Neutral Citation Number: [2011] EWHC 1847 (TCC)

Case No:

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19th July 2011

Before :

MR JUSTICE AKENHEAD

- -

Between:

MERMEC UK LIMITED **Cla**

- and -

NETWORK RAIL INFRASTRUCTURE LIMITED **Defe**

- -

- -

Stephanie Barwise QC (instructed by **Systech Solicitors**) for the **Claimant**

Jason Coppel (instructed by **Eversheds LLP**) for the **Defendant**

Hearing date: 8 July 2011

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JUDGMENT

Mr Justice Akenhead:

1.

This a public procurement case which relates to tendering pursuant to the Utilities Contracts Regulations 2006 ("the Regulations"), as amended, by which Network Rail Infrastructure Ltd ("Network Rail") sought tenders for the provision of what is called Plain Line Pattern Recognition ("PLPR"), which is part of a maintenance regime involving high-speed examination of rail track and fittings. Mermec UK Ltd ("Mermec") has been an unsuccessful tenderer which has commenced proceedings seeking damages for alleged breaches of the Regulations. Network Rail as the Defendant in these proceedings seeks summary judgement primarily on the basis that all the complaints against it about the tendering process are made out of time under the Regulations and that several of the complaints are bound in any event to fail.

The Facts

2.

These facts are based on the witness statements and the Particulars of Claim. In late 2009, Network Rail was interested in securing a computerised method of inspecting what is called Plain Line Track. To date, this had been carried out by staff either on foot or on motorised trolleys by way of visual inspection. The idea was that, using a Network Rail inspection train, a camera system would perform pattern recognition on images so that the associated software would recognise and detect pre-

determined defects and "assets" and make "defect and asset reports". Initially for this project, Network Rail considered using a company called Selex System Integration Ltd ("Selex") which was one of the companies already part of its Infrastructure Maintenance Framework agreement. In December 2009, it entered into a bidding arrangement with Selex and by February 2010 it had been resolved that Selex was to be the lead bidder for the PLPR. In early March 2010, Selex submitted a bid and it is clear that Mermec collaborated with Selex in some way on this bid. Although in June 2010 Network Rail had indicated that Selex was the preferred bidder for the PLPR project, it decided for reasons which are not clear that it would seek competitive tenders.

3.
In July 2011, Network Rail decided to seek tenders for the PLPR project from tenderers from its approved "Link Up" suppliers for vision technology. The Invitation to Tender ("ITT") was dated 7 July 2010 and up to 5 companies were invited to tender at that time; these included Mermec and a company called Omnicom Engineering Ltd ("Omnicom"). The ITT described the project but made it clear that it required the PLPR system to be designed and developed with an "initial implementation [to] be deployed on the DVT [driving van trailer] as a trial on 6 different sections of Network Rail infrastructure on 16 pieces of track which equates to approximately 500 miles of footage". It was planned that when the trial was successful "the pilot will be rolled out across prioritised sites" and thereafter there would be a "national rollout" with Network Rail purchasing a further five DVT vehicles fitted with the same specification as the first DVT. The ITT described at Paragraph 1.4 that the scope of services involve the provision and installation of a “single complete PLPR system including the train mounted image capture system and on-train data processing and storage system”. A "capability statement summarising the Supplier’s previous experience, approach and success in delivering similar projects" was to be provided and a "fixed cost quotation for the deliverables covering the design/develop/deploy phase of the single unit and a capped cost for the supply and installation of up to a further five units" was called for. The ITT also provided a substantial amount of documentation apart from the ITT itself.

4.
The ITT provided a timetable which initially indicated that the contract would be awarded on 27 August 2010, albeit this was clearly later amended. Paragraphs 5.2 and 5.3 stated:

“5.2 The tender must be compliant with all the terms and conditions of the Contract Arrangements and Contract Requirements, without any non-compliance and the Compliance Statements in the Supplier’s Submission must be signed accordingly.

5.3 The Supplier must submit a compliant tender. In addition to this, non-compliant alternative tenders may be submitted where it can be demonstrated that significant benefits are offered.

Network Rail reserves the right not to consider non-compliant or alternative tenders if an unqualified compliant tender has not been submitted.

A separate submission must be completed in respect of any non-compliant or alternative tender and such tender must clearly list in the Compliance Statement all the non-compliances in detail and identify the benefits offered to Network Rail."

5.
Paragraph 7 of the ITT is addressed "Tender Evaluation":

“Network Rail will select the Supplier using the high-level weighting outlined below:

Award Criteria	% Weighting
Technical Requirements	65%
Commercial Requirements	35%

For further detail please see the Weighted Scoring Matrix."

