

Procurement law update Jason Coppel

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Time limits for procurement challenges

Uniplex and SITA

2. As originally enacted, and until 1 October, the time limit for bringing a claim under the Public Contracts Regulations 2006 (~~PCR~~) is stated to be the same as that for judicial review, that claims should be brought promptly and in any event within three months of the grounds for the claim first arising, subject to a discretion to extend time (reg. 47(7)(b); reg. 47D(2) of the PCR as amended in December 2009).
3. As is now well known, the time limit in the PCT was considered by the Court of Justice of the European Union (~~CJEU~~) in *Uniplex v NHS Business Services Agency* [2010] 2 CMLR 47 and held not to comply with general principles of EU law regarding the effectiveness of national remedies. The CJEU found that it is for each member state to establish time limits for applications for review of procurement procedures, but that these must not compromise the effectiveness of the underlying EU Directive, 2004/18 (§§26-27). 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 (§30). 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 (§31). Therefore the periods laid down for bringing such proceedings must start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (§32).

4. As for the requirement for promptness, the CJEU found that the objective of rapidity must be achieved in national law in compliance with the requirements of legal certainty and the principle of effectiveness. To that end, member states have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations (§39). A limitation period whose duration is placed at the discretion of the competent court is not predictable in its effects (§42). That was the nature of the promptness requirement, which was accordingly precluded by the Directive (§§42-43).
5. Finally, the CJEU considered the relevance of the national courts' discretion to extend time. It found that the national courts were required to interpret reg. 47 in line with its findings (by extending time where necessary) or, if that was not possible, to refrain from applying the reg. 47 time limit altogether (§48).
6. The leading domestic authority on the application of *Uniplex* is now the ruling of the Court of Appeal in *SITA UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156 (upholding the ruling of Mann J at first instance: [2010] 2 CMLR 47). It held that the approach of the CJEU in effect converts the discretion conferred by the regulation [to extend time] into a duty where the reason for delay is lack of actual or constructive knowledge. There still remains the genuine discretion to extend time further if the court thinks there is good reason to do so. (§14). That is, where a Claim is out of time on the rules stated in reg. 47(7)(b)/47F(2), but has been brought within three months of actual or constructive knowledge of the alleged breach, the Court must extend time in order to comply with EU law.
7. As for the degree of knowledge or constructive knowledge required: The knowledge must relate to, and be sufficient to identify, the grounds for bringing proceedings, as it is expressed in [reg. 47(7)(b)]. The Directive does not use that word but the concept of grounds was to be read consistently with the Directive's concept of infringement. 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? (§19). Elias LJ (giving the majority judgment) continued (§22):

Mainly, 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.+

8. As for the strength of the evidence of infringement required, Elias LJ adopted Mann J's test that the standard ought to be a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement+ (§§27 and 31).

Can time start to run before reasons are given?

9. In *J Varney & Sons Waste Management Limited v Hertfordshire County Council* [2010] BLGR 801, the High Court considered an argument that it followed from *Uniplex* that in every case time cannot start to run earlier than the date on which an unsuccessful tenderer is told the reasons why his tender was unsuccessful (cf §31 of *Uniplex*). There is wording to that effect in the judgment of the CJEU and the Opinion of the Advocate General in *Uniplex* but Flaux J held that that wording reflected the facts of *Uniplex*, which was a challenge to a tender evaluation in which the claimant had been unsuccessful, as opposed to a challenge to a wrong committed earlier in the tender procedure. There was no general principle to that effect; and time in *Varney* - a complaint about non-disclosure of tender evaluation criteria/sub-criteria/weightings - had started to run from the date of publication of the Invitation to Tender (IT).

10. Similarly, in *Mears v Leeds City Council* [2011] EWHC 40 (QB); [2011] BLR 155, §§67-70 the High Court (Ramsey J) rejected the submission that, pursuant to *Uniplex*, time can never start to run until after a potential claimant is provided with the reasons for its elimination (that is, at the earliest, in the award notice which commences the standstill period). He stated (§70):

(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.+

11. Applying those principles, he held out of time a complaint about a change to pricing evaluation which had been notified to tenderers by letter during the tender procedure, although after bids had been opened. Proceedings had been brought after the award decision had been notified, which was more than three months after the relevant letter.

