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Judgment: approved by the Court for handing down | *Delivered:* **11/02/2015**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

ROL TESTING LIMITED

Plaintiff;

-and-

NORTHERN IRELAND WATER

Defendant.

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HORNER J

A. INTRODUCTION

[1] The plaintiff is a limited liability company which specialises in electrical testing, compliance, maintenance, UPS ("uninterruptable power supplies") and lighting. The defendant is a utility company, which is the sole provider of water and sewage services in Northern Ireland. The defendant decided that the inspection and maintenance of all its electrical equipment and circuitry should be carried out by the same specialist sub-contractor. In the past it had contracted with the plaintiff to provide for testing, inspection and reporting only. Under this proposed new contract, the defendant was adding electrical installation and repair, which had previously been carried out by Scott's Electrical Services Ltd ("Scott's"). The new contract was expected to last 36 months from commencement and was thought to be worth between £5.6m and £10.5m. It would provide for all the electrical circuits and systems across the defendant's estate in Northern Ireland. This new contract was an Electrical Inspecting Testing and Repair contract ("EITR contract"). The negotiated procedure was used to select the most economically advantageous tenderer ("MEAT"). On 12 December 2013 pre-qualification questionnaires ("PQQs") were uploaded to e-sourcing. On 13 December OJEU Notice of Contract C685 – electrical inspections, testing IT and repair- was advertised. The two stage process involved a sifting process to identify at least three candidates who would come through the

PQQs. The next stage involved a competition among the chosen candidates through the invitation to negotiate ("ITN") to find the most economically advantageous tender.

[2] The plaintiff by writ of summons dated 4 July 2014 seeks to have the tender process set aside for this contract. The plaintiff relies on, inter alia, breaches of the requirements of the Utilities Contract Regulations ("2006") as amended ("the Regulations") and Directive 2004/18EC (as amended) ("the Directive"), breaches of enforceable general principles of EU law and/or breaches of an implied tendering contract between the plaintiff and the defendant.

[3] The defendant claims that the plaintiff has no case to set aside the tendering process. It argues, inter alia, that under Regulation 45D of the Regulations the plaintiff has commenced proceedings outside the statutory limit of 30 days. An application was made under Order 33 Rule 3 of the RSC (NI) 1980 to determine, as a preliminary point, whether the plaintiff's claims to have the tender process set aside under the writ of summons of 4 July 2014 (and the statement of claim served on 25 November 2014), is out of time. The court agreed to proceed on this basis and the parties have filed affidavits and detailed skeleton arguments. It is only right that the court should record its thanks for the well-constructed, written skeleton arguments supplemented by thoughtful oral submission presented by both legal teams in general, and counsel in particular.

B. BACKGROUND

[4] It is necessary to understand the background to this dispute so that the strike out application may be put into its proper context.

[5] On 12 December 2013 PQQs were delivered to the interested applications. The deadline for prospective bidders to complete and return the PQQs was 14 February 2014. The plaintiff completed its PQQ and submitted it on 24 January 2014 – well within the deadline. On 22 May 2014 the plaintiff was advised that it had been successful and that it would move on to the next stage of the tender process, the ITN. There were three other successful candidates from the PQQ stage, namely, Irwin Electrical Services Limited ("Irwin's"), Graham Asset Management ("Graham's") and Scott's. The ITN documents were uploaded to e-sourcing for viewing by the successful candidates on Friday 30 May 2014 at 2.06 pm.

[6] Mr O'Lone, the Director of the plaintiff describes what happened in his affidavit:

(a) At the time the ITN documents were uploaded he was at a Smart Business show at the Odyssey dealing with customers. The result was that he did not open the package until Monday 2 June 2014.

(b) The ITN ran to 3,116 pages. Furthermore, the terms and conditions had to be amended. The web had to be accessed to download these amendments, and they then had to be superimposed upon the standard terms and conditions. He claims that this took most of 2 June 2014.

(c) He then sought a meeting on 4 June 2014 with the accountants, McKeague Morgan, for advice on pricing, profitability, detailed margins and inflationary projections. It was the first time the plaintiff had used outside expert assistance to help it complete a tender. The plaintiff relies on this to prove just how complex this part of the tender process was.

(d) A further modification to the ITN came through to the candidates on 5 June 2014 for viewing at 3.40 pm. This is not relevant to the present dispute.