6.
The Weighted Scoring Matrix identified how these two "Award Criteria" would effectively be marked. Thus the Commercial Requirements 35% was to be marked by giving 80% of it to the total tender costs score and 20% to "other commercial evaluation criteria". The Technical Requirements 65% was split into six sub-requirements, "Meeting Requirements", "Delivery Capability", "Architecture", "Strategic Fit", "Reference Site Visit" and "PLPR Demo" some of which were split into further sub-sub-requirements. Thus, for example, the marks for "Meeting Requirements" were to represent 35% of the 65% and the relevant part of the table was set out as follows:

Weight	Evaluation Criteria	Weight (1-5)	Rated (1-10)	Score
35%	1. Meeting Requirements			
	Meeting Requirements PLPR	5	10	29.17
	Value adding	1	10	5.83
				35.00

The PLPR Requirements were on another page themselves broken down into a further 10 sub-sub-sub-requirements each with a weighting and score to produce the figure of 10 in the fourth column above. Other sub-sub-sub-requirements were given under the "Delivery Capability" and "Installation Capability" sub-sub-requirements.

7.
On 6 August 2010, Mermec submitted its tender and, having given to Network Rail on about 19 August 2010 a presentation of its bid, it submitted various tender clarifications on 24 August 2010. On 3 September 2010, Network Rail invited tenderers to submit a "Best and Final Offer" ("BAFO"). Following an apparently abortive attempt on the part of Mermec to obtain certain clarifications from Network Rail, Mermec submitted its BAFO on 8 September 2010.

8.
On 23 September 2010, Network Rail wrote by e-mail to Mermec informing them that the tender evaluation process had now been completed and informing them "that on this occasion you have not been successful" and that Network Rail had "decided to award the contract to Omnicom…" The letter went on:

"As explained in the Invitation to Tender documents, the award criteria and weightings were as shown in the attached table, which now also indicates the score you achieved, the score of the successful [tenderer] and the reasons for the award of the scores."

Mermec was informed that the statutory "standstill period" was expected to end at midnight on 3 October 2011.

9.

The attached table was set out in six columns: "Award Criteria", "Weight", "Your Score", "Reasons for award of score", "Successful Omnicom Score" and "Reasons for award of [Omnicom] score". Under the heading "Technical Requirements-65%" there were set out the six sub-requirements referred to above; in four of these, Mermec had higher scores than Omnicom; however, against Mermec's overall score of 71.7 out of 100, Omnicom scored 72.06 out of 100. Under the heading "Commercial Requirements-35%", there were set out the requisite two sub-requirements and, although the tenders achieved the same score on the "other commercial" requirements, Omnicom scored 80 as the "best value whole life cost" whilst Mermec scored 62.7 with the reason given as "high whole life cost"; Mermec achieved a score on the Commercial Requirements of 78.27 out of 100 whilst Omnicom scored 96 out of 100. A total aggregate weighted score was 74.02% for Mermec and 80.44% for Omnicom. The reasons contained brief verbal observations. By way of example, against the "Delivery Capability" Technical Requirement, the reasons for Mermec scoring 20.06 against Omnicom's score of 24.75 were:

"Lack of UK organisation and experience, no mention of fitting company. Assumptions are poor. Safety and installation planning is unconvincing. Recent European Rail experience and track record."

10.
There is no evidence as to what was said or done by Mermec personnel over the next six days. However, on 30 September 2010, the matter was referred to Mermec's solicitors in this case in particular to a Mr Whitlock who had a discussion with a representative of Mermec, a Mr Ebreo, on 1 October 2010. On that date, Mermec wrote to Network Rail materially as follows:

"We are most surprised and very disappointed at your decision not to award the contract to us, which is contrary to expectations we have received regarding the quality and price of our bid.

We wish to fully understand the basis of the scoring of not only our bid but also the bid you consider to have been successful ("the Omnicom Bid").

We note that under regulation 33 (1) of the Utilities Contracts Regulations…[as amended] you are required to notify us of:

1.
the criteria for the award;

2.
the reasons for the decision, which will include the characteristics and relative advantages of the successful tender;

3.
the score (if any obtain by the economic operator which is to receive the notice and also the economic operator to be awarded the contract

You are also required to provide anything required by paragraph 33 (10) which states that any reasons are to be provided as to why an economic operator may have been unsuccessful under the requirements of regulation 12(6) and 12(7).

Your Award Decision Notice merely sets out the criteria together with its relative weight and score. The reasons for the score do, however, contain many subjective comments and do not demonstrate an objective analysis of the relative characteristics of each tender. For example…

Accordingly, we consider that your Award Decision Notices is defective and does not include all of the information you are legally obliged to provide…

We wish to hold a meeting with you to discuss the detail of our scoring and evaluation when compared to the tender you consider successful, as we fully believe that our bid fully meets your requirements. We are able to meet to discuss the requests…

In the meantime, we reserve our right to start proceedings under regulation 45F of the Regulations in relation to a breach of duty under regulation 45A. Please indicate your address for the service of such proceedings."