Satisfying the knowledge-based test

12. The most straightforward application of the *SITA* test of knowledge occurs in the context of challenges to evaluation criteria which have been stated in the ITT, perusal of which gave the claimant sufficient knowledge of the alleged breach. In addition to *Mears*, the following cases are examples of this principle:

- In *R (Hereward & Foster LLP) v Legal Services Commission* [2010] EWHC 3370 (Admin), one of the tender evaluation criteria adopted by the LSC in a tender for immigration work was the extent to which a supervisor was present in the office. Most points were awarded for a full-time supervisor, less for part-time supervision. Upon failing to win a contract, the claimant complained that the supervisor attendance criterion gave rise to indirect sex discrimination against women, who are less able to work full-time. The Administrative Court held that the criterion was discriminatory but objectively justified, but (relying on pre-*Uniplex* case-law, in particular *Jobsin Co UK Plc v Department of Health*) that the Claim was out of time, as the criterion could and should have been challenged when the ITT was published.
- Similarly, in *Allan Rutherford v Legal Services Commission* [2010] EWHC 3068 (Admin), Burnett J held out of time a challenge to an evaluation criterion that a firm tendering for social security work should have experience of First-Tier Tribunal and Upper Tribunal appeals. Again, the challenge had been brought after the claimant had failed to win a contract. In this case and in *Hereward & Foster*, Burnett J distinguished *R (Law Society) v Legal Services Commission* [2010] EWHC 2250 (Admin) in which an evaluation criterion for the award of family law work published in February 2010 had been challenged by the Law Society only in August 2010. In the *Law Society* case there were special circumstances which made it doubtful that the criterion could have been

challenged on publication (its likely effects being unclear), and there were strong public interest reasons for extending time.

- In *Traffic Signs v Department for Regional Development* [2010] NIQB 138, one of the challenges was to a 60/40 price/quality split in the tender evaluation and time was held to run from the date on which the ITT was downloaded, alternatively the date on which it was read by the managing director of the claimant. The claim was, therefore, a week late, but time was extended mainly in reliance on the fact that there were other challenges which were not out of time which would prevent contracts from being entered into in any event, and on there being no prejudice to the defendant authority.
13. In a claim for non-disclosure of criteria, sub-criteria or weightings, as opposed to the adoption of an unlawful criterion, it is much less likely that time will start to run from the date of publication of the ITT. But it may still be that there is enough in the ITT to put a challenger on notice that matters had not been disclosed. in a particular case. In *Varney*, the transparency complaint was that the authority had requested various information in the ITT but had not identified the relevant requests as criteria or sub-criteria or disclosed their weightings. The High Court held that the date of knowledge was publication of the ITT because it was or should have been obvious to the claimant from that date that the information requests (known as Return Schedules) would be used in marking tenders and that their weightings had not been provided.
 14. The Court of Appeal recently upheld the High Court's rejection of the transparency claim on its merits and did not consider a challenge to the findings on time limits ([2011] EWCA Civ 1108). One of the arguments in *Varney* which the Court of Appeal did not address is that the relevant breach of the Regulations which occurs when criteria etc. are not disclosed has been defined by the CJEU not as the failure to publish but as the application of criteria etc. which have not been disclosed. Hence, for example, it stated in *Lianakis* [2008] ECR I-251, that %a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers's attention+(§38). If, in this type of case, time is held to start to run from the date of publication of an incomplete ITT then it starts before the relevant breach has occurred. That would ignore the important distinction made in reg. 47 between anticipatory and actual breaches of the Regulations (see *Brent LBC v Risk Management Partners* [2009] EWCA Civ 490, §§147-149, 251-252).
 15. In *SITA* itself, the issue was when the claimant acquired sufficient knowledge of the authority's decisions to change the features of a contract for which it had not been selected as the preferred bidder. Various pieces of information had become available to it, being published by the authority or provided in correspondence, some quite soon before proceedings were issued. But the claim was held out of time, essentially because SITA was held to have sufficient knowledge at the time of writing letters before action complaining about