(e) Mr O'Lone met the accountants on 9 June 2014 for discussions which included calculating how the tender would be priced. They needed a whole day to understand the process and how it worked.

(f) Arising out of this Mr O'Lone e-mailed an enquiry to the defendant on 11 June 2014, having heard from his accountants. He complained about the spread sheet and the way in which the annual cost of inspecting, testing and repairing electrical charts had been calculated. He claimed it was meaningless. The reply from the defendants sought to reassure him that there was no error. This did not satisfy Mr O'Lone who e-mailed again. The person replying did not understand the nature of the complaint. But a further response from the defendant on 12 June 2014 indicated that the query was now understood but that there was no error. On 16 June 2014 the defendant confirmed that there would be no amendments to the spread sheet in general and to the pricing of scheduled quantities in particular.

(g) On 13 June 2014 Mr O'Lone e-mailed again complaining that Irwin's had been terminated on two other contracts and, if these terminations had not been disclosed, these omissions would have been a breach of the tender process. The defendant thanked Mr O'Lone for bringing this to their attention and the defendant promised to revert in due course. It never did. The affidavit sworn by Mr Murray on behalf of the defendant does not deal with this issue at all. Consequently the court does not know whether there were omissions on the part of Irwin's to inform the defendant of relevant terminations in the previous three years and, if so, how the defendant dealt with those omissions.

(h) On 4 July 2014 McIldowies, solicitors on behalf of the plaintiff wrote to the defendant alleging that the procurement process had not complied with the 2006 Regulations, common law, EU law and the Government's own procurement proceedings in terms of equal treatment, transparency, fairness and value for money. A writ of summons was issued on the same day in very general terms. A response from DLA Piper, Solicitors acting on behalf of the defendant at that stage, was received dated 11 September. It made two points. First the letter noted the application was outside the time limit specified in Regulation 45D. Secondly, it stated on 3 different occasions that the proceedings were "without merit".

(i) On the same date the plaintiff obtained advice from Michael Jennings, chartered accountant and a partner in BDO, the well-known firm of accountants. He had been asked to comment on the procurement process. In particular he had been asked to review the schedule which permitted calculation of the annual cost of the contract. His conclusion was that the pricing schedule was not fit for the purpose in meeting the objectives of the EITR contract. In a letter of 15 October 2014 he states:

> "I do not consider the Schedule to be an adequate tool for use in the calculation of estimated annual costs of the Contract."

He claims that this is because "it does not take of the actual number of units required each time the need occurs". This is disputed by Mr Murray in his affidavit on behalf of the defendant who claims the defendant is best placed to assess "the hypothetical basket". Significantly there is no expert retained by the defendant contradicting Mr Jennings and explaining why he is mistaken in his conclusions.

(j) The ITN was weighted in favour of the lowest adjusted 1 year price receiving a score of 70 and the scores of the other ITN responses would be adjusted on a pro rata basis to determine the most economically advantageous tender.

(k) The tender process made it clear that if any information provided by any of the tenderers was false, then the defendant reserved the right to exclude the guilty party from the process.

(l) In addition the defendant specifically reserved the right to exclude any tenderer from further participation if the response in respect of any terminations of other contracts in the preceding period of 3 years represented an "unacceptable risk to the defendant".

C. STATUTORY PROVISION

[7] The relevant provisions are contained in Regulation 45D of the Regulations with deals with "general time limits for starting proceedings". This states:

> "45D.—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.
>
> (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;
>
> (b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first—
>
> (i) 15 days beginning with the day after the day on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
>
> (ii) 10 days beginning with—

(aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or

(bb) 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;

(c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.

(4) Subject to paragraph (5), the Court may extend the time limit imposed by paragraph (2) (but not any of the limits imposed by regulation 45E) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued."

D. THE PROPER APPROACH TO THE 30 DAY TIME LIMIT

[8] It is important to appreciate when looking at other legal authorities in relation to procurement cases that they can relate to different contracts, to different Regulations even though the words are similar and indeed the tender process itself can be different. The stage at which the challenge is made can also be different. Normally, the challenge occurs after the award of the contract, and when the unsuccessful tenderer has been informed of the "grounds" why its tender has failed. In this case the challenge has occurred during the course of the ITN. In this case a negotiated procedure was used. This is more flexible than other procedures such as open or restricted procedures which can also be chosen. The court has sought guidance from other decided procurement cases as to the proper principles that should be applied but has done so in the knowledge that the facts of these cases may

be different as may be the relevant contractual provisions or the applicable Regulations.