11.
Mr Whitlock met Messrs Garner, Tracy and Carotti on 13 October 2011 and with them attended a meeting with Network Rail on 14 October 2010, which had been set up on the telephone. Mr Tracy made a note of this meeting which contains his observations as well as a note of what was said:

"…NR insisted that our Price was very high as compared to competition. Our final evaluation through scoring analysis and NR intelligence indicates that for the whole life costs of the pilot project we were about £250,000 more expensive than Omnicom and for the national rollout double Omnicom-£4m higher.

We reviewed the scoring numbers with NR and made many comments as laid out in our notes document…We were ably supported by Mr Shaun Whitlock…both at the meeting and during preparation. It was fairly obvious that NR made significant efforts to "arrange" the technical scoring so that we could not win the bid. We stress the fact that the [Mermec] bid was only for bogey mount and not body mount as Omnicom proposed. We were criticised for not supplying a detailed quote for body mounting. They considered it an omission on our part. We stressed that they [had] not replied to our specific bogey/body mounting questions prior to our submission of the BAFO. They also made several comments regarding the inferior quality of our bid as compared to Omnicom.

It was clear that NR had no intention of changing their decision and felt very comfortable in their position. After 90 minutes of meeting we considered no further progress could be made. We did however request the detailed scoring matrix as per the scoring scheme communicated with the ITT. They will review with their management to determine if they will supply-Systech to follow up.

Our legal position will be supplied by Systech-my view is that any further legal action will jeopardise our long-term position with regard to being able to supply NR with any products..."

12.
Mermec's solicitors wrote to Network Rail on 26 October 2010 referring to the earlier meeting, stating:

"At this meeting you had in your possession a set of detailed scores leading to the eventual scores our client received on each of the criteria in your letter of 23 September 2010. You referred to these scores at regular intervals during the meeting when answering our client's questions upon the scores you had awarded to it.

We requested a copy of those detailed scores during the meeting and you undertook to look into this. To date neither ourselves nor our client has received the said detailed scores.

We therefore formally request that you provide these detailed scores forthwith together with the same document which applied to the successful tenderer's scores."

13.
On 28 October 2010, Network Rail responded saying that it would not be "appropriate to provide any further material to you regarding the tender evaluation process for the above project" adding that they had concluded that it had "already supplied your clients with a standstill letter containing a breakdown of your clients' scoring and that of the successful bidder, as well as conducting a telephone debrief and holding a subsequent meeting on 14 October 2010 to discuss the evaluation."

14.
On 22 December 2010, Mermec issued its current Claim in the TCC seeking damages for breaches of various regulations. There was an accompanying letter dated 22 December 2010 but it is accepted that this letter and the Claim Form were not served on Network Rail until 30 December 2010. There is no explanation as to why this delay occurred.

The Particulars of Claim

15.
Mermec's Particulars of Claim set out some of the above facts and a synopsis of various of the relevant regulations some of which it asserts Network Rail was in breach of. The first two complaints (Paragraphs 63 and 64) relate to alleged breaches of Regulation 33 involving failures by Network Rail to provide to Mermec relevant or necessary information concerning the relative characteristics of the successful tender compared with its tender, in particular the various scores against the sub- or sub-sub criteria or requirements so that it could not assess the relative characteristics so as to make a decision within the "standstill period". Paragraphs 73 and 74 essentially involve a repetition of Paragraph 63 and 64. The complaint in Paragraph 65 is not pursued. The third complaint in Paragraph 66 is an alleged failure by Network Rail properly to assess Mermec's bid as it is suggested that it was not given "full credit for the solution it proposed which was based upon the ITT specification criteria that the equipment was to be mounted on a DVT". Paragraphs 67 to 72 were explained in argument to be part of the narrative and support for the complaint made in Paragraph 66. The complaint made in Paragraph 75 is:

"The Defendant failed to properly score the successful tenderer when compared to the Claimant's tender. Until expert reports have been prepared and exchanged the Claimant is unable to set out the exact particulars of the incorrect scoring and will do so either in a witness statement and/or a schedule of loss as soon as possible. The reason why the Claimant is unable to provide these particulars at this stage is that the Defendant, when questioned at the meeting of 14 October 2010, only answered in general and vague terms which left the Claimant unable to properly assimilate the Defendant's technical scoring. Furthermore the Defendant has not provided any detailed document or record which enables the Claimant to fully understand the Defendant's position."

Mermec goes on to claim its wasted costs of tendering (€230,200) and to reserve its rights to make any other claim for loss and damage.