what it believed the authority had done to change the contract. It had, by that stage, a clear indication that the authority was in breach of its procurement obligations and matters which came to light subsequently were merely particulars of an existing claim which reinforced the view that a cause of action existed. They were not necessary building blocks in establishing that cause of action (§85).

16. *SITA* was recently applied by the High Court in *Mermec UK Limited v Network Rail Infrastructure Limited* [2011] EWHC 1847 (TCC). Here, the claimant had been sent an *Alcatel* letter containing its scores, the scores of the successful tenderer and some brief comments about the reasons for the claimant's scores. The claimant submitted that it had a claim of non-disclosure of tender sub-criteria/weightings and of impermissible acceptance of a variant bid, which was not apparent from the *Alcatel* letter but had only come to light subsequently. But its Particulars of Claim omitted to plead any important fact which was not apparent from the *Alcatel* letter. Akenhead J applied the *SITA* test in the following way: "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" (§22i). He rejected a submission that the claimant's date of knowledge was not its date of receipt of the *Alcatel* letter but the date, a week or so later, when it had the opportunity to take legal advice on the implications of the letter (§18).

The new time limit

17. Following a recent consultation exercise, the Public Procurement (Miscellaneous Amendments) Regulations 2011 (SI 2011/2053, the Amendment Regulations) have now been laid before Parliament and are due to come into force on 1 October 2011.
18. Regulation 12 amends regulation 47D PCR so that it will read as follows:
 - (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) [subsection (3) is not amended by regulation 12]
 - (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 47E) 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.+

19. Therefore, the requirement of promptness has formally been removed. Time starts to run from the date when the claimant first knew or ought to have known that grounds for starting the proceedings had arisen (instead of the date on which those grounds actually arose). These aspects of the new time limit were necessary to give effect to *Uniplex*. Importantly, the time limit will be 30 days from the date of actual or constructive knowledge rather than, as at present, three months. There remains a power in the court to extend time for good reason, but the power is now limited in that the court must not permit proceedings which have been started more than three months after the date of actual or constructive knowledge.
20. Under the original PCR, the issue of a Claim Form was sufficient to bring proceedings, and stop time running, even though the Claim Form did not have to be served immediately (*Harry Yearsley v Secretary of State for Justice* [2011] EWHC 1160 (TCC), §23). However, under the provisions of the amended PCR which apply currently, proceedings are not started until a Claim Form has been served on the defendant. This was a trap for the unwary, as the CPR provisions on service entail that service takes two business days; so issuing a Claim Form at the very end of three month period would not suffice. The claimant in *Mermec* fell into that trap. The new time limit returns the position to that under the original PCR - reg. 47D(6) provides that issue of the Claim Form is sufficient to start proceedings.
21. There are transitional provisions in regs. 4-5 of the Amendment Regulations. Where the date of knowledge occurs on or after 1st October 2011 (the commencement date of this instrument), the new limits will apply (i.e. 30 days from the date of knowledge, with discretion for the Court to extend this up to 3 months from the date of knowledge). Where the date of knowledge has occurred before 1st October 2011, the time limit will be 3 months from the date of knowledge, with open-ended discretion for the Court to extend the limit.

Providing information to unsuccessful tenderers

22. Regulation 32 PCR requires an award notice which includes the reasons for the decision, including the characteristics and relative advantages of the successful tender. Upon request from a tenderer, the authority must provide reasons why the tenderer was unsuccessful. However, there remains very little case-law on the extent of the information which must be provided to unsuccessful tenderers in order to comply with reg. 32.