[9] At the outset the court was informed that the plaintiff was only putting forward two claims to challenge the tender process. The defendant claims that both of these are time barred. They may be briefly summarised as follows:

(i) The shortcomings in the Schedule do not permit the calculation of the estimated annual costs – ("Claim 1").

(ii) The alleged failure of Irwin's to disclose two previous contracts which they had entered into with Belfast City Council and Translink in the previous three years and the defendant's response to this information - ("Claim 2").

[10] In this case the unequivocal sworn evidence filed on behalf of the plaintiff is that in respect of Claim 1, the plaintiff had no idea that there was a problem with the ITN questionnaire until Richard O'Lone met with the accountants in McKeag Morgan on 9 June 2014. He states:

> "Ultimately the conclusion of the meeting was that the pricing documentation and costing information was fundamentally flawed."

That is not the subject of any challenge.

In respect of Claim 2, the plaintiff claims that it does not know whether or not there is a defect in the tender process. It suspects that there might be one because of the defendant's response to the information provided by Richard O'Lone that Irwin's had two contracts terminated in the previous three years. By thanking him for bringing this information to their attention, the inference might be drawn that this was information that they were acquiring for the first time. However, the defendant's assurance that it would review matters and get back to the plaintiff has not been made good.

Certainly so far as Claim 1 is concerned the court must determine what the proper approach is to the issue of when the plaintiff "ought to have known that there were grounds for starting proceedings had arisen". If the plaintiff was out of time in respect of either ground, then the court must go on to consider whether there is a good reason for extending the time limit under Regulation 45D(4).

[11] In Sita UK Limited v Greater Manchester Waste Disposal Authority (2011) EWCA Civ. 156 the Court of Appeal had to consider this issue of whether a challenge was time barred under the Utilities Contracts Regulations 2006. Provision in that case was somewhat different in that proceedings had to be brought "within three months from the date when grounds from the beginning of the proceedings

first arose unless the court considers there is a good reason for extending the period within which proceedings may be brought". However, the Court of Appeal stated:

> "At the heart of this case lies the question: what degree of knowledge or constructive knowledge is required before time begins to run? The knowledge must relate to, and be sufficient to identify the **grounds** for bringing proceedings, as it is expressed in Regulation 32(4)(b). The Directive does not use that word but instead Article 1 speaks of taking proceedings rapidly against a decision involving an **infringement** in community law. The concept of **grounds** in the Regulations must be sought consistently with that concept of **infringement**, as the judge below recognised (paragraph 127). So the question becomes- when is the information known or constructively known to the appellant sufficient to justify taking proceedings for an infringement of the public procurement requirements?" (see paragraph 19)

Elias LJ pointed out that Mann J at first instance had formulated the test thus:

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

This was the test adopted by Akenhead J in Corelogic Limited v Bristol City Council (2013) EWHC 2088 (TCC). I propose to follow it.

[12] Guidance of how to approach the issue of constructive knowledge can be obtained from the Supreme Court judgment of Lord Reed in Health Care at Home Limited v The Common Services Agency (Scotland) (2014) UKSC 499. At paragraphs [1]-[4] Lord Reed deals with the legal fiction of the reasonable man as a means of describing the standard to be applied by the court. He then goes on to discuss the issue of the "reasonably well informed and diligent tenderer" at paragraphs [5]-[16]. At paragraph [12] he said:

> "As the Advocate General noted in that passage, the yardstick of the RWIND tenderer is an objective standard applied by the court. An objective standard of that kind is essential in order to ensure equality of treatment, as the court explained in SIAC. In addition, as the Advocate General explained, such a standard is consistent with legal certainty: something which would be undermined by a standard which

> depended in evidence of the actual or subjective ability of particular tenderers to interpret award criteria in a uniform manner. Furthermore, to require proof of the subjective understanding of tenderers would be inconsistent with the need for review to be carried out as rapidly as possible, as required by Article 1 of Directive 89/665. The latter requirement has also been emphasised by the Court of Justice: see for example Universal-Bau AG v Entsorgungsbetriebe Simmering GmbH (2002) ECR 1-11617 at paragraph 74."