The Regulations and the Law

16.
The Regulations apply to a "utility" whose definition expressly, by name, includes Network Rail and to an "economic operator" whose definition applies in this case to Mermec. The wording of the Regulations is very similar to that of the Public Contracts Regulations, as amended. Relevant parts of the Regulations are as follows:

“4. (3) A utility shall (in accordance with Article 10 of the Utilities Directive)—

(a) treat economic operators equally and in a non-discriminatory way; and

(b) act in a transparent way.

13.—(1) Where a utility intends to award a contract on the basis of the offer which is the most economically advantageous in accordance with regulation 30(1) (a), it shall indicate in the contract notice whether or not it authorises economic operators to submit offers which contain variants on the requirements specified in the contract documents and a utility shall not accept an offer which contains a variant without that indication.

(2) Where a utility authorises a variation in accordance with paragraph (1), it shall state in the contract notice the minimum requirements to be met by the variants and any specific requirements for the presentation of an offer which contains variants.

(3) A utility shall only consider variants which meet its minimum requirements as stated in the contract documents in accordance with paragraph (2).

(4) A utility shall not reject an offer which contains variants on the requirements specified in the contract documents on the ground that—

(a) where it intends to award a services contract, the offer would lead to the award of a supply contract; or

(b) where it intends to award a supply contract, the offer would lead to the award of a services contract…

30.—(1) Subject to regulation 31 and paragraphs (6) and (9) of this regulation, a utility shall award a contract on the basis of the offer which—

(a) is the most economically advantageous from the point of view of the utility; or

(b) offers the lowest price.

(2) A utility shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including delivery date or period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after sales service and technical assistance, commitments with regard to parts, security of supply and price or otherwise.

(3) Where a utility intends to award a 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.

(4) When stating the weightings referred to in paragraph (3), a utility may give the weighting a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.…

33 (1) Subject to paragraph (13), a utility shall, as soon as possible after the decision has been made, inform the tenderers and candidates of its decision to award the contract, and shall do so by notice in writing by the most rapid means of communication practicable.

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

(a) the criteria for the award of the contract;

(b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—

(i) the economic operator which is to receive the notice; and

(ii) the economic operator to be awarded the contract, and anything required by paragraph (10);

(c) the name of the economic operator to be awarded the contract; and

(d) a precise statement of either—

(i) when, in accordance with regulation 33A, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies; or

(ii) the date before which the utility will not, in conformity with regulation 33A, enter into the contract.

45.—(1) In this Part, except where the context otherwise requires—

"claim form" includes, in Northern Ireland, the originating process by which the proceedings are commenced…

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) and (4), such proceedings must be started promptly and in any event within 3 months beginning with the date when grounds for starting the proceedings first arose.

(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…

(4) The Court may extend the time limits imposed by this regulation (but not the limits imposed by regulation 45E) where the Court considers that there is a good reason for doing so.

(5) For the purposes of this regulation, proceedings are to be regarded as started only when the claim form is served in compliance with regulation 45F(1).

45F.—(1) Where proceedings are to be started, the economic operator must, after filing the claim form, serve it on the utility…

(5) In this regulation, "serve" means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served."

17.

The impact of the provisions of Paragraphs 45D is that an economic operator such as Mermec, if it wishes to secure any of the remedies allowed by other provisions in Paragraph 45, has to commence proceedings within the time limit. The comparable provision in the Public Contracts Regulations (Regulation 47D) has been reviewed in **Sita UK Ltd v Greater Manchester Waste Disposal Authority** [2010] EWHC 680 (Ch) by Mr Justice Mann; he decided that the "promptness" test contravened the provisions of Directive 89/665. In effect he decided that the time period for the institution of proceedings was to be considered as three months from the time when the claiming economic operator knew or ought to have known of the alleged infringements of the Regulations, subject to any extension of that period. The **Sita [2011] EWCA Civ 156** case has since been upheld in the Court Appeal [2011] which reviewed a number of authorities including the European Court of Justice decision in **Uniplex (UK) Ltd v NHS Business Services Authority**[2010] 2 CMLR 47 to which Mr Justice Mann had had regard. Lord Justice Elias, with whom Lord Justice Rimer agreed, went on:

“19. 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" of Community law. The concept of "grounds" in the regulations must be read consistently with that concept of "infringement", as the judge below recognised (para 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?

20. Some assistance in answering this question can be gleaned from the Uniplex decision itself. The ECJ said this:

"30) However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.

31) It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings."

21. This reflects the approach of the Advocate General in that case who observed that time should run from the date when an unsuccessful bidder had been told the "essential reasons" why their bid had failed. The Advocate General observed that this would normally be from the date when the tenderer was sent a summary of the relevant reasons - a requirement which the Directive, following an amendment in 2007, now requires.