23. In *Alstom v Eurostar* [2011] EWHC 1828 (Ch), Mann J held that the further information required by reg. 32 can be provided either orally or in writing (§66). In §72, he recognised that the reasons provided in response to a request can be short. He cited *Strabag Benelux NV v Council* [2003] ECR II-135 in which the reasons were given in a letter which did no more than set out that the tenders were evaluated against 8 previously specified criteria and stated that the successful tenderer had submitted the most economically advantageous tender.
24. However, *Evropaïki Dynamiki v Commission* (judgment of 9 September 2010) suggests that the detail given in *Strabag* may no longer suffice. The claimant was provided with a list of evaluation criteria together with its scores and the scores of the successful tenderer. That was not enough to tell the claimant the characteristics and relative advantages of the successful tender (§70).

Remedial discretion

25. Where a contract has not been entered into, the Court has a broad discretion under reg. 471(2) to set aside a decision or action, order amendment of a document and/or award damages. But it had been assumed until recently that where a claimant had been prejudiced by a breach of the PCR in such a case, the usual remedy would be a re-running of the tender procedure, or the relevant stages of the tender procedure.
26. In *Mears v Leeds CC* (No. 2) [2011] EWHC 1031 (TCC), Ramsey J held that there had been a failure to disclose tender evaluation criteria and weightings which had been contained in an evaluation table and in model answers used by officers who evaluated the tenders. The claimant satisfied the standing criterion now contained in reg. 47C (breach actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage+ because there was a real and significant chance that the claimant would have been selected for the next stage of the procurement if it had been provided with the undisclosed matters (§214). Therefore, the claimant was entitled to relief, but only damages were awarded (§§224-225):

The remedy must be proportionate. There will obviously be cases at one end of the scale where the impact of the breach of the Regulations is so serious or obvious that it can only be met by setting aside a decision or action. At the other end of the scale there will be cases where the impact is less serious or obvious where damages will deal adequately with the breach. In between there will be many cases where the court must perform a balancing exercise of the various interests in deciding on the appropriate remedy.

In this case, I am clear that the overall balance favours awarding Mears the remedy of damages alone and not setting aside the Procurement. The prejudice in terms of the housing arrangements for a significant number of tenants and the delay in the provision of those arrangements weigh heavily against requiring the procurement process to start again. This is a case where Mears loss or risk of loss can be adequately compensated by damages and that provides a proportionate remedy.+

27. Up to now, the award of damages in procurement cases has followed standard principles which would apply in contractual claims (breach causing loss = damages, often for loss of a chance), rather than those which apply more generally in public law (damages very unusual, proof of misfeasance usually required). The recent decision of the CJEU in *Combinatie Spijker Infrabouw* (judgment of 9 December 2010) suggests that this may have been too generous an approach. One of the questions before the Court related to the conditions on which EU law required the award of damages in a procurement case. It stated (§92):

“as regards State liability for damage caused to individuals by infringements of EU law for which the State may be held responsible, the individuals harmed have a right to redress where the rule of EU law which has been infringed is intended to confer rights on them, the breach of that rule is sufficiently serious, and there is a direct causal link between the breach and the loss or damage sustained by the individuals. In the absence of any provisions of EU law in that area, it is for the internal legal order of each Member State, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with.+”

28. The condition that breach must be “sufficiently serious” involves an examination essentially of the culpability of the state; a technical or unexpected breach does not give rise to liability in damages but a clear and obvious breach would do so (see, for example, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029). Conditions for the award of damages for breach of EU procurement rules must not be less favourable than those applying to similar domestic claims for damages, but it is at least arguable that the appropriate analogue in this context is public rather than private law. *Combinatie Spijker* therefore opens the door to arguments in domestic procurement cases that damages should not be awarded because the breach in question was not serious or blatant enough.

Part B services

29. The categories of services listed in Part B of Schedule 3 to the PCR are subject only to very limited substantive obligations (mainly relating to technical specifications and publication of

award notices) (reg. 5(2)). But they are subject to the general obligations of transparency and equal treatment in reg. 4, at least to the extent that a contract is of cross-border interest and engages the provisions of the EU Treaty. It is frequently argued that these general obligations give rise to detailed requirements *vis-à-vis* the conduct of the tender procedure, which are analogous to those applying to Part A services.

