HT-2021-000147

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2022] EWHC 413 (TCC)

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 25/02/2022

Before:
MRS JUSTICE O'FARRELL DBE

- -

Between:

EXCESSION TECHNOLOGIES LIMITED **Claimant**

- and -

POLICE DIGITAL SERVICE **Defendant**

- -
- -

Parishil Patel QC (instructed by **Trowers and Hamlins LLP**) for the **Claimant**
Joseph Barrett (instructed **by TLT LLP**) for the **Defendant**

Hearing dates: 25th & 26th August 2021
Further written submissions: 30 November 2021 & 2 December 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 25th February 2022 at 10:30am"**

.....
MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. The matter before the Court concerns a procurement challenge arising out of a tender exercise carried out by the Police Digital Service ("PDS") for the appointment of a contractor to a framework agreement for the provision of computer and information technology services in respect of a covert surveillance operation room ("the SOR").

2. This is the trial of the following preliminary issues:

    i) Was the Defendant, PDS, entitled to rely on the exemption under regulation 7(1)(b) of the Defence and Security Public Contracts Regulations 2011 ("the Regulations") in relation to the procurement with contract reference: PICT 108-2020 ("the Procurement")?

    ii) Are the claims pleaded at paragraphs 40-42, 46, 47-48 and 49 of the Particulars of Claim subject to the statutory time-bar pursuant to regulation 53 of the Regulations?

    iii) Is the Procurement governed by an alleged implied contract between the Claimant, ("Excession"), and the PDS containing the terms alleged by Excession in the Particulars of Claim?

Background

3. On 22 March 2019 an outline business case was published by the National Police Chiefs' Council, setting out a blueprint for the delivery of a national network of SORs with enhanced capability and minimum standard operating procedures, enabling improved connectivity and interoperability across counter-terrorism and serious organised crime capabilities. The executive summary stated:

> "To keep pace with the evolving threat from Counter Terrorism (CT) and Organised Crime (OC) a transformation in the way in which we utilise and manage covert assets is required.
>
> The ever-changing threat picture demands greater resilience across organisations and more sophisticated types of Surveillance. Although recent events have demonstrated the willingness of agencies across CT and OC to provide crucial support in times of demand, the configuration of covert SOR, how they have been designed and how they assist in the delivery of surveillance deployments, do not promote the agility and ability to surge at time of demand.
>
> …
>
> The surveillance operations rooms project seeks to deliver a fully connected and interoperable national SOR network in England and Wales, in a phased approach subject to a proof of concept evaluation to enable an agile capacity to meet the business needs.
>
> - Implementation of a blueprint which defines the future minimum requirements of SORs to enable an agile

> capacity to meet the business needs, servicing local, regional, national and international requirements and surge demand requirements within CT/OC
>
> - Exploitation of emerging digital opportunities to enable more effective and agile deployments
>
> - Facilitate enhanced interoperability with CT/OC partners UK wide including MI5, MOD, NCA, Police Organised Crime (force and ROCU level), PSS and PSNI
>
> - Necessary Memorandums of Understanding, Service Level Agreements and Information Sharing Agreements to support national operations
>
> - Standard business processes, based upon national protocols …"

4. A summary of the SOR categories was stated to be:

   i) capability to provide basic intelligence support to a single surveillance team;

   ii) capability to coordinate communications and provide lifetime tactical and intelligence support to a surveillance deployment with limited additional specialist capability;

   iii) enhanced capability with capacity to command, coordinate communications and provide lifetime tactical and intelligence support to multiple surveillance teams and additional specialist capabilities;

   iv) enhanced capability with capacity to command multiple teams and provide lifetime strategic, tactical and intelligence support, including the ability to record all covert radio transmissions, telephony and key decisions in response to nationally significant events or high threat scenarios.

5. A CSOR Manual of Standards published by the National Surveillance User Group in 2019 described the business needs as follows:

> "Directed surveillance takes investigators to places they would not otherwise realise by other more conventional investigation tactics.
>
> Technological advancements in the situational awareness and command and control drive the need to maintain expertise to continue effectively impacting and disrupting OC and CT threats, in line with HMG directive.
>
> Ongoing evaluations have identified weaknesses, inconsistencies and interoperability shortcomings in currently utilised surveillance technological, hindering advancement in line with changing sophisticated threat of organised crime and terrorism. Additionally the ability to provide surveillance

> product in real time to SIOs and investigators, to enable effective tactical and strategic decision making and case direction.
>
> Identification of and investment in a bespoke interoperable system will sustain and advance policing's covert capability ensuring we are at the forefront of tackling our threats with the tools required to do the job effectively."

6. Identified requirements included:

> "The provision and use by SOR, surveillance operatives and investigators of a single, fully interoperable platform, complying with the 2007 IPCC Stockwell Report recommendations, the Criminal Procedures and Investigations Act 1996 and NPCC Authorised Professional Practice Guidelines."