22. Plainly, the ECJ is drawing a clear distinction between the reasons for a decision and the evidence necessary to sustain those reasons. It does not envisage that the prospective claimant should be able to wait until the underlying evidential basis for the reasons is made available. To put it in the language of the regulations, there is a difference between the grounds of the complaint and the particulars of breach which are relied on to make good those grounds. Once the prospective claimant has sufficient knowledge to put him in a position to take an informed view as to whether there has been an

infringement in the way the process has been conducted, and concludes that there has, time starts to run.

23. But what degree of knowledge is sufficient to provide that informed view that a legal claim lies? That depends upon how certain a case should be before a party is expected to take proceedings. Is a claimant expected to initiate proceedings once there is an arguable case, a reasonably arguable case, a strongly arguable case, or even a certain case? He may have knowledge sufficient to enable him to conclude that he has an arguable case but it may not be sufficient to enable him to take an informed view as to whether it is a strong case. So if the latter test is the right one, time will not begin to run until he acquires further knowledge which enables him to take an informed view about that. In my judgment Uniplex does not assist in determining that question. It is true that in answer to the first question it says that time runs from when the claimant "claimant knew, or ought to have known" of the infringement. But I do not believe it was thereby intending to state that the claimant is entitled to be certain that there is an infringement before taking proceedings. The issue the ECJ was considering was simply whether time ran from the date of the (alleged) infringement or the date of actual or constructive knowledge about it. The Court was not addressing an argument how strong the evidence of infringement has to be before time starts to run, and I do not think it engaged with that question.

24. In the domestic context this was a matter that was considered by the House of Lords in Haward & Ors vFawcetts (a firm)[2006] 1 WLR 68 which involved a claim for damages in a latent damage case where section 14A of the Limitation Act 1980 applied. Lord Nicholls, in a characteristically succinct formulation, described the degree of knowledge required to bring a claim in the following way (para 9):

" 'knowledge'" does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence; suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice".

25. He added that "it is not necessary for the claimant to have knowledge sufficient to enable his legal advisors to draft a fully and comprehensively particularised statement of claim". Lord Nicholls added that one should ask in broad terms whether the claimant had knowledge of the facts on which his complaint is based.

26. In these proceedings Mann J adopted a test which was arguably more favourable to the appellant. He formulated it thus:

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

30. I have no doubt that this formulation that time should not run until the claimant knows that he has a real likelihood of success puts the test too high, and there is no authority supporting it. It appears to be a complaint that knowledge of facts which, to use the judge's words, clearly indicate an infringement will not be enough to set time running. I agree with Ms Rose that this analysis confuses the detailed facts which might be deployed in support of the claim with the essential facts sufficient to constitute a cause of action. Mr Bowsher's approach would undermine the principle of rapidity which lies at the core of these provisions.”

18.

Elias LJ also confirmed that the proper test for considering whether in effect a claim for breach of the Regulations may be struck out is that the court must be satisfied that the claim is bound to fail as a matter of law and/or fact on limitation grounds. In effect the Court of Appeal held that time starts running when the tenderer has sufficient information to commence proceedings (see for instance Paragraph 37); the Court applied the test put forward by Mr Justice Mann, set out in Paragraph 26 of Elias LJ's judgement. It follows from Paragraph 30 that time does not start to run from the time that legal advice has or should reasonably have been taken; broadly, the claimant must have knowledge of the basic facts which clearly indicate an infringement of the Regulations. One must bear in mind that the claiming party has time within the allotted three months to issue proceedings and that should be more than sufficient for it to take legal advice and formulate its written claim.

19.
This echoes the earlier Court of Appeal decision in **Jobsin Co UK PLC v Department of Health** [2003] EWCA Civ 1241 in which Lord Justice Dyson said:

"33…Although the maxim "ignorance of the law is no excuse" is not a universal truth, it should not in my view be lightly brushed aside. Regulation 32(4) specifies a short limitation period. That is no doubt for the good policy reason that it is in the public interest that challenges to the tender process of a public service contract should be made promptly so as to cause as little disruption and delay as possible. It is not merely because the interests of all those who have participated in the tender process have to be taken into account. It is also because there is a wider public interest in ensuring that tenders which public authorities have invited for a public project should be processed as quickly as possible. A balance has to be struck between two competing interests: the need to allow challenges to be made to an unlawful tender process, and the need to ensure that any such challenges are made expeditiously. Regulation 32(4)(b) is the result of that balancing exercise. It may often be the case that a service provider is not aware of the intricacies of regulations such as the 1992 regulations, and has little or no understanding of how they should be interpreted. If ignorance of such matters were routinely to be regarded as a good reason for extending the time for starting proceedings, the clear intent of regulation 32(4)(b), that proceedings should normally be started promptly and in any event not later than three months after the right of action first arose, would be frustrated."