He goes on to say that:

> "Judgments of the Court of Justice subsequent to SIAC are consistent with this approach."

Accordingly, I consider in looking at the constructive knowledge the plaintiff should have possessed, the court must approach the subject on the basis of the knowledge of a "reasonably well-informed and normally diligent tenderer".

[13] Finally when a Court has concluded that the 30 day period has passed for a proposed tenderer on what basis should it be granted an extension of time under Regulation 45D(4)? In Turning Point Limited v Norfolk County Council (2012) EWHC 2121 (TCC) Akenhead J said at paragraph [37]:

> "A good reason will usually be something which is beyond the control of the given Claimant; it could include significant illness or detention of relevant members of the tendering team."

Such an approach to grant an extension of time makes good sense.

[14] The test for striking out was considered by Mann J in Sita UK Limited v Greater Manchester Waste Disposal Authority. He said at paragraph [18]:

> "The real question for me is whether it is clear enough, at this stage, that the claim is bound to fail on limitation grounds, and that a trial (or a fuller hearing of a preliminary issue) would not change that situation. Any doubt about it would have to be resolved in favour of the claimant. When I make any determination in this matter whether of fact, law or discretion, I should be taken to be doing so on the footing that the point has been clearly established,

> and that the same result will clearly be reached at trial."

This approach was followed by the Court of Appeal: see paragraph [41]. Again this approach commends itself to this court.

[15] In Mears Limited v Leeds City Council (2011) EWHC 40 (QB) Ramsey J said at paragraph [70]:

> "70. In summary therefore, I consider that the following propositions can be derived from the previous decisions on when time starts under Regulation 47(7):
>
> (1) The 'date when grounds for the bringing of the proceedings first arose' will depend on the nature of the claim in the proceedings.
>
> (2) The grounds for making certain claims may arise before there has been any decision to eliminate a tenderer from the procurement process or not to award a contract to a tenderer.
>
> (3) Where the claim is based on infringement of the Regulations occurring during the procurement procedure and before any decision has been taken to eliminate a tenderer or award a contract to another tenderer, the date when the grounds arise will depend on when the claimant knew or ought to have known of that infringement.
>
> (4) **Where a claimant knows or ought to know** of the infringement, the grounds for bringing the proceedings will then arise. They do not arise only when there has been a decision to eliminate a tenderer or award a contract to another tenderer.
>
> (5) Where the claim is based on grounds which arise out of a decision to eliminate a tenderer or award a contract to another tenderer then those grounds will only arise when the tenderer knew or ought to have known of the infringement and this will generally depend on the tenderer being given the reasons for the decision.

> (6) 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. There is not a separate requirement relating to the appropriateness of bringing proceedings."
>
> (Emphasis added)

[16] In Jobsin Co UK Plc v Department of Health (2001) EuLR 685 at paragraph [28] Dyson LJ said:

> "It would be strange if a complaint could not be brought until the process has been completed. It may be too late to challenge the process by then. A contract may have been concluded with the successful bidder. Even if that has not occurred, the longer the delay, the greater the cost of re-running the process and the greater the overall cost. There is every good reason why Parliament should have intended that challenges to the lawfulness of the process should be made as soon as possible. They can be made as soon as there has occurred a breach which may cause one of the bidders to suffer loss. There was no good reason for postponing the earliest date when proceedings can begin beyond that date."

Accordingly I consider that the plaintiff acted prudently to protect its position in bringing this challenge while the tendering process was on-going.

DISCUSSION

Claim 1

[17] The alleged defect in the ITN can be summarised thus. The winning tender should have submitted the most economically advantageous tender. However, the ITN precluded the tenderer from being able to price his tender accurately. It was not certain. There are 25,000 circuits to inspect per annum in the defendant's estate. The defendant knows or should know where these are situated. In the schedule it states, for example, in the range of 5-10 charts, that the cost per unit is £14.50 and the estimated annual quantity is 365. The tenderer is then invited to discount the unit price but to do so without knowing whether there are 365 with 5 charts or 365 with 10 charts. This can make an enormous difference to the outcome, producing a figure on the one hand of £52,925 and £26,467.50. As there are only 10 units in the 60-70 chart range, it can be seen that a mistake in the 5-10 category will have a massive