7. In April 2019 the business case was approved and, from November 2019 to March 2020, Excession undertook a 'proof of concept' pilot (POCP). The evaluation report following the proof of concept pilot stated:

> "The POCP supports the adoption of a single cloud based solution hosting a suite of applications, with SORs operating to national mandated standards and has demonstrated how teams from different agencies can work together and share intelligence. This would deliver the concept of shared surveillance teams across agencies in the future, allows multiple assets and capabilities to be tracked and visible together, allows the immediate and live streaming of surveillance footage to ANY member of the operation (whether in control rooms or deployed on the ground) and, introducing 'e-logging' in surveillance operations giving robust auditable records of deployments, briefings and imagery."

The prior information notice ("PIN")

8. On 29 September 2020 PDS commenced the tender exercise by publishing a prior information notice ("the PIN") for the "Surveillance Operation Room Covert Procurement." The PIN provided a short description of the nature and scope of the services as follows:

> "The Police ICT Company intends to implement a 4 year Framework Agreement which allows police forces and other law enforcement agencies and public bodies to call off the services … A high level scope of the services the Supplier will deliver are as follows:
>
> - a cloud based software application housing a suite of surveillance applications;

> - facilitating interoperability (including legacy systems) and connectivity (including to other organisations) of surveillance operations;
>
> - a scalable and agile solution; and
>
> - appropriate security and restricted access to the services."

9. The PIN included the following additional information:

> "Due to the sensitive nature of these services being procured, the procurement documents will only be shared with economic operators who satisfy the following three requirements:
>
> (a) Complete and return to the Police ICT Company a copy of the (Non-Disclosure Agreement) issued upon request to interested parties);
>
> (b) Confirm and evidence that the recipient of the procurement documents holds at least NPPV3 security clearance; and
>
> (c) Confirm and evidence that they have the necessary experience and expertise to deliver the services described in this Notice."

10. On 5 October 2020, Excession responded to the PIN, expressing interest in participating in the tender process.

The selection questionnaire ("SQ")

11. On 23 October 2020, PDS sent to Excession the Selection Questionnaire ("the SQ") and related documents. The SQ stated:

> "Purpose of this document:
>
> The Authority is seeking Applicants who may wish to tender for the Contract to provide SOR services. The Police ICT Company will not be calling off any of the Services under the Framework itself and is undertaking the procurement on behalf of UK Policing and other contracting authorities.
>
> The Organisations who can call-off from the Framework Agreement are as follows: any eligible Central Government Departments (and arm's length bodies) and all other UK Public Sector Bodies, including but not limited, to: Health, Police … Fire and Rescue … Home Office, Her Majesty's Revenue and Customs, Ministry of Defence, National Crime Agency, Police Scotland, Police Service of Northern Ireland and Devolved Administrations.

> Given the nature of the SOR services, the procurement (as outlined in the PIN notice) is being run under the DSPCR 2011. Owing to the sensitive nature of the Requirements (which entail both intelligence services and classified information), the exemption set out in Regulation 7(1)(b) DSPCR applies. This Process is therefore exempt from the full ambit of the DSPCR. Notwithstanding, the Authority considers it helpful to Applicants to maintain the structure of having an SQ and ITT stage and therefore intends to run the Process adopting these two stages. For the avoidance of doubt, this is to assist all parties to manage their engagement with the procurement utilising a process which is familiar. This does not however in any way oblige the Authority to comply with the DSPCR 2011 in full, and the Authority reserves the right in its sole discretion to change the Process at any time.
>
> Given the sensitive nature of this procurement, the Authority will not be using a procurement portal and all bids and/or correspondence (including all clarification questions) should instead be submitted by CJSM.
>
> This SQ relates to the procurement project advertised by the Police ICT Company in the PIN Notice 465342-2020. This SQ has been issued to parties that have executed a Non-Disclosure Agreement ("NDA") and complied with additional security requirements outlined in prior correspondence.
>
> The objective of the SQ process is to short-list a limited number of Applicants … who will participate in the subsequent ITT which will result in the award of a Contract to the highest scoring Applicant. Applicants at the subsequent ITT stage will be required to demonstrate their product which will form part of the evaluation.
>
> At the conclusion of this Process the Authority intends to award a Framework Agreement for a period of four (4) years. Only one Applicant will be appointed to the Framework Agreement, it is a single supplier framework."

12. The background the Procurement to the tender exercise was described as follows:

> "It is universally acknowledged that SOR capabilities and capacity differ between forces and that while there are a number of ongoing projects these are predominately completed in silos.
>
> The Specialist Capabilities Programme set out in 2019 to deliver a national network of SOR with enhanced capability, minimum standard operating procedures and improved connectivity and interoperability. A Proof of Concept Pilot ("POCP") was commissioned and delivered by Excession Technologies Limited.