20.
The recent Court of Appeal case of **J Varney & Sons Waste Management Ltd v Hertfordshire County County Council**[2011] EWCA Civ 708 shed some light on what has to be disclosed by a utility such as Network Rail under Regulation 33 when it notifies the losing tenderers of its decision to award the contract elsewhere, albeit that the case related to the Public Contract Regulations. This was a case which involved an ITT which identified that the tender submissions would be evaluated as to 65% on an "most economically advantageous" basis and as to 35% on the basis of resources to be allocated to the delivery of services and the manner in which the services were proposed to be provided. Lord Justice Burnton gave the lead judgment, relevant parts of which are as follows:

"34. Mr Coppel's primary submission was that the subject matters of the Return Schedules were criteria for the award of the contracts, and that the Council therefore had to identify them, or those that were criteria, as such, together with the weightings the Council proposed to attach to them, as required by regulation 30(3). In the circumstances referred to in regulation 30(5) it would be unnecessary to give weightings, but those circumstances did not apply in the present case. Even if the Return Schedules were sub-criteria, it was necessary for tenderers to be informed of the weightings attached to each of them. In this connection, he relied on the judgment in Letting International v Newham LBC [2008] EWHC 1583 (QB); [2008] LGR 908, in which Silber J cited and applied the

definition of "criterion" in the Shorter Oxford English Dictionary as meaning "principle, standard, or test by which a thing is judged, assessed or identified". If that definition is appropriate, it would mean that regulation 30 requires every standard by which a bid is to be evaluated, no matter how minor or subsidiary, to be disclosed as such with its proposed weighting. That would seem to me to be impracticable, and I do not think it is what Community law requires."

Much of this case was concerned with whether or not certain unspecified sub-criteria within the marking system should have been disclosed. It is certainly arguable that in a case such as the current case all the criteria used to "mark" a tender which are specified in the ITT should be disclosed when the utility comes to notify its decision to the tenderers and that, at the very least, it should identify what marks it has awarded to the particular losing tenderer and the successful tenderer against the criteria which it has specified in the ITT.

Discussion

21.
Essentially, Network Rail argues that Mermec's case as currently formulated is bound to fail because it will all be defeated by a limitation defence and the claims under Paragraph 63 and 64 of the Particulars of Claim are bound to fail in any event. Mermec argues that the time did not begin to run until 14 October 2010 or at the earliest 1 October 2010 and that in any event it is premature for the Court to dismiss its case before any Defence is submitted and document disclosure provided. In the alternative, it seeks an extension of time to bring its service of its Claim within time. During the course of her able argument Ms Barwise QC for Mermec indicated that, although it was not yet pleaded, her client would in time wish to assert that in effect there was never a "level playing field" and that Network Rail had "arranged" things so that Mermec could not win the bid.

22.
I have formed a very clear view that Mermec's claim as formulated, however otherwise good and arguable, is bound to fail on the grounds that it was served too late. My reasons are as follows:

(a) It is not necessary for this Court to decide whether the notification letter dated 23 September 2010 contained enough information or not in terms of spelling out the scoring on the sub-sub- or sub-sub-sub-criteria. On its face, it did spell out the scoring both of the high level criteria (Technical and Commercial Requirements 65%/35%), as specified in the main body of the ITT in Section 7 (see above) and of the sub-criteria. If it was necessary pursuant to Regulation 33 in the context of this case for Network Rail to identify the marking against the sub-sub- and sub-sub-sub-criteria, that was obvious on the face of the document provided. Therefore to the extent that complaint in this regard is made, as it is in Paragraph 63, 64, 73 and 74 of the Particulars of Claim, the basic facts supporting any complaint were and must have been clear in effect on the day on which the letter of 23 September was received, that is the same day. The right to sue or make a claim arose on that day.

(b) The most substantive claim is that set out in Paragraphs 66 to 72 of the Particulars of Claim which is to the effect that Network Rail marked Mermec's bid insufficiently highly for its proposal to mount the equipment on a DVT. This, as explained in argument, most obviously related to the "Meeting NR Requirements" sub-criterion to which 35% of 65% of the overall marks applied. In any event, Network Rail marked Mermec higher than Omnicom but the argument is that it should have been higher still because in effect it is argued that Mermec's solution wholly met the Network Rail requirements. If that is right, then again that must have been obvious on the day on which Mermec received the notification of outcome, namely 23 September 2010.