effect one way or the other. Indeed, it could be said that such a tendering process favours the incumbent tenderers, the plaintiff and Scott's, over the other tenderers, Graham's and Irwin's. Regardless of whether there is a breach of the requirement to afford equal treatment, the process, on the plaintiff's argument, is not transparent, is not certain, and does not serve to achieve the objective of insuring that the most economically advantageous tender succeeds. There is strong support for this claim from Mr Jennings in his report. The defendant has not sought to contradict his conclusions with expert evidence or pointed out any obvious flaws in his reasoning. On the evidence there are grounds which clearly indicate an infringement. Mr O'Lone gave unchallenged evidence about the plaintiff's actual knowledge and that this was not acquired until well after the cut-off date of 4 June, the writ being issued on 4 July, some 30 days later. The central issue therefore is when should the reasonably well-informed and diligent tenderer have had knowledge of Claim 1?

[18] The ITN documents were sent out on the afternoon of Friday 30 May 2014. The court considers that it would have been reasonable to study the documents over the weekend. Mr Dunlop BL for the defendant had great difficulty in explaining to me why the schedule was not defective and why Mr Jennings was mistaken in his conclusions. Equally, the plaintiff's counsel has had great difficulty in trying to explain the nature of the error in the statement of claim which has been served. I have no hesitation in concluding that it was reasonable for the plaintiff to bring in outside expert assistance to help it in understanding how the tender should work and with its completion. That being so it is reasonable to give the accountants until 4 June to consider all the tender documents and to organise a meeting at the plaintiff's offices for that day. The accountants should have been able to determine the error in the schedule and communicate it to the plaintiff on 4 June at the earliest and, at least, by 6 June. This gave them 2 days to consider the tender documents after their discussions with the plaintiff.

[19] I note that in reality the accountants did draw the attention of the plaintiff to the error within 2 days after their visit to the plaintiff's premises on 9 June 2014. That does not seem to be unreasonable. I consider that the possible range for acquiring the necessary knowledge lies between 4th and 6th June for the reasonably well informed and diligent tenderer. On the balance of probabilities I conclude that 6 June 2014 was the date when the hypothetical tenderer would first have acquired the necessary knowledge from its accountants which would have allowed it to conclude that there was clear indication of an infringement.

Accordingly, I conclude that the application to strike out Claim 1 as time barred fails.

If the court is wrong in this issue, I do not consider that any reason has been advanced which would explain the delay and as such the plaintiff would not be entitled to any extension. Mr Humphreys QC on behalf of the plaintiff was quite

candid in accepting that he could offer no good reason to extend time in accordance with Regulation 45D(4) if I found time to be sped.

Claim 2

[20] There is a possible infringement alleged on the basis that Irwin's did not disclose that in the three years leading up to the tender they had suffered two terminations of contracts with Translink and Belfast City Council respectively. It is important to highlight the following:

(a) A failure to disclose a termination in the operative period in the PQQ could, at the discretion of the defendant, result in the exclusion of the guilty tenderer: see 3.5.1.

(b) Furthermore, where there has been a termination the defendant reserves the right to exclude the party who has been terminated during the previous three years "if the response represents an unacceptable level of risk to the defendant".

The plaintiff did draw Irwin's alleged terminations to the defendant's attention on 13 June 2014.

There are at least four possible scenarios:

(i) Irwin's disclosed the terminations and the defendant exercised its discretion in their favour.

(ii) Irwin's did not disclose the terminations. On hearing of them from the plaintiff, the defendant brought them to the attention of Irwin's and the defendant exercised its discretion in favour of Irwin's.

(iii) Irwin's did not disclose the terminations to the defendant who has not yet determined whether to exercise its discretion in Irwin's favour.

(iv) There were no terminations and Irwin's have pointed this out to the defendant.

[21] In the circumstances I do not consider that it could be said that the hypothetical tenderer even now has the necessary information which would allow it to issue proceedings. Such a tenderer will require, at the very least, confirmation that Irwin's failed to disclose information about the terminations to the defendant and the defendant's response to that failure to disclose. It is only at that stage, at the earliest, that time will begin to run against the plaintiff. Accordingly Claim 2 is not time barred.

CONCLUSION

[22] In answer to the preliminary issues, the court says as follows:

(a) The plaintiff is not out of time in respect of Claim 1.

(b) Nor is the plaintiff is not out of time in respect of Claim 2.

I will hear the parties on issue of costs.