> The POCP was created based on a set of requirements, evaluated by over 100 users and evidenced that it was possible to deploy a cloud based software application hosting a suite of surveillance applications…
>
> The Project will deliver a service model that reflects the future needs of UK law enforcement agencies. It will enable a standardised approach facilitating interoperability and connectivity of covert surveillance operations on a national level. The Project will allow for the option of a scalable and agile approach to covert surveillance and with it an improved user experience and greater value for money."

13. The SQ provided that Applicants, in submitting a response to the SQ were deemed to accept the terms and conditions in section 3 of the SQ, which included the following provisions:

> "Status of this SQ:
>
> No information contained in this SQ or in any communication made between the Authority and any Applicant in connection with this SQ shall be relied upon as constituting a contract, agreement or representation that any contract shall be offered in accordance with this SQ. The Authority reserves the right to change the basis of, or the procedures for, the Process or to terminate the Process at any time.
>
> Under no circumstances shall the Authority incur any liability in respect of the SQ or any supporting documentation nor be responsible for any losses or costs whatsoever caused to Applicants in relation thereto or as a result of any termination, amendment or variation of this Process.
>
> …
>
> Nothing in this SQ is intended to exclude or limit the liability of the Authority in relation to fraud or in in other circumstances where the Authority's liability may not be limited under any applicable law."

14. Section 4 of the SQ set out the evaluation approach that would be adopted:

> "The objective of the selection process is to assess the responses to the SQ and select potential providers to proceed to the next stage of the Process.
>
> Selection criteria will consider:
>
> a) Eligibility Assessment - confirmation that the Applicant is eligible to participate in this Process and that no

> mandatory or discretionary grounds for exclusion apply to the Applicant.
>
> b) Technical and Professional Ability - the Applicant must be able to demonstrate relevant experience to ensure that the Applicant can perform the Contract to the Authority's required standards. The Applicant will be assessed on the totality of resources and core competences available."

15. On 3 November 2020 PDS held a bidders conference to explain the procurement process. Excession attended the conference. Slides produced at the conference included the following:

> "Overview of Process - Procurement
>
> - The Authority is procuring covert surveillance operation room ("SOR") services under the Defence and Security Public Contract Regulations 2011 due to the sensitive nature of the services.
>
> - However, bidders should be aware that this procurement is exempt under Regulation 7(1)(b) Defence and Security Public Contract Regulations 2011.
>
> - Notwithstanding the above, the Authority considers it helpful to bidders to maintain the structure of having an SQ and ITT stage and therefore intends to run the Process adopting these two stages.
>
> - Bidders should be aware that the Authority reserves it[s] rights to flexibility throughout the procurement on the basis this is an exempt procurement."

16. On 20 November 2020 Excession submitted its response to the SQ.

The invitation to tender ("ITT")

17. On 18 December 2020, PDS published the Invitation to Tender ("the ITT") and sent the ITT pack to Excession on 19 December 2020. The ITT included the following:

> "This procurement is being run under the Defence and Security Public Contracts Regulations 2011 due to the nature of the SOR Services. However, owing to the sensitive nature of the Requirements (which entail both intelligence services and classified information), the exemption set out in Regulation 7(1)(b) DSPCR 2011 applies.
>
> Notwithstanding the above, the Authority considers it helpful to Applicants to maintain the structure of having an SQ and ITT stage and therefore intends to run the Process adopting these two

> stages. For the avoidance of doubt, this is to assist all parties to manage their engagement with the procurement utilising a process which is familiar. This does not however in any way oblige the Authority to comply with the DSPCR 2011 in full, and the Authority reserves the right in its sole discretion to change the Process at any time."

18. The technical requirements for the SOR solution were set out in Annex A of the ITT and included:

    i) the provision of a cloud based technical solution that was compliant with the minimum current published Cyber Security Standard Responsive to updates in technology and supported system versions;

    ii) the ability to allow images from mobile devices, video streams and data currently captured on legacy systems to be integrated, displayed and shared with via a secure internet connection, from a computer or mobile device;

    iii) the ability to record in real time the information for each surveillance operation and provide a running log that could be viewed in real time;

    iv) facility for live time, dynamic briefing to teams via mobile devices;

    v) e-logging to replace the existing written logs completed by surveillance operatives;

    vi) the ability to interoperate with other agencies and departments using the same applications;

    vii) provision of an appropriate test environment to demonstrate how any upgrade, new capability or additional functionality for the SOR system solution would function.