(c) It is said that it was only at the 14 October 2010 meeting that the Mermec people knew or became aware of this. However, if this so, there are substantial and serious inconsistencies in the evidence put before the Court by Mermec. Mr Tracy's note of the meeting does not obviously note this as arising. Mr Whitlock, Mermec's solicitor, who attended the meeting of 14 October 2010, without himself verifying it, says at Paragraph 9.1.10 of his second witness statement that Mr Carotti of Mermec had said to him that a Ms Lennox of Network Rail "suggested to him that perhaps Mermec's system was too technically advanced, a "GOLD PLATED" solution and thus NR's technician decided to choose a less expensive and not too "gold plated" one." This is said to support the assertion that Mermec should have been scored higher within the Technical Requirements scoring. However, the Particulars of Claim in describing the meeting as one at which Network Rail only talked "in general and vague terms which left the Claimant unable to properly assimilate the… technical scoring" contradict this; the Particulars of Claim are supported by a Statement of Truth signed by Mr Whitlock with the authority of his client. In effect, his second witness statement is inconsistent with the Particulars of Claim and is therefore unreliable.

(d) At its highest, there is nothing in the evidence which suggests that the meeting of 14 October 2010 provided information the bare bones of which were not already available and discernible from the letter of 23 September 2010. As Mr Whitlock says at paragraph 7 of his second witness statement, "it was only really at that meeting that Mermec became convinced that NR had applied a flawed approach to the evaluation of its tender…". The use of the word "convinced" is telling because it necessarily implies that prior to the meeting there was a belief on the part of Mermec that there had been a flawed approach. Doubtless, Mermec could ascertain well before 14 October 2010 if its technical bid was sufficiently perfect or "gold plated" to justify a higher mark than it was given. As Mr Whitlock himself says in his first statement, the failures about which complaint is made now by Mermec could have been "known about by the Claimant once it had had the opportunity to read and comprehend the" 23 September 2010 letter.

(e) There was nothing wrong with Omnicom submitting, or in Network receiving, a "variant" bid as such because the ITT expressly permitted it, subject to certain reservations and Regulation 13 recognises that such a course of action is appropriate. It was of course open to Mermec to put in a variant bid itself, which might have enabled it to put in a lower price than it did.

(f) The question then arises as to when the three months period for the purposes of Regulation 45D (2), as now interpreted, started to run. Undoubtedly, the grounds for starting proceedings had crystallised on or by 23 September 2010 in that the marking was completed and the decision had been taken not to place the contract with Mermec but with Omnicom; any errors which occurred had occurred on or by that date. There is no doubt that the letter was received on that date by Mermec. There is no evidence and no suggestion that it was not seen and read on that date. The date of 23 September 2010 was a Thursday and neither that day nor the following day were public holidays. There is indeed no evidence that anything, like illness of critical personnel, intervened to prevent the relevant people considering the letter, its contents and its ramifications.

(g) I can see no reason why I should conclude anything other than that on 23 September 2010 or possibly within one or two days at the outside thereafter Mermec as a company had a knowledge of the basic facts which would indicate, objectively, that it had any arguable claim. By saying this, I do not necessarily accept that there was or is an arguable claim but the basic facts to support the claim which Mermec wishes to pursue were ascertainable at that time. There is nothing obvious which had happened between then and the time at which it formulated its claim in writing as put forward in the Particulars of Claim as would have made the Particulars of Claim incapable of articulation in their

current from from on or about 23 September 2010. The test articulated by Mr Justice Mann in the **Sita** case is met as at 23 September 2010 or within one or two days at the outside. The basic facts which currently are deployed to support the Particulars of Claim were known at that time. If the relevant personnel at Mermec did not bother to look at the letter, which is inherently unlikely, that can not assist in deferring the time when the three-month period starts. It matters not that Mermec did not seek legal advice until 30 September 2010 although, interestingly Mr Whitlock does not actually say that legal advice was not sought before; he merely says (at Paragraph 7 of his second statement) only that the matter was not referred to him until 30 September.

(h) Mermec's letter of 1 October 2010, again, interestingly, articulates a number of reasons and examples why the award decision notice of 23 September 2010 was said to be defective.

(i) The fact that Mermec could not be certain about all the facts or that it definitely had an unchallengeable case does not mean that time does not start running. All that is needed is a knowledge of the basic facts which would lead to a reasonable belief that there is a claim. There is not one fact pleaded in the Particulars of Claim that was not ascertainable upon a reading of the 23 September 2010 letter. It might be said that the letter did not spell out, if indeed it was the case, that the accepted Omnicom bid was in relation to a "variant" but it is of interest that Mr Tracy's note of the later 14 October 2010, although referring to the fact that Omnicom was proposing a "body mount" for the equipment as opposed to the "bogey mount" proposed by Mermec, does not suggest that this was information provided at the meeting. Be that as it may, the basic fact ascertainable on receipt of the 23 September letter must have been that, as Mermec itself must have known or believed (if indeed it is correct), its technical bid wholly met the Technical Requirements and should have been marked accordingly.

(k) Thus, if time started running as it must have done before 30 September 2010, that is more than three months before the date on which Mermec now accepts its Claim was served, its claim is barred by the three-month limitation period imposed by the Regulations as properly interpreted in the light of the relevant Directive.

23.
The main remaining issue is whether or not there is some good or arguable reason why there should be an extension of time in effect to bring the service of the Claim on 30 December 2010 within time. I do not consider there is any such reason:

(a) There is no explanation from Mermec as to why the Claim could not have been drafted let alone served weeks before it was served.

(b) It is perhaps unhelpful to try to give some exhaustive list of the grounds upon which extensions should be granted but such grounds would include factors which prevent service of the Claim within time which are beyond the control of the claimant; these could include illness or detention of the relevant personnel. There must however be a good reason and none is advanced by the Claimant in this case.

(c) It is said that the delay was only some six or seven days and that there should be an extension for such an insignificant period because it is a relatively short delay. However, there is no point in having a three-month period if what it means is three months plus a further relatively random short period.

(d) The evidence is however that the Particulars of Claim were drafted and ready to be served on 22 December 2010 which of course would, just, have been within the three months period. No

explanation has been offered as to why it was not served if necessary by hand on that date or even shortly before . There clearly was no problem preventing Mermec or its advisers from articulating a claim and serving it within a few weeks of 23 September 2010. Even if they hoped to get more information from Network Rail, it was clear from the latter's letter of 28 October 2010 that no further information was provided. Certainly, all the basic facts relied upon in the Particulars of Claim were known well before them.

(e) It was said by Counsel for Network Rail that if, as appears at least possible, the Claim was served late as a result of some error on behalf of Mermec's legal team, Mermec will have a claim for professional negligence against its lawyers and that should militate against the granting of any extension. I would rather not speculate as to whether there was any culpable carelessness on the part of the lawyers. There are several possibilities, one of which is professional negligence on behalf of the lawyers. Another is that there was a lack of urgency on the part of Mermec in the October to December period. As there is no explanation for the delays, that itself is reason enough to undermine any entitlement to an extension of time. Limitation periods are there for a purpose and extensions of limitation periods should be for good reason; there is no obvious good reason which has been floated in this case by Mermec, which is telling.

24.

The final point taken by Mermec is that the three-month period does not begin to run until 10 days after (in this case) the e-mail communication of the 23 September 2010 letter. This is based on an interpretation of Regulation 45D. However, in my judgement, this simply does not work on the wording. Regulation 45D (2) talks about proceedings being started "within 3 months" and Regulation 45D (3) then talks about Paragraph (2) not requiring "proceedings to be started before the end of…10 days beginning with…the day after the date on which the decision is sent…". One needs to remember that the 2009 Amendment Regulations which brought in Regulation 45D came into effect on 20 December 2009 before the first instance decision in **Sita** at a time when there was still an obligation to start proceedings "promptly and in any event within 3 months"; it is obvious that Regulation 45D (3) was primarily supposed to qualify the requirement for prompt commencement and it was that requirement to which that part of the Regulation was intended to relate. In any event, Regulation 45D (3) simply operates to confirm that proceedings do not have to be started; that is not inconsistent with starting within three months. If it had been the intention of the legislature or if there was anything in European legislation or directives which suggested that one always had to add on 10 or 11 days to whatever period one selected for proceedings to be commenced within, the wording would and could have clearly said so. It was said that some assistance might be provided by the formal Explanatory Note (expressed as being "not part of the Regulations") or the Explanatory Memorandum to the Regulations but I do not consider that they materially assist.

25.

It was also argued by Network Rail that the complaints in Paragraphs 63 and 64 were bound to fail in any event. It is unnecessary to decide that as the complaints are in any event time barred. However, I agree with the submission made by its Counsel that the complaints are not really substantive in the sense that I can not see that in themselves they would give rise to any entitlement to damages which is essentially what the claim is for. Alleged failures to provide information about the scoring may render the utility in breach of the regulations but in themselves do not obviously give rise to loss. What gives rise to loss would for instance be a failure to conduct the tendering process fairly or marking incorrectly.

26.

Finally, there is the assertion made by Counsel for Mermec, based on the note of the meeting of 14 October 2010, that there may be a claim related to what is in effect classifiable as a rigged bidding process which was always going to favour Omnicom. That is not part of the Particulars of Claim or the Claim in these proceedings. It is unsupported by any witness evidence from any Mermec employee and it is not supported by Mr Whitlock who attended the meeting. It would be wholly wrong for this Court to refuse Network Rail's application in relation to such an unpleaded complaint. It has all the hallmark of a perfectly understandable reaction by an employee who was disappointed that his company did not succeed and involves no more than an uncorroborated belief that Mermec could only have been stopped from succeeding by some sort of skulduggery. In football supporter terms, it is no more than a cry of "we was robbed".

Decision

27.
It follows from the above that Network Rail's application for summary judgement succeeds.