30. In two cases in the past year, the CJEU has rejected arguments to that effect, on the basis that the imposition of detailed obligations for Part B services would be to undermine the clear distinction drawn between the treatment of Part A and B services in the EU Directive.

- In *Commission v Ireland* (C-226/09, 18 November 2010), the Court held that there was no breach of the Treaty principles of transparency and equality of treatment when an Irish authority had failed to provide tenderers with the award criteria weightings before tenders were submitted. Publication of weightings would meet the requirements of transparency etc., but was not an obligation in relation to Part B services particularly where, as here, it could not have had a significant effect on tender preparation (§§40-49). However, it was a breach of Treaty principles to alter the weighting scheme after an initial review of tenders had taken place (§§56-65).
- In *Strong Segurança* (C-95/10, 17 March 2011), the claimant complained that the authority had failed to apply Article 47(2) of the Directive, which permits a tenderer to rely, when seeking to demonstrate its economic and financial standing, upon resources which it does not legally own but which are available to it from another entity. The services in question were Part B services, so Article 47(2) did not strictly apply and the CJEU rejected the argument that the same rule should apply by virtue of Treaty rules on transparency and equality of treatment. It stated (§42): %such a broad approach to the applicability of the principle of equal treatment could lead to the application, to the service contracts referred to in Annex II B to Directive 2004/18, of other essential provisions of that directive, for example, as the national court observes, provisions which establish the qualitative criteria for the selection of candidates (Articles 45 to 52) as well as the contract award criteria (Articles 53 to 55). That would involve the risk of rendering entirely ineffective the distinction drawn by Directive 2004/18 between the services of Annexes II A and II B, as well as the application of that directive on two levels, under the terms used by the case-law of the Court.+

Selection and disclosure of evaluation criteria

31. Case-law under the PCR suggests that authorities have a very broad discretion to choose their evaluation criteria, the main (hardly taxing) limitations being that criteria must be objective and linked to the subject matter of the contract. However, the series of cases brought against the LSC by solicitors firms who failed to win contracts in recent tendering

rounds appear to establish that criteria are challengeable on standard public law grounds, including, as in *Hereward & Foster*, for failure to comply with the public sector equality duty. In that case, the LSC had conducted an equality impact assessment which did not, however, take account of the supervision criterion, which had been included at a late stage. Having rejected the LSC's argument that this matter had no bearing at all on equalities issues, Burnett J found there to have been a breach of the sex equality duty then contained in s. 76A of the Sex Discrimination Act 1975.

32. *Traffic Signs v Department for Regional Development* [2011] NIQB 25 is a rare example of breach of the requirement that criteria be objective. The Northern Ireland High Court held that a 60-40 price/quality split in a contract for the supply of traffic signs was left too much room for subjectivity and was unlawful. There had been a history of allegations of bias and subjectivity in the award of traffic signs contracts, and the Department had introduced an accreditation requirement which had been stated at one stage to remove the need for any qualitative assessment. It then failed to provide any reasoned justification for the allocation of 40% of the marks to quality (§§65-66).