19. Appendix 1 to the ITT stated at section 2:

> "The Supplier must fully document how they intend to establish configure and implement a cloud-based solution to deliver the SOR (the Solution).
>
> The Supplier's resources must have the requisite skills and knowledge to successfully establish and implement a cloud-based solution and ensure it can be fully managed during and post deployment.
>
> The Supplier must be able to maintain the infrastructure incorporating upgrades and software releases.
>
> The Supplier must document how they will comply with the detailed list of this Appendix and all Annexes - including the technical requirements listed at **Annex A.**

> The Supplier must fully document applicable APIs in the Solution to ensure it can integrate both legacy and new equipment systems in accordance with the Surveillance Operations Rooms Open System Architecture detailed at **Annex B.**
>
> …
>
> As part of the requirement, the Supplier must:
>
> - Be able to provide a UK based secure data centre that has or can achieve PASF (Police Assured Secure Facility) with separation of infrastructure and data demonstrable by time of Contract Award of the Framework Agreement…
>
> - Be able to manage, patch, test and deploy the Operating System and application updates;
>
> - Have a fully operational solution that meets the requirements at Contract Award so an efficient implementation process can commence without delay for Contracting Authorities;
>
> - Have a fully operational solution that meets the requirements at Contract Award of the Framework Agreement so an efficient implementation process can commence without delay for Contracting Authorities."

20. Section 3 of the ITT explained the selection and assessment methodology:

> "The Authority will assess all Applicants and tender submissions in relation to the requirements set out in this section 3. Representatives from both the Authority's commercial function and technical team will be carrying out the evaluations.
>
> All tenders received will be considered on the information contained in the tender or obtained by the Authority as a direct result of the tender process. Submissions will be assessed based on the most economically advantageous tender (MEAT).
>
> The ITT Bid evaluation will be based on:
>
> • Evaluation of Applicants' compliance with Appendix 1 Solution Requirements (including Annexes) via responses to Section 4 Technical Questions;
>
> • Appendix 2 Pricing Schedule within the Bids; and
>
> • Solution Demonstration Day and User Scenario Testing.

A high level breakdown of the ITT scoring between these is as follows:

Evaluation Criteria	**ITT Overall Scoring (%)**
Applicants responses to Section 4 Technical Questions	40%
Appendix 2 Pricing Schedule	30%
Solution Demonstration Day and User Scenario Testing	30%
TOTAL	**100%**

…

Where the Authority considers that the prices or costs offered are apparently abnormally low it will require the Applicant to provide further additional information to explain them and shall consult the Applicant to assess this information. The Authority either:

- may reject any abnormally low tender where the explanation is unsatisfactory; or

- must reject any abnormally low tender which does not meet certain environmental or social laws, or which constitutes unlawful State aid.

The evaluation criteria for the ITT Bid evaluation are designed to ensure the selection of the Bid that represents the [MEAT] to the Authority, using criteria linked to the subject matter of the Framework Agreement.

Once the Bids have been evaluated and scored all the Applicants will be ranked. Scoring will be rounded to 2 decimal places. Award of the Framework Agreement will be offered to the most economically advantageous tender (1 Supplier)."

21. The technical questions were set out in Schedule 4 of the ITT and covered the following matters:

i) compliance with the service level ("SLA") requirements;

ii) implementation and transition approach;

iii) security management;

iv) business continuity and disaster recovery;

v) business change;

vi) technical change;

vii) training;

viii) open system architecture;

ix) exit management.

22. Section 3 of the ITT stated that the technical solution forming part of the bid would be evaluated using the sub-criteria and weighting set out in the table in section 3.3 and marked on a scale of zero to five using the methodology set out in the table at section 3.4:

> "The individual weighting for each Technical Question is detailed in Schedule 4. The score awarded for each question will be multiplied by the individual question weighting to provide a weighted score. The weighted scores will then be added together to give a total weighted score.
>
> Applicants must score a minimum weighted score of 15% (out of a maximum of 30%) for the technical section for their Bid to be considered any further. The Authority reserves the right to disqualify any Bid which scores lower than this threshold. If no Bid meets this minimum standard, the Authority reserves the right to cancel the tender process. "

23. The pricing schedule forming part of the bid would be evaluated using the high level sub-criteria and weighting set out in the table in section 3.3 and in accordance with the detailed methodology, sub-criteria and weighting set out in section 3.5. The maximum score would be awarded for the lowest priced bid against each sub-criteria, save for the service charge, where the maximum score would be awarded for the highest percentage discount across the user band.

24. Schedule 2 of the ITT set out details for the Solution Demonstration Day and User Scenario Testing ("the Demonstration Day") to be held between 8 and 12 February 2021, stating that:

> "The Authority will allocate a full day to each Applicant to undertake this stage of the ITT evaluation…
>
> Each Applicant will be required to demonstrate their SOR Services solution, this will be a live demonstration against a scenario (provided in advance by the Authority).
>
> The Authority has allocated 30% of the total ITT score to the demo day. Applicant's SOR Services solution will be [assessed] against the following requirements:
>
> - Creation of management operations and adding users;

- Connectivity from Desktop / Laptop and mobile devices;
- E-logging;
- Visibility of assets and situational awareness;
- Mapping and annotation;
- Live real time asset tracking;
- Live real time image and video capture/streaming;
- Sharing of documents, images and video files;
- Integration of agreed legacy equipment (Video & GPS Tracking); and
- Cross agencies connectivity."

25. On 21 December 2020, Excession submitted a clarification request in respect of the pricing schedule in the ITT:

> "Noting your position on the SQ Feedback call of 21/12/20 that discussions on milestones and cashflow could only be done with potential Contracting Authorities, could the Authority please provide either (a) a forum for discussion with potential early Contracting Authorities regarding our draft milestone plan, or (b) a notional timetable for Contracting Authority commitment, so that all bidders might provide responses to Schedule 4, Question 1 and Appendix 2, Pricing Schedule against a common baseline?"

26. On 14 January 2021, Excession and PDS participated in a videocall, during which Excession checked that PDS understood the key features of its offer, expressed concerns about pricing and sought clarification as to the Demonstration Day. Excession asked to be provided with further information about the likely level of demand for the SOR solution under the framework but PDS explained that a such an estimate could not be provided and that each bidder should use its commercial judgment in deciding what it was prepared to bid.

27. PDS provided a formal response to Excession's request for clarification by the ITT clarification log attached to an email dated 28 January 2021 at reference CQ01 (out of 126 clarification responses):

> "Response A
>
> The discussion would form part of the Order Form/Implementation Plan and the Contracting Authority's acceptance of the Implementation Plan. The Authority does not consider it necessary to create a further forum for discussion at this stage. Rejected. No change.

> Response B
>
> Rejected. No change."

The Demonstration Day

28. On 21 January 2021, PDS provided Excession and other potential providers with the instructions for the Demonstration Day, explaining that each bidder would be allocated a day and time slot to demonstrate their proposed SOR Solution by way of a live demonstration against a set scenario provided in advance. The functional requirements that would be assessed during the live demonstration (together with the sub-criteria weighting that would be applied to each) were identified as:

    i) creation of management operations and adding users;

    ii) connectivity from desktop laptop and mobile devices;

    iii) E-logging;

    iv) visibility of assets and situational awareness;

    v) mapping and annotation;

    vi) life real time asset tracking;

    vii) live real time image and video capture streaming;

    viii) sharing of documents, images and video files;

    ix) integration of agreed legacy equipment (Video and GPS tracking);

    x) cross agencies connectivity.

29. The document stated:

> "All of the above functions will be scored by the Demo Day evaluators on a scale of zero to five as detailed in the table at Annex 1 (to this document). All Demo Day evaluators will have completed a Declaration of Interest/Confidentiality form and not being involved in the proof of concept."

30. On 25 January 2021, PDS sent by email to all potential providers details of the scenarios for the Demonstration Day; this was followed subsequently by a video call with each bidder to provide an overview and explain the approach that would be adopted on the Demonstration Day.

31. On 4 February 2021 Excession submitted its tender in response to the ITT.

32. On 9 February 2021, Excession attended the Demonstration Day. The demonstration room was located in Hendon, London, and the relevant field operatives were located in Oxford. There were seven evaluators in Hendon (together with a number of observers who were not evaluating) and twenty-one evaluators in Oxford. David Peto, the Chief

Executive Officer of Excession, was allowed approximately thirty minutes to give a short presentation of the company and its solution prior to the start of the demonstration.

Notice of contract award

33. By letter dated 1 April 2021, PDS informed Excession that it had been unsuccessful in the tender exercise and that Airbox Systems Limited ("Airbox") was the winning bidder:

> "The evaluation resulted in your tender proposal receiving a score of 71.85% compared to the winning bidder Airbox Systems Limited, who scored 73.89%.
>
> The bids received were evaluated against the stated evaluation criteria, based on the most economically advantageous tender. Your tender passed all mandatory questions and was then evaluated against the scored criteria."
>
> …
>
> While this procurement is being conducted under the Defence and Security Public Contract Regulations, the Police ICT Company will enter into a voluntary 10 day standstill period before entering into any contract. This standstill period will conclude at 23.59:59pm on 12 April 2021."

34. The standstill agreement was extended on two occasions until 27 April 2021 but the parties were unable to resolve the dispute.

Proceedings

35. On 26 April 2021 Excession issued a claim for judicial review in the Administrative Court, seeking to quash the award of the contract to Airbox ("the JR Claim").

36. On 5 May 2021 Excession filed its Statement of Facts and Grounds in the JR Claim, setting out the basis of challenge, namely, that:

    i) the software procured for the SOR had to meet certain statutory requirements in order for the collection and use of evidence to be lawful;

    ii) PDS knew that Airbox's software was not fully compliant with all relevant statutory requirements or failed to properly assess and satisfy itself that Airbox's bid was fully compliant with the relevant statutory requirements;

    iii) therefore, its decision was *Wednesbury* irrational.

37. On 25 May 2021 the PDS filed Summary Grounds of Resistance in the JR Claim, asserting that:

    i) the conduct of the tender process was not amenable to challenge by judicial review on grounds of alleged irrationality because of the absence of any public law element;

ii) the claim was not brought promptly or within three months of the date on which the grounds of any claim first arose and therefore was time-barred;

iii) the claim that the evaluation criteria/methodology was irrational was not arguable.

38. On 28 May 2021 the JR Claim was transferred to the Technology and Construction Court (the TCC) so that it could be case managed with the related procurement proceedings that had been commenced.

39. On 26 April 2021 Excession issued Part 7 proceedings in the TCC against PDS, seeking to challenge the decision to award the contract to Airbox on the grounds that PDS acted in breach of the Regulations ("the Part 7 Claim").

40. Particulars of Claim in the Part 7 Claim were served on 5 May 2021 and included the following grounds of challenge:

i) PDS failed to verify whether Airbox's bid was abnormally low or should have rejected Airbox's bid as being abnormally low;

ii) PDS acted contrary to the principle of transparency in failing to provide to the bidders information about the likely level of demand of call offs under the framework agreement;

iii) PDS made manifest errors in its evaluation of the tenders, by the scoring of the Demonstration Day presentations by Excession and Airbox.

41. The remedies claimed include:

i) an order setting aside the decision of PDS to award the contract to Airbox;

ii) an order setting aside the decision of PDS not to award the contract to Excession;

iii) damages.

42. On 2 June 2021 PDS served its Defence in the Part 7 Claim, setting out its case that:

i) the Regulations did not apply to the Procurement on the basis that it was seeking offers for a framework contract "for the purposes of intelligence activities" within regulation 7(1)(b) of the Regulations;

ii) there was no implied contract between Excession and PDS governing the Procurement as such term was not necessary;

iii) Airbox's bid was not abnormally low;

iv) it did not act unlawfully in providing information about the level of demand;

v) there were no manifest errors in the scoring of Excession's and Airbox's presentations at the Demonstration Day.

43. On 25 June 2021, by consent, the court ordered that the JR Claim and Part 7 Claim should be managed together and that there should be a trial of preliminary issues.

Witness evidence

44. The hearing took place on 25 and 26 August 2021. The following witnesses gave evidence at the trial:

    i) the CEO of Excession, who filed his first witness statement on 12 July 2021 and a second witness statement on 21 July 2021;

    ii) Philip Parker, National Surveillance Operations Room Project Manager, who filed his first witness statement on 12 July 2021 and a second witness statement on 21 July 2021.

45. On 3 August 2021, Mr Parker prepared a third witness statement which was served on Excession on 5 August 2021. By application notice dated 25 August 2021 PDS sought permission to rely on the additional statement. The application was opposed by Excession on the ground that it was too late and no proper explanation was provided. Although the witness statement was produced late, the court permitted PDS to rely on it on the basis that it was short (8 pages) and was confined to responses to points raised in specific paragraphs of Mr Peto's second witness statement.

Issue 1 – applicability of the Regulations

46. The issue is whether PDS is entitled to rely on the exemption under regulation 7(1)(b) of the Regulations which provides that:

> "These Regulations do not apply to the seeking of offers in relation to a proposed contract or framework agreement –
>
> …
>
> (b) for the purposes of intelligence activities."

47. PDS's case is that the exemption in regulation 7(1)(b) is applicable to the Procurement. The purpose of the framework and the SOR solution is to provide a national solution for the command and coordination of covert surveillance operations by police forces and security agencies relating to organised and serious crime and terrorism. This is an intelligence activity and the SOR solution is a central and integral element of the successful conduct of that intelligence activity.

48. Excession's case is that the ambit of the exemption should be strictly construed and is not applicable in this case. The purpose of the exemption is a recognition that contracts related to intelligence activities are too sensitive to be awarded in a transparent and competitive procedure. However the provision of computer and IT services to a SOR is, on a proper analysis, incidental to the surveillance operations. Whilst the software solution is a component of the SOR, it is only one of a number of components which allow or enable the SOR to function or function properly.

The Regulations

49. The Regulations came into force on 21 August 2011, implementing the Defence and Security Procurement Directive 2009/81 ("the Directive").

50. Recital (27) of the Directive provides:

> "In the fields of defence and security, some contracts are so sensitive that it would be inappropriate to apply this Directive, despite its specificity. That is the case for procurements provided by intelligence services, or procurements for all types of intelligence activities, including counter-intelligence activities, as defined by Member States. It is also the case for other particularly sensitive purchases which require an extremely high level of confidentiality, such as, for example, certain purchases intended for border protection or combating terrorism or organised crime, purchases related to encryption or purchases intended specifically for covert activities or other equally sensitive activities carried out by police and security forces."

51. Article 11 - 'Use of exclusions' provides that:

> "None of the rules procedures, programmes, agreements, arrangements or contracts referred to in this section may be used for the purpose of circumventing the provisions of this Directive."

52. Article 13 - 'Specific exclusions' provides that:

> "This Directive shall not apply to the following:
>
> …
>
> (b) contracts for the purposes of intelligence activities …"

53. The Regulations provide at regulation 6(1) that:

> "… these Regulations apply whenever a contracting authority seeks offers in relation to a proposed supply contract … or … framework agreement, other than a contract or framework agreement excluded from the application of these Regulations by regulation 7 …, for … (e) sensitive work or works or sensitive services."

54. Regulation 7(1) states:

> "These Regulations do not apply to the seeking of offers in relation to a proposed contract or framework agreement –
>
> …
>
> (b) for the purposes of intelligence activities …"

55. "Sensitive work or works" and "sensitive services" are defined in regulation 3 as:

> "work or works and services for security purposes, involving, requiring or containing classified information."

56. "Classified information" is defined in regulation 3 as:

> "any information or material, regardless of its form, nature or mode of transmission, to which a security classification or protection has been attributed and which in the interests of national security and in accordance with the law or administrative provisions of any part of the United Kingdom requires protection against appropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any type of compromise."

57. Where the Regulations apply, regulation 5(2) imposes a general obligation on a contracting authority to act in a transparent way and to treat economic operators equally and in a non-discriminatory way.

58. Regulation 20 provides that where a contracting authority intends to conclude a framework agreement, it must follow one of the procedures set out in the Regulations and select an economic operator to be party to a framework agreement by applying award criteria set out in accordance with regulation 31.

59. Regulation 31(1) states:

> "… a contracting authority shall award a contract on the basis of the offer which -
>
> (a) is the most economically advantageous from the point of view of the contracting authority; or
>
> (b) offers the lowest price. "

60. Regulation 31(2) states:

> "A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, functional characteristics, environmental characteristics, running costs, life cycle costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period, period of completion, security of supply, interoperability and operational characteristics."

61. Regulation 31(3) provides that the contracting authority must state the weighting which it gives to each of the criteria chosen in the contract documents.

62. Regulation 31(6) provides that:

> "If an offer for a contract is abnormally low the contracting authority may reject that offer but only if it has:

> (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;
>
> (b) taken account of the evidence provided in response to a request in writing; and
>
> (c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator."

63. Regulation 38 provides that where the contract involves, requires or contains classified information, the contracting authority must specify, in the contract documents, the measures and requirements necessary to ensure the security of that information at the requisite level.

64. Regulation 52(1) provides that a breach of the obligations under the Regulations is actionable by an economic operator which, in consequence, suffers or risks suffering, loss or damage.

65. Regulation 53(2) provides that, subject to the other provisions in regulation 53, 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.

66. Where the contract has not been entered into, regulation 58 provides that, where the court is satisfied that a decision taken by a contracting authority was in breach of its obligations under the Regulations, it may set aside the decision, and/or award damages to an economic operator which has suffered loss or damage as a consequence of breach. Where the contract has been entered into, unless any of the grounds for ineffectiveness applies, regulation 59 limits the court's power to an award of damages.

67. It is common ground that the wording of the regulation 7(1)(b) exemption should be given a strict construction; however, it must be construed in a manner consistent with the objectives it pursues and not so as to deprive the exemption of its intended effect: *Fastweb SpA v. Telecom Italia SpA* 11.9.14 (C-19/13) at [40].

68. It is also common ground that the burden of proving that the exclusion is applicable in this case rests on PDS.

Ministry of Defence Guidance

69. Although not binding authority, the Ministry of Defence has issued guidance on the Regulations, including the exemptions and exclusions:

70. Paragraph 7 states:

> "You must interpret the wording of the exemption and exclusions strictly in accordance with the case law of the Court of Justice of the EU (CJEU) … They cannot be abused just to circumvent the DSPCR. However, the principle of strict interpretation cannot result in any preconditions which are not set out in the wording of the exemption or exclusion, i.e. they

> must not be construed in such a way as to deprive that exception of its intended effect."

71. Paragraph 57 quotes regulation 7(1)(b) and states:

> "It assumes that contracts related to intelligence are, by definition, too sensitive to be awarded in a transparent and competitive procedure."

72. Paragraph 58 refers to the exemption at regulation 7(1)(b) and states:

> "The [DSPCR] does not define "intelligence" but it includes both military and security intelligence functions. In addition, "intelligence activities" is not a defined term in the DSPCR but it includes counter-intelligence activities."

73. Paragraph 59 states:

> "The exclusion at regulation 7(1)(b) applies to contracts for the purposes of intelligence activities, which could include the collection, communication and processing of information required to maintain and defend the security and resilience of the procurer's activities, infrastructure, and economic well-being, and influence and deterred those who are hostile to that requirement."

74. Paragraph 61 contains a non-exhaustive list of contracts that are understood to be covered by the exclusion:

> "• contracts awarded by the intelligence services for their intelligence activities, including counter-intelligence;
>
> • contracts awarded by dedicated intelligence services sections located within procurers who are not part of the intelligence services (for example, such non-intelligence procurers "may include central government departments, the armed forces, security forces or agencies, police forces, and utilities) for their intelligence activities;
>
> • contracts awarded by non-intelligence procurers to the intelligence services for specific supplies, services and works for the purposes of intelligence activities of the non-intelligence procurer concerned for example, protection of government information technology (IT) networks;
>
> • contracts awarded by dedicated intelligence services sections located within non-intelligence procurers to the intelligence services, provided the contract is also in support of the intelligence activities of the non-intelligence procurer;
>
> • contracts awarded by non-intelligence procurers which provide benefits to the intelligence services in respect of their

> intelligence activities, provided the contract is also for the intelligence activities of the procurer; and
>
> • contracts awarded by the intelligence services for the intelligence activities of others, provided the subject of the contract is for the purposes of intelligence activities."

75. Paragraph 124 states:

> "Procurers should note that you must not apply an exclusion simply with the sole purpose of avoiding the requirements of the DSPCR. You must be able to justify objectively the application of the exclusion."

76. Paragraphs 125 and 128 require the contracting authority to record the circumstances justifying the use of an exclusion, and the decision to use the exclusion, for audit purposes and in the event of a legal challenge.

77. Paragraph 129 states that the availability of an exclusion may not necessarily mean non-competitive procurement in all cases; a restrictive competition may be an option; and paragraph 133 states:

> "Procurers must still treat suppliers fairly by setting out the rules under which such a restricted competition is to run, ensuring that they comply with those rules and giving all participating suppliers equal opportunity. Failure to do so may give rise to a breach of implied contract to treat bidders equally and fairly."

Discussion and conclusion on issue 1

78. The regulation 7(1)(b) exemption applies where the procurement is for the purposes of intelligence activities. "Intelligence activities" is not a defined term but it would include the collection, analysis and sharing of covertly collected information. The reference to a contract *"for the purposes of intelligence activities"* indicates that the exemption is not limited to a contract that directly provides for such activities; it extends to a contract of which the object for performance is intelligence activities.

79. A broad interpretation of the words used in regulation 7(1)(b), to establish the meaning of the same, is not inconsistent with a strict interpretation of the ambit of the exemption so established. Furthermore, it is consistent with the inclusive description of intelligence activities set out in Recital (27) of the Directive, which is not confined to procurements provided *by* intelligence services but also includes procurements for *all types* of intelligence activities and extends to other procurements requiring an extremely high level of confidentiality. The examples given include purchases intended to combat terrorism or organised crime, purchases related to encryption or intended specifically for covert activities and: *"other equally sensitive activities carried out by police and security forces".* This strongly indicates that the object of the exemption is to protect particularly sensitive information concerning procurements relating to covert operations and systems.

80. Mr Barrett, counsel for PDS, submits that the purpose of the framework, and the SOR solution, is to provide a national solution for the command and co-ordination of covert surveillance operations by police forces and security agencies relating to organised and serious crime and terrorism. This is an "intelligence activity" and the SOR solution is a central and integral element of the successful conduct of that "intelligence activity".

81. He draws attention to the explanation by Mr Parker in his first witness statement as to the purpose of the SOR solution:

> "The role or purpose of the CSOR solution that is the subject of the Procurement is to act as a tool to conduct and control covert surveillance operations relating to serious crime or terrorism. In summary, the CSOR solution brings together various inputs such as video and audio feeds from covert surveillance devices (microphones and cameras) and collects, process is and managing's manages them in a way that allows them to be accessed and used in a number of different ways by the specialist officers or agents who are responsible for the overall conduct and command of the relevant covert surveillance operation.
>
> The CSOR can provide live, real time, tactical and intelligence support to multiple surveillance teams and additional specialist capabilities including the ability to record all covert radio transmissions, telephony and key decisions in response to nationally significant event(s) or high threat scenario(s)."

82. Mr Patel QC, leading counsel for Excession, does not dispute that part of Mr Parker's evidence but submits that it is of limited assistance. The focus of Mr Parker's evidence is on the provision of a SOR and its use as a solution or tool to conduct and manage surveillance operations. Whilst "intelligence activities" is not defined in the Regulations, Mr Patel agrees that it would cover surveillance operations, and the provision of a SOR given that is its use. However, he submits that the procurement was for the provision of computer and IT services to a SOR, which are not in themselves "intelligence activities". At best, it assists a SOR in controlling and managing the surveillance operation conducted.

83. Mr Patel argues that the ambit of the exclusion should be strictly construed. The purpose of the exclusion is a recognition that contracts related to intelligence activities are too sensitive to be