments v Covent Garden [2012] EWHC 2546 when he noted that "the court's function is a limited one". He added that the court is not undertaking a "comprehensive review of the tender evaluation process" nor is it "substituting its own view as to the merits or otherwise of the rival bids". The only UK decision to which I was referred in relation to abnormally low offers is Amey v Scottish Ministers [2012] CSOH 181. In the course of his judgment Lord Hodge states as follows:

> "But the court gives the contracting authority a margin of appreciation in relation to matters of judgment or assessment. The test is one of manifest error, namely whether an error has clearly been made … In Renco Spa the Court of First Instance presented the test as a

> "manifest and serious disregard of the limits of (the contracting authority's) discretion."

He also agreed with the judgment of Lord Malcolm where he said:

> "The court should be mindful of the risks of becoming embroiled in the merits of the evaluation and assessment of tenders in a public procurement exercise. Not only is the court poorly placed to do this, it would be quite wrong for it to trespass on the jurisdiction clearly given to the contracting authority to exercise a broad discretionary judgment as to the identification of the most economically advantageous bid. The court's jurisdiction is to supervise the way in which the process has been carried out, and to review whether proper procedures and basic principles underlying the Directive have been respected, for example those concerning equality of treatment and transparency."

[34] The standard of review was set out in similar terms but perhaps with a greater focus on the duty of the contracting authority in the judgment in the case of Lion Apparel Systems Ltd v Firebuy Ltd [2007] EWHC 2179 in the following paragraphs:

> "[35] The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the authority are correct and that there is no manifest error of assessment or misuse of power.
>
> [36] If the authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the authority to have a "margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.
>
> [37] In relation to matters of judgment, or assessment, the authority does have a margin of appreciation so that the court should only disturb the authority's decision where it has committed a "manifest error".
>
> [38] When referring to "manifest error" the word "manifest" does not require any exaggerated

> description of obviousness. A case of "manifest error" is a case where an error has clearly been made."

[35] In conducting such a review it seems to me the key is Regulation 30 of the 2006 Regulations and in particular Regulation 30(6) which bears repeating:

> "(6) If an offer for a public contract is abnormally low the contracting authority may reject the offer but only if it has –
>
> (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;
>
> (b) taken account of the evidence provided in response to a request in writing; and
>
> (c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator."

[36] Neither European nor domestic case law provides a single definition of what is meant by "an abnormally low tender". The cases to which I have been referred use concepts such as whether it is "genuine", "genuine and viable", "reliable and serious" and "serious". I refer to the only UK decision to which I have been referred, namely Amey, where Lord Hodge described the purpose of the Regulation 30 procedural obligation in the following way:

> "In my view, the various expressions, although different, are all directed towards the same broad end, namely that of judging whether the bid is one that is likely to provide the contracting authority with the services which it seeks. Concepts such as reliability, viability and soundness are objective concepts. Serious and genuineness have the potential to be subjective …"

The Evidence

[37] On review of the evidence it is clear that the defendant sought to comply with the provisions of Regulation 30. The defendant appointed a Commercial Evaluation Panel ("CEP") led by Mr Ian Morris, a partner in Chandler KBS, for the purposes of assessing the commercial submissions portion of the tender and making a recommendation to the department. As he explained in his evidence:

> "At the time of tender, the design for the project was not sufficiently progressed to enable the defendant to

> obtain from the market the prices for the works. The commercial schedules were developed to obtain a fixed price for Phase I of the Scheme and relevant, meaningful pricing information that would form the basis for establishing the target cost for Phase II. In order to prevent the tendering process becoming onerous and to keep tendering costs to a realistic minimum, the schedules concentrated on the key construction activities of drainage, earthworks, pavements and structures. These elements generally have the greatest variance in price and are influenced by methods of working and resource allocation. The rates and outputs tendered would also apply to other construction activities including kerbs and footways and accommodation works."

[38] Therefore, tenderers were invited to submit figures in respect of these areas and also in respect of core management team, fee and information for contract data Part II. When this information was collated it was clear that the BBMC tender was significantly lower than the average of the other tenderers in 6 of the 8 areas of assessment (core management, drainage, earthworks, pavements, structures and fees). The overall tender at £14m approximately was also significantly lower than the average of all tenders which was £19m. The figures were also significantly lower than the bench mark figures which had been prepared by Mr Morris although all of the tenderers were significantly lower than this particular bench mark.

[39] On the basis of the initial analysis requests for clarification were raised in accordance with the ITT (paragraphs 1.3.11; 3.3.1; 4.1.1 and 4.4.2) to BBMC. It is clear that this request referred to concerns that BBMC's rates were "abnormally low". I consider that it was both lawful and reasonable for the defendant to seek the clarifications sought at this stage. The response from the plaintiff was received on 23 November 2009. This response was described by Mr Morris as "voluminous", including "spreadsheets detailing the build-up of the rates, sub-contract and supplier quotations and detailed equipment specification documents". In an email of 24 November 2009 to Mr Hutchinson, Mr Morris described BBMC as having "provided robust explanations and substantiation". Mr Morris discussed the response with Mr Scullion and they formed the view that some areas of the submission provided required further clarification. Thus further clarifications were submitted to BBMC on 27 November 2009. The second request did not make any reference to the rates being "abnormally low" but indicated that "further clarification is required to enable the CEP to complete the commercial assessment".

[40] Again, I take the view that it was reasonable and lawful to seek the clarification under the second request. BBMC replied to the further clarification, again within a very short period of time on 1 December 2009. Thereafter Chandler KBS produced a "commercial assessment report" together with an executive

summary to that report in which it recommended that the BBMC tender be excluded for being abnormally low. It appears that prior to that there was an "informal meeting" between Mr Morris, Mr White and others on 2 December 2009. According to Mr White the purpose of the meeting was to brief him on the course of the commercial evaluation and the issues that had arisen. Whilst the meeting was not minuted and the witnesses were vague about the precise course of the meeting it appears there was a discussion on whether it would be possible to agree a target cost based on the figures submitted by BBMC. Mr Morris was asked to produce a forecast target cost incorporating the plaintiff's rates. Mr Morris produced a spreadsheet setting out three different scenarios purporting to be a potential target cost on the basis of the rates provided and this was received on 15 December 2009. The Roads Service Board met the next day on 16 December 2009 and it was at that meeting that the substantive decision was made to reject BBMC's tender for being abnormally low. Balfour Beatty were informed of this on 4 January 2010 and a debrief meeting took place on 14 January 2010.

[41] I have already set out the witnesses who gave evidence at the trial. There was much detailed and contested evidence about the reliability or sustainability of the rates and outputs put forward by BBMC and how they were assessed by the defendant. On reflection I fear that contrary to the warnings of Lord Malcolm in Amey the court became embroiled in the merits of the evaluation and assessment of BBMC's tender. This was particularly so in relation to the evidence of Mr Crawley on behalf of the plaintiff and Mr Scullion on behalf of the defendant. I will deal with specific matters of evidence which have informed my conclusions in this case later but at this stage bearing in mind the limited function of the court I propose to provide a brief overview of some of the evidence I heard.

[42] Hugh McCann is the Operations Director within F P McCann Limited. He explained that the company was a local one and had three core sectors namely:-

(i) A civil engineering section contained within the construction division.

(ii) A manufacturing division for supply and delivery of pre-cast concrete solutions.

(iii) Quarries and aggregate facilities within the company's construction materials supply division.

[43] He explained how his company would approach a tender. He indicated that when the A8 dualling project was out for tender he felt the company were ideally suited for the job. In particular he was convinced that because the company had a quarry on site at Looughside it would have a strong commercial advantage with relation to the supply of crucial raw materials to the project, which is always a significant aspect of the costing of such works. He indicated that to enhance its prospects the company identified the need for a strong consortium partner. For this reason the company decided to partner with Balfour Beatty which is one of the

largest if not the largest contractor in UK civil engineering and highways. In relation to the submission of the bid the company relied on the services of a Mr Crawley who is a Director of JC Construction Services Limited. Whilst Mr Crawley is independent from the plaintiff's company it was clear both from his evidence and the evidence of Mr McCann that F P McCann Limited were his main client and that they worked closely together. When questioned about the plan for the project it was clear that F P McCann would be providing the direct labour and work on the site with Balfour Beatty providing senior management to the case management team and would be responsible for helping to oversee the contract.

[44] In terms of its general approach he indicated that the company planned to submit a bid which was commercially competitive and at the same time deliver a reasonable level of profit. He indicated that the company had a strong track record of delivering projects on budget within the timeframe and was confident that had the contract been awarded to BBMC it would have been completed. In his evidence he conveyed a sense of shock and disappointment when the defendant rejected its tender because it was abnormally low. He seemed to have a particular difficulty in understanding the decision given what he perceived to be the very strong commercial advantage of his company in particular with regard to the on-site quarry.

[45] It was his view that a target price would have been agreed with the Department had the contract been awarded to BBMC. His evidence was that it would not make sense not to agree a target price having regard to the incentives to both parties of the contract to do so.

[46] Under cross-examination it became clear that Mr McCann was not aware of the detail of how the tender was priced and in this regard he relied heavily on the expertise and evidence of Mr Crawley. He did give some important evidence in relation to quantum and I do not propose to rehearse this at this stage.

[47] Much of the summary provided above is taken from relatively uncontroversial evidence from Messrs White, Caves, Hutchinson and Morris. I will refer to important parts of their evidence later in the judgment.

[48] The real meat of the factual disputes in relation to whether or not the rates and outputs contained in the tender were reliable turned on the evidence of Mr Crawley on behalf of the plaintiff and Mr Scullion on behalf of the defendant. It should also be noted that Mr Morris worked closely with Mr Scullion when preparing the CEP Report for the defendant.

[49] I will now examine in summary form the approach taken in relation to each of the key elements of the commercial assessment.

Core Management Team

[50] Whilst the value tendered by BBMC was the lowest tendered and significantly lower than the average it was not identified as a reason to reject the plaintiff's tender.

Drainage

[51] The initial review identified that all of the rates tendered by BBMC were low and 14 of the 19 proposed product activity outputs were high when compared to the average of all tenderers. Along with Mr Crawley Mr Morris give detailed evidence about the drainage rates and the concerns the CEP had in relation to the tender. Ultimately however Mr Morris was "just satisfied that although the tenderer in this regard may be low, I was persuaded that these concerns should not be carried through to the overall assessment as to whether the tender was abnormally low. This matter fell out of consideration in the assessment that led to the CEP's conclusion."

Earthworks

[52] The BBMC's commercial submission for earthworks totalled £495,020 compared to the average value of all the tenderers of £963,927. The greatest disparity between the rates proposed by BBMC and the other tenderers was on items for disposal and deposition. It became clear through the clarifications provided by BBMC and the evidence of Mr Crawley that BBMC had developed an earthworks strategy and calculated haulage distances rather than providing rates for the haul distances specified in the commercial model. Thus BBMC's tender rate of £0.75/m^3 was based on an average haul distance not exceeding 1 km, whereas the average haul distance in the tenderer model was 3.8 km, with separate items for haul distances not exceeding 1 km; between 1 km and 5 km and between 5 km and 10 km. The plaintiff maintained that this was a correct approach but in any event the defendants did not consider this as being a reason to exclude BBMC's tender and the clarification response included an amended rate for inclusion in the model which increased the average deposition rate from £0.75m^3 to £1.51m^3. This would have increased the amount of BBMC's tender by £139,840. Mr Scullion gave evidence that he undertook a detailed assessment of haulage costs for the range of haul distance stated in the commercial model, calculating average trip times and associated labour, equipment and fuel costs. This calculation assumed the same equipment levels and rates proposed by BBMC. The average rate calculated was £1.69m^3 so that the rate of £1.51m^3 was still considered to be low. It was noted that the rate of £32 per hour applied to the AE 25T dump truck was low compared to previous projects with comparative rates suggesting rates of between £40 to £43 per hour.

[53] There was also a dispute about the rates tendered for excavation activities. Mr Scullion indicated that the rate quoted by BBMC was £0.25m^3 with an output of

100m^3 per hour by using a 20 ton excavator. He indicated this equated to £25 per hour with 100m^3 output per hour inclusive of driver and fuel. The next lowest rate for an excavator entered by the other tenderers for the same activity was £50.50 per hour with an output of 50m^3 per hour. The average rate for excavators tendered by the other tenderers for the same activity was £65.94 per hour.

[54] Mr Scullion said that he assessed the fuel element for a 20 ton excavator (£11 per hour) and labour element (£13.00 per hour) to be £24 per hour leaving £1 per hour for the hire and use of the excavator. The defendants argued that the amount of £1 per hour for this item appeared to be abnormally low. The equivalent plant hire only rate for 20 ton excavator from the other road projects is typically between £12 and £15 per hour.

Pavements

[55] BBMC's commercial submission for payments totalled £7,563,015 compared to the average value of all the tenderers of £10,075.165. Clarification was sought in relation to the tendered pavement prices and Mr Scullion undertook a detailed evaluation of the information on rates provided. In summary a query was raised in relation to the price for the supply rate of bitumen and I shall deal with this in detail later. Concerns also arose in relation to the labour and equipment proposed for the laying operations which were low in comparison to other tenderers. The black top rates do not include any allowance for the hire, haulage, establishment, testing and commissioning of the mixing plant, there was no allowance for laboratory facilities or aggregate storage bins and the allowance for depreciation/maintenance was low. In this regard BBMC through Mr Crawley relied heavily on the availability of the mixing plant which would be owned outright by the plaintiff and would be made available to the project at the costs of £50,000 per year. A mixing plant with a capacity to produce the stated outputs had a significant commercial value although the CEP was concerned that the plaintiff would seek to recover the cost of the mixing plant as defined costs under the terms of the contract.

[56] BBMC's tender included no allowance for the cost of haulage, mobilisation, erection, testing and commissioning of the mixing plant, nor did it include for an on-site laboratory facility and aggregate storage bins.

Structures

[57] The plaintiff's commercial submission for structures totalled £2,489,310 compared to the average value of all the tenderers of £3,267,599. The plaintiff's tender rates were 21% lower than the second lowest tenderer and 24% lower than the average. The CEP was particularly concerned with the pricing of labour and equipment at £56,166 per structure compared to the prices of the other tenderers which ranged from £90,787 to £111,706 per structure.

Fee

[58] BBMC tendered a fee of 4.98%. This was the lowest percentage rate but there was no reason to doubt that it did not represent a profit margin which was acceptable to the consortium. It was not examined further and no clarification was raised in respect of the fee.

[59] Having considered the clarification provided by Mr Crawley on behalf of BBMC and the views of Mr Scullion the CEP considered that the plaintiff's commercial submission was abnormally low.

[60] I stress that this is but a summary of the evidence given in relation to these issues. It seems to me that these were issues that the court was not well suited to determine and certainly fell within the margin of appreciation afforded to the defendant.

Conclusion

[61] Having considered all the evidence I have considerable concerns about the tender process in this case.

[62] Before identifying these expressly it is important to remember that the evidence of the defendant was that the issues which gave rise to the recommendation to reject on the basis that the offer was abnormally low related to the tendered figures in respect of earthworks, pavements and structures. The defendant's evidence was that ultimately the figures for core management team, drainage and fee did not contribute to the recommendation that the offer was abnormally low.

[63] I would set out my specific concerns as follows.

Concern No.1

[64] **I am concerned that matters which were expressly excluded as contributing to the recommendation in fact did or may well have contributed to the actual decision taken by the defendant to reject the plaintiff's bid.**
When one looks at the decision made by the Board on 16 December it is clear that no member of the CEP attended to brief the Board or deal with any queries raised by the Board. Only the decision itself is minuted. In his evidence Mr White indicated that he does "not remember the precise detail of the discussions". In coming to a view as to how the decision was made by the Board I could only come to the conclusion that it was informed by the papers produced at the meeting namely the "commercial submission – summary sheet"; the "commercial assessment report" and the document "Forecast target of costs for BBMC". I also pay regard to what the plaintiff was told at the debrief meeting on 14 January. A consideration of this material leads me to the view that the rates for the core management team, the fee

and drainage are likely to have contributed to the Board's decision. If one considers the bullet points at the start of the executive summary justifying the conclusion that BBMC's tender price is abnormally low reference is made to "an overall comparative analysis against the other tender prices" and "a comparative analysis against the Chandler KBS benchmark" which was completed prior to the receipt of tenders. Clearly the matters to which I have referred must have been included in this overall analysis. I also formed the view that the Chandler KBS benchmark was of little value to the exercise since all of the tenders were significantly lower than the benchmark. Many of the example projects used to assist in compiling its benchmark where largely based in Wales or the Republic of Ireland and provided little assistance as a comparator.

[65] Furthermore, it is clear that specific reliance is placed on a "comparative analysis of drainage, earthworks, pavements and structures" notwithstanding the fact that drainage was excluded as a reason for the bid being abnormally low according to the evidence of the defendant.

[66] The executive summary of the commercial evaluation report goes on to assert that "the BBMC price is low in 5 of the 8 areas of assessment". Again it appears that the five areas include the price for core management and drainage. Specifically, when considering the price for the core management team the report re BBMC states:

> "The proposed programme duration is considered appropriate but the size of core management team is considered inadequate."

[67] It is correct that this is qualified by reference to a sensitivity analysis in section 7 of the report but certainly it seems to me that this was likely to have contributed to a view that the CEP were dissatisfied with the BBMC core management price.

[68] In relation to drainage and the BBMC's tendered price the report states "the CEP remains concerned that the rates are not sustainable". It further states in relation to drainage "even if efficiencies are achieved for the use of prefabricated components the CEP considers the outputs to be very optimistic and unsustainable". Furthermore, in relation to drainage and BBMC the report states:

> "The detailed breakdown of the rates provided by both BBMC and tenderer 3 confirm that the rates are based on minimum resource levels for labour and equipment. The gangs have been stripped back to the basic components and the CEP is concerned that this level of resource is insufficient to achieve the proposed productivity outputs."

[69] Dealing with specific concerns the report states in relation to BBMC that:

> "The strategy for drainage is based on a minimal resource gang with operatives undertaking a number of roles simultaneously. It is unlikely that this strategy is achievable without affecting the optimistic productivity outputs."

[70] It is correct to say that there is a passage in the report which states that:

> "One of the reasons for the low price is the competitive fee percentage offered by BBMC. For this reason, any comparative assessment should be made on the following elements only:
>
> Drainage
> Earthworks
> Pavements
> Structures"

[71] In my view a fair reading of the documents provided to the Board would support the contention that the prices for core management, fee and drainage contributed to the CEP's recommendation that the bid was abnormally low notwithstanding the evidence that these matters were discounted in that regard.

[72] Further support for the suggestion that some of these matters were taken into account is to be found in the debrief meeting which took place on 14 January 2010. Again, no member of the CEP attended at this meeting. It is clear from the evidence given in the trial together with the "debrief note" prepared for that meeting as an aide memoire that core management team and fee were included as reasons given for the rejection of the tenderer. These have been described as "errors" but certainly support the view that this was part of the thinking of the Department.

Concern No.2

[73] **I am concerned that BBMC were not given the opportunity to explain matters which ultimately contributed to the decision to reject the tender.**
Under Regulation 30(6)(a) before an authority can come to any decision that a tender is "abnormally low" it must request "in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low".

[74] Following on from concern number one above it is clear that both tender clarification requests focussed on the areas of drainage, earthworks, pavements and structures. No clarification was sought in respect of the fee and core management team prices which as I have indicated above, in my view, at the very least could

have and probably did contribute to the decision to reject the tender. This constitutes a clear breach of the requirements of the regulations.

[75] The final matter under this heading is of less significance than the matters to which I have referred already but nonetheless does trouble me, namely the extent to which the plaintiff's involvement in the A5 tender process affected the assessment in this process. As will be seen below this also had an impact on the decision made by the defendant in terms of verification under 30(6)(c). It appears that a separate joint venture between BBMC and another partner had been awarded a section of the A5 contract, notwithstanding the concern that its bid was abnormally low, and the purported risk which might flow from this, along with advice being received from Roswell Wright, a firm of consultants engaged to assist the department in respect of the A5 project (but not on the A8 project). It is clear that at no stage were any concerns raised with BBMC about any commercial risk which might arise from its consortium members being involved in a separate project with another JV partner on the A5 project. Mr White in his evidence accepted that this did influence his approach to the matter although what bearing it ultimately had on the decision is not clear. However, if it was to be a factor it was clearly incumbent on the defendant to present the BBMC consortium with an opportunity to address it. Certainly this issue on its own would not lead me to a conclusion that the process was unlawful but I do take it into account in addition to the other matters set out in this judgment.

Concern No.3

[76] **The department failed to comply with its obligation to verify the offer or parts of the offer which were allegedly abnormally low.**
This obligation is an express requirement of Regulation 30(6)(c). It is clear from the evidence that Mr Morris had a concern about this and certainly suggested that before coming to a decision after the second clarification provided by BBMC on 1 December the department should seek verification in accordance with 30(6)(c). This issue has to be seen in the context of a very tight deadline, with a key date being the meeting with Mr White on 2 December 2009. The timescale was described as "demanding" in an email sent from Mr Chris Caves to Mr Ian Morris on 23 November 2009. In his reply Mr Morris indicated that this would be "very tight" in terms of consideration of BBMC's responses to the second post-tender clarification request. Thereafter, Mr Caves accepted that the timescale they had imposed upon them meant that requests would have to be dealt with in a way which was "not ideal I know" – on 4 December 2009. After Mr Morris had received the first set of clarifications he received an email from Mr Caves on 25 November in the following terms:

> "Just wondering if you have a feel on the need for further requests for clarification/time for analysis of the clarification received?

[77] Notwithstanding the limited time a second post tender clarification request was sent and replies received within 4 days on 1 December 2009. This was only one day before the meeting on 2 December at which Mr White was to be briefed on the CEP report. On 4 December 2009 Mr Caves asked Mr Morris "could you confirm you have all the clarifications needed to complete your analysis of all tenders". Mr Morris replied on the same day that he needed to query the Lagan bitumen rate. Significantly, in relation to BBMC he writes the following:

> "Also do we need to notify BBMC that we consider their bid, or parts thereof (my underlining) to be abnormally low and to allow them one further opportunity to provide evidence in support of the bid? Is this a requirement of the regulations?"

Mr Caves replies on the same date:

> "I think we need to look carefully at the Regs in Clause 30(6) we have clearly addressed clauses a and b. We must ensure that clause c is also addressed to ensure parity and compliance with the Regs.
>
> Could you confirm the CKBS interpretation of this and how this was addressed elsewhere?
>
> Mike – could you please provide your view in support of closing this out."

[78] By email of 7 December 2009 Mr Morris writes to Mr Caves enclosing the text that was issued to BBMC in relation to another contract in which the plaintiff was part of a consortium, namely the A5. Mr Morris suggests that "I don't think it's necessary on A8 as they have already provided the relevant information;" part of the text which was issued in respect of the A5 states:

> "From the IFT you will be aware that your productivity and unit rates provided for drainage, earthworks, pavements and structures will be used as the basis for agreeing the target cost. Please confirm that you understand this requirement and that you consider your rates are adequate for developing a sustainable target price."

[79] In the response it was suggested that part of this text should be removed as "if we asked them an open question I think it could cause more problems as they will obviously confirm that their rates are adequate". At this stage there is an intervention from Mr Taylor of Chandler KBS as follows:

> "Gents
>
> I do not see what we are trying to achieve with this. We have had the necessary response from BBMC. This further correspondence will not yield anything that we do not already know and so my advice is we should not send this."

The debate continues with an email from Mr Taylor to Mr Caves on 7 December in which he sets out Regulation 30(6) and states:

> "I do not think that asking for confirmation that they believe that their rates are adequate (which Ian's note does) constitutes verification that the offer is abnormally low.
>
> I am of the view that we need to verify by reference to other tenders received on the same scheme and confirm that subsequently with BBMC.
>
> We have a query out with our subscription service at Themis to seek clarification on what precisely is required to satisfy 30(6)(c) and I would be reluctant to correspond further with BBMC until we receive that clarification."

[80] There was no further correspondence produced at the trial in relation to this matter and as already indicated there was no further communication with BBMC.

[81] It is clear from the evidence in this case that the primary concern of the defendant was whether or not it could agree a target cost with the plaintiff. Based on the figures quoted in its tender I agree with the defendant's submission that this was a legitimate concern. The plaintiff argues that there would have been an agreement on target cost in this case had BBMC been successful. They point to the fact that none of the witnesses in the case could give an example of when a target cost had not been achieved in this type of contract. They rightly point to the fact that both parties are incentivised to ensure that there is an agreement at Phase II. The defendant responds by saying that if the prices were in fact abnormally low or unreliable then there was a real risk that they simply could not form the basis of a credible agreement. A further and fundamental consideration for the defendant is that if a target cost were to be agreed at a higher level than the rates tendered for by BBMC this would be grossly unfair to the other tenderers who had been beaten by prices that would not be carried through to the contract.

[82] Put simply or crudely this type of contract is potentially open to the risk of a tenderer putting in an unrealistic bid to ensure it wins the contract and after the completion of Phase I seeks to negotiate prices upwards. Mr Crawley in his

evidence described this as a risk of someone "taking a flyer". The cross-examination of Mr Crawley, the main witness for the plaintiff, illustrated there may well have been some grounds for this concern in this particular case. Mr McMillan QC took Mr Crawley through the documentation that had been provided relating to the pre-tender discussions between the plaintiff and Balfour Beatty. Nowhere in the documentation is BBMC's tender strategy set out. In particular he points to a reference in the materials to a strategy paper on how to recover target margins. No such strategy paper was produced for the court. He also referred to various comments from Mr Cudden on behalf of Balfour Beatty which suggests that the plaintiff's strategy in this bid was precisely that about which the defendant was concerned. Thus giving his rate for drainage Mr Cudden states:

> "For this type of target cost pricing I would discount this rate by 25% …"

When amending various rates in the course of the preparation he goes on to say:

> "I consider your outputs to be on the 'very' optimistic side but this is where we have to be."

In another note Mr Cudden makes reference to a distinction between prices for 'traditionally priced contracts' and ECI contracts and concludes by saying:

> "I would be the first to admit that your strategy to pricing would closely mirror the strategy we take here, get to the table and negotiate from there up!"

[83] Furthermore, Mr McMillan QC pointed out that Mr Crawley records the plaintiff used 'the lowest credible rate' in preparing its bid. That the issue of agreeing a target cost was a major concern of the defendant is clear from the report which the CEP provided to the Board on 16 December. The concern that the CEP had is encapsulated in the following passage:

> "The CEP considers that the pricing methodology employed by BBMC represents a significant commercial risk to Road Service and as such the CEP recommends that BBMC's commercial submission is rejected.
>
> In the event that rates and prices are not deliverable or sustainable Road Service will be unable to agree a target price and consequently the contractor would not progress to Phase II. This would require Road Service to undertake a new procurement event that would add significant time and cost to the delivery of the section."

[84] It is clear that a key part of their thinking was that based on the rates provided by BBMC they would not actually agree a target cost. Mr Bowsher QC argues that this would not have happened but more importantly for the purposes of this issue this concern was not made clear to BBMC. I would not necessarily be sympathetic to this as a failure on the defendant's part as this is surely implicit in the request for clarification on the basis that the rates were "abnormally low". However, the concern I do have in this regard relates to what took place after the meeting with Mr White on 2 December when Mr Morris prepared the third document presented to the Board, namely his forecast for target costs and outturn costs for three different scenarios. The aim of this exercise was to demonstrate the impact of the allegedly low rates tendered by the plaintiff on the future target cost together with a forecast outturn cost to the department and the corresponding non-recoverable costs to BBMC based on the share mechanism set out in the conditions of contract. He says it was provided "for information only". This document proved to be extremely controversial in the trial when considering the issue of quantum. It became clear that this was almost an impossible task for Mr Morris and its value must be questionable.

[85] He presented three scenarios. In scenario 1 he simply applied the plaintiff's tendered amounts to the current cost plan with all the other costs un-amended. In scenario 2 the other costs were amended with percentage differences between the tender benchmark and the tender prices submitted by BBMC applied to the full value of drainage, earthworks, pavements and structures in the cost estimate. Scenario 3 was the same as scenario 2 with the addition that the percentage difference was also applied to the kerbs and footways on accommodation works. Thus in effect, scenarios 2 and 3 were an attempt to extrapolate BBMC's tendered rates into the non-tendered rates. This of course was controversial because the tendered costs were specifically chosen by the defendants because this was the area that was likely to have the greatest variation. The initial assessment was that the remaining matters in the Phase II contract would be fairly similar for all the tenderers. Leaving aside this issue, in terms of any potential loss suffered by the plaintiff this demonstrates the focus that the defendant was placing on the issue of target costs and the potential implications of the tender for non-tendered rates. In my view the plaintiff should have been given an opportunity to deal with this issue to comply with the regulations and the principles of fairness and transparency.

[86] In terms of what is required under the Regulations for verification at the very least this requires the economic operator to be told of the authorities concerns. Thus it is very difficult to understand why BBMC at the very least were not asked to confirm that their productivity and unit rates provided for drainage, earthworks, pavements and structures would be used as the basis for agreeing the target costs. However, in my view verification also requires an element of engagement between the authority and the operator whereby the authority explains to the economic operator the basis and reasons for its decision. I do not know how Mr Taylor could assert that "further correspondence will not yield anything". As was evident from

this trial there was much to be said about the outstanding issues between the parties at that time. In any event proper compliance would have given BBMC the opportunity to submit further information or evidence if it wished and in particular deal with the issue of the potential agreement of target cost which was obviously prominent in the defendant's thinking.

[87] In the circumstances, I consider that there has been a breach of Regulation 30(6)(c).

Other Concerns

[88] In this category there are two further matters that arise. The first is the way in which the matter was presented to the Board. The BBMC's bid was repeatedly presented in dramatic terms as being 59% of the benchmark price and 76% of the next lowest bid. Such figures would clearly give rise to an immediate concern about the reliability of the tendered figures. However, as Mr Crawley demonstrated in his evidence this dramatic presentation failed to take account of the fact that the parties were only tendering in respect of 20% of the overall value of the work and in respect of those items in which there would be a greater area of variation. If the defendants were correct in their assertion that the remaining areas would be similar for the various contractors then the overall percentage difference is much smaller. Again, there was controversy about what this might be given the unknown factors in the case with Mr Crawley arguing that it could be less than 5%. The presentation may have given a misleading impression to the Board.

[89] Of greater concern is the issue of bitumen prices quoted by BBMC. There is no doubt that the rate quoted by BBMC for bitumen prices played a role in the defendant's determination that the plaintiff's tender was abnormally low. In the commercial assessment report Chandler KBS describes BBMC's rate for the supply of bitumen (£263/tonne) as being "significantly lower than the current market rate". The report further concluded that "the only way of securing these rates is through a hedge funding arrangement" and advised in those circumstances that "this is a high risk procurement strategy with no guarantee of success".

[90] The basis for this assessment is the evidence from Eamon Scullion. In relation to the specific issue of the price quoted for bitumen his evidence was as follows:

> "The supply cost of bitumen (£263 per tonne for penetration grade bitumen …) appeared to be low. In order to obtain a benchmark rate I spoke with Dr Robert Peden from Tenants Bitumen who is a supplier of bitumen products in Northern Ireland. I explained who I was and the purpose of the call to Dr Peden and asked what the rate for penetration grade bitumen was in Q2 2009. Dr Peden suggested that £350 per tonne was a competitive rate and

> suggested I get the actual information from the Platts Index. Platts is a provider of energy and metals information and a source of benchmark price assessments in physical energy markets across Europe and the world. I asked Dr Peden if a rate between £260 and £270 per tonne was realistic for that period and he stated the only possible way of achieving such low rates is that the bitumen was procured through hedge funds which in itself could cause issues with storage. He also suggested that hedge funds were a high risk strategy."

[91] Arising from this Mr Scullion recommended that the defendant seek clarification from BBMC in respect of their bitumen rates. In response the plaintiff provided a quotation from Atlantic Bitumen, a well-established bitumen supplier in Northern Ireland, confirming a price for the relevant grade of bitumen at £263 per tonne. In considering this response Mr Scullion referred to the Platts Index which on 1 June 2009 quoted the average price at $370 per tonne. This translates at £230.41 per tonne. However, according to Mr Scullion this was not the Northern Ireland commercial rate for bitumen because various additional costs needed to be added to the price. His conclusion was that "the cost associated with the terms above clearly indicate that the plaintiff's tender rate was low".

[92] At the trial I heard evidence from Dr Peden in relation to his conversation with Mr Scullion and his view of what the competitive rate would have been at the relevant time. In support of his oral evidence he referred to a note in his diary of 2 October 2009 and a short note of his record of the conversation on 3 October 2009. His note makes interesting reading having regard to the evidence given by Mr Scullion. It is as follows:

> "Eamon Scullion rang representing consultant assessing A5 contract bids. Derry to Aughnacloy. He is receiving what he considers very low cost/tonne for bitumen from some tenderers. £350 seems average but some 'half that'. Mention that Ferrovial, SIAC, Lagans and Atlantic Bitumen were competing for the contract."

[93] A number of key issues arise from this. Initially, it is to be noted that the call related to the A5 contract and not the A8 contract. The call was apparently unscheduled and took place on a Friday afternoon sometime between 2 and 4pm. Comparing his note with the evidence of Mr Scullion it was his view that it was Mr Scullion who quoted the figure of £350 and not him. He accepted that he would have agreed with £350 as being a competitive price since at that time he was supplying material at that price. Thus he thinks this is why Mr Scullion uses the phrase "Dr Peden suggested £350". Dr Peden went on to say that in his view if this

was a serious intent to market test the prices for products at that time he would have needed sufficiently more information before any reliable figure could have been given in relation to explicit rates. In relation to the issue of hedge funds his view was that this may well have arisen from the inference that people were quoting prices half of £350 per tonne to nearly £175 per tonne which in Dr Peden's view would certainly have been impossible to achieve by any means other than through a hedge fund. Most importantly of all however he gave quite explicit evidence that he did not believe that a price of £263 per tonne for the relevant period was unsustainably low. His opinion was that "it was a realistic price".

[94] In dealing with this evidence Mr Scullion also referred to his own note which is written on a previous quote from Atlantic Bitumen dated 12 August 2009. He is absolutely adamant that the figure of £350 did not come from him and came from Dr Peden. Equally, he asserts the issue of hedge funds must have come from Dr Peden. Dr Peden did accept in cross-examination that he may well have referred to the issue of hedge funds but in the context of a much lower figure than £350 i.e. half of that.

[95] Overall, I was very impressed by the evidence of Dr Peden. I considered him to be a careful witness who gave his evidence fairly and made appropriate concessions. He did concede of course that he was trying to remember a conversation that took place 6 years ago but in this regard his contemporaneous note is important. Insofar as there is conflict between the evidence of Dr Peden and Mr Scullion, I preferred the evidence of Dr Peden.

[96] In general terms Mr Scullion has considerable merit as a witness. It was clear that he had a very detailed knowledge of the industry and I have no doubt that he formed a genuine view about the plaintiff's tender. Much of his detailed evidence did impress me. He gave his evidence with conviction and was comfortable in dealing with the detail of the various matters in dispute. If he had a weakness it was that this conviction may have closed his mind to explanations which were being provided. Perhaps an example of this is the frequent reference in his affidavit evidence to matters being "proven" when in fact the best that could be said was that they "supported" the arguments or judgments at issue. However, returning to the question of the bitumen, what is clear is that the rate actually quoted by the plaintiff was a sustainable rate. It was not low or abnormally low. Indeed, in his evidence Mr Morris accepted that he would have taken a different view on the reasonableness of the plaintiff's bitumen rate if Dr Peden's evidence had been known at that time.

[97] The significance of this issue is that it undermines the robustness of the efforts by the defendant to validate the plaintiff's tender and assess the clarification responses. Another issue that arises from the assessment of the plaintiff's bitumen quotation is the fact that the successful bidder quoted a rate of £212 per tonne. Mr Scullion justified his acceptance of this on the basis that that bidder had a direct supply from within its own firm. Indeed, this appears to have been the subject matter of a third clarification of LFC – something which was denied BBMC.

[98] It is very interesting that when it came to the debrief meeting the notes originally indicated that the plaintiff was to be informed that one of the reasons for the rejection of its bid related to the low bitumen rates. Prior to the meeting this was actually struck from the notes and was not referred to at the meeting. It was clear therefore that notwithstanding the entries in the CEP report it must have been recognised that this assertion could not be stood over.

[99] What are the implications arising from this? Certainly they confirm my view that there were significant flaws in the process adopted in assessing the plaintiff's tender. It may call into question the quality of the remainder of the evidence given by Mr Scullion. However, in my view having assessed Mr Scullion and listened carefully to his evidence I do not conclude that this means he was wrong in relation to the remainder of his evidence. In relation to the overall decision I accept what Mr Scullion says, that even if one accepts the rate of £263 per tonne as being reasonable and sustainable, it does not account for all of the very significant differences between the plaintiff's tender price for pavements which was in the order of £2m lower than the second lowest tender and £2.5m lower than the average of all the tenders. Overall, however, this issue supports my conclusion that there was a significant chance that the defendants may have taken a different decision had they been aware of the true position in relation to bitumen rates.

[100] These concerns lead me to the view that there has been a clear breach of duty by the defendant in respect of its consideration of the BBMC bid and specifically a breach of Regulation 30. I consider that if these matters had been properly dealt with there was a significant chance that the decision in this case would have been different.

[101] Notwithstanding these matters, there clearly remain concerns about the rates tendered in respect of earthworks, pavements and structures. In the course of the trial I heard very detailed evidence and analysis of the debate between the parties as to the sustainability and reliability of these rates. As I have said already, perhaps in hindsight I was unduly indulgent in this respect having regard to the warnings set out in the Amey case. It seems to me that on these issues I am being asked to assess matters of commercial judgment which I am not well placed to decide. Having heard all the evidence in this matter I was left with the view that there were very real and legitimate concerns about whether these rates were in fact reliable. In my view they were capable of sustaining a conclusion that those parts of the bid were abnormally low with the consequence that it was open to the defendant, properly advised, to come to the view that the whole offer was in effect abnormally low. Therefore, as a fact, I do not find that the defendant was wrong or guilty of manifest error in this regard.

Decision

[112] The defendant was in breach of Regulation 30 of the Public Contracts Regulations 2006 and is guilty of a breach of duty to the plaintiff.

[113] I have come to the conclusion that there was a significant chance that the defendant may have taken a different decision were it not for those breaches.

[114] I do not conclude that BBMC would necessarily have been awarded the contract if the concerns I have raised had been dealt with properly, as I take the view that many of the concerns raised by the CEP in relation to the tender could have supported a conclusion that the bid was abnormally low.

[115] In the event, for example, that it had been open for me to set aside the award of the contract to the putative successful tenderer under Regulation 47, I would have referred the matter back to the defendant for further consideration.

[116] That option is not available to me and I hold that the plaintiff is entitled to an award for damages.

[117] The difficulty that arises is how one assesses the loss or damage that the plaintiff has suffered as a consequence of the breaches which I have found.

[118] In the course of the hearing I heard detailed evidence from forensic accountants which were essentially based on the argument on behalf of the plaintiff that BBMC should have been awarded the contract. Whilst self-evidently the calculation of any such loss was fraught with difficulties given the high degree of speculation that was involved, I do not consider that it is an appropriate approach to damages in light of my findings.

[119] In deciding on a remedy, I bear in mind the following passage from the judgment in Energy Solutions EU Limited v Nuclear Decommission Authority [2015] EWCA Civ 1262 as follows:

> "In these circumstances the question resolves itself into an analysis of whether the claim for damages under the Regulations is a discretionary one. For the reasons the judge gave I am sure that it is not, at least not in the sense NDA contends. There is no requirement in English law for a breach of statutory duty to be shown to be 'sufficiently serious' before damages must be awarded. A breach is a breach. Once a breach is established the victim of that breach is entitled to be compensated in damages such as to put the victim in the position he would have been in had there been no breach. The assessment of the quantum of damages has an element of judgment about it, but the exercise upon which the court

> embarks is governed by well-established legal principles."

[120] As is clear, I have come to the view that there was a significant chance that the defendant's decision would have been different had it not been guilty of the breaches to which I have referred. I have therefore come to the conclusion that the loss to the plaintiff is in effect a loss of chance to obtain the contract in accordance with the well-known Chaplin v Hicks [1911] 2 KB 786 CA principles.

[121] In light of this finding I propose to give the parties the opportunity to make further submissions in relation to how such damages should be assessed. In doing so I make it clear that I do not accept that the plaintiff is entitled to compensation on the basis set out in its accountant's report which is predicated on the basis that the plaintiff should as a matter of law been awarded the contract. Equally, I reject the suggestion made on behalf of the defendants that even if the plaintiff had been awarded the contract he has failed to establish any loss. In my view the defendant's breach of duty should be marked by a meaningful award to reflect the loss of opportunity to the plaintiff to be awarded a significant and potentially lucrative contract.