33. Two cases on disclosure of award criteria and weightings have already been mentioned.

- In *Mears*, the Court found a breach of disclosure requirements, applying a test in relation to the Model Answers as to whether on a reasonable view, it introduces different or new criteria, sub-criteria or weightings in the light of what would be reasonably foreseeable to a reasonably well-informed and normally diligent tenderer; whether it could have affected the tenders and whether it is a matter aimed at identifying the most economically advantageous tender rather than ability to perform (§146).
- In *Varney*, the Court of Appeal considered the distinction between criteria and sub-criteria. This may be of significance because it is a requirement of reg. 30 PCR that criteria and their weightings be disclosed; but sub-criteria weightings need not be disclosed in all circumstances (see *ATI-EAC*, C-331/04 [2005] ECR I-10109) and Flaux J had held that that exception also applied to the sub-criteria themselves. The Court rejected as too broad a definition of criterion adopted by Silber J in *Letting International v Newham LBC* of principle, standard, or test by which a thing is judged, assessed or identified. It held that the Return Schedules, which represented a breakdown of quality or customer satisfaction were sub-criteria because it would be a significant imposition on contracting authorities if such matters had to be disclosed at an early stage (§51). The sub-criteria had been disclosed even though they had not been identified as sub-criteria, another departure from *Letting International*. And there was no requirement to disclose their weightings because overall there had been no breach of the principles of equality and transparency (§52).

Allowing correction of mistakes by tenderers

34. The LSC cases provide strong endorsement of the ruling of David Richards J in *Leadbitter v Devon CC*, upholding the refusal of the authority to extend a deadline where a tenderer had forgotten to upload an important document with its tender. Authorities generally have a discretion to permit tenderers to correct errors such as this, which must be exercised proportionately, but they must have in mind the dangers of breaching the principle of equal treatment in relation to other tenderers if one is given special treatment.

35. Hence, for example, in *Azam & Co v LSC* [2010] EWCA Civ 1194, where the claimant had missed a deadline for submitting a tender, allegedly through pure inadvertence, the Court of Appeal upheld the LSC's refusal to permit a late submission. Rimer LJ stated (§36):

%A deadline is a necessary part of a tendering process. The deadline was plainly stated in readily accessible documents. There is no fault by the respondents; they needed to be conscious of their duty to treat tenderers and potential tenderers equally and to avoid suggestions of favouritism towards a particular party. The failure to tender arose from a single and very unfortunate failure, though against the background of a failure by Mr Azam and his firm to monitor what would seem to be documents sensible to be monitored by a firm doing this type of work, it was the failure to take action on the receipt of the letter of 23 December. The need for an extension could not be attributed to any fault on the part of the respondents or to any factor outside the control of the appellants.+

36. Similarly, in *R (Hoole & Co) v LSC* [2011] EWHC 886 (Admin), the claimant had omitted to fill in a section of the tender submission which would have given it a higher score, although the relevant information appeared elsewhere in its tender. It argued that the LSC had a public law duty to take account of information of which it had been aware from the other part of the tender. Blake J rejected the challenge, stating (§30):

%Viewed entirely from the point of view of a public law duty to act fairly, it may well be that the exercise of a discretion to grant a benefit should be based on all matters that could or should be known to the authority, and that fairness might well include a reasonable opportunity to correct obvious errors without changing the fundamental nature of the bid submitted. It is after all in the public interest that a well-qualified and experienced provider of legal services in the field of immigration should be permitted to continue in business. However, any such duty is severely circumscribed where there is a competitive tender and an over-riding duty to treat all tenderers equally. Here for reasons that were not the responsibility of the defendant, the claimant had failed to supply the information that would have lead them to being ranked in priority where there was competition for the award of NMS. Any general duty to give an

applicant an opportunity to correct errors in the absence of fault by the defendant, yields to the duty to apply the rules of the competition consistently and fairly between all applicants, and not afford an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed.+

37. Similar sentiments were also expressed by Davis J in *All About Rights Law Practice v LSC* [2011] EWHC 964 (Admin).

The 2011 Amendment Regulations

38. The provisions on time limits are by far the most significant in the new Regulations. Two other minor amendments are worthy of mention:
- Reg. 47G, the automatic stay, is modified, to reflect the change to the means by which proceedings are started. Whereas currently the stay comes into effect when a Claim Form is served, it will come into effect in the future when the authority becomes aware that it has been issued.
 - Reg. 32 currently requires the provision of information about a contract award both to unsuccessful tenderers and to candidates who did not survive the PQQ stage. The obligation in relation to candidates will be removed once the three month long-stop time-limit has passed (or the legality of an exclusion has been upheld by the Court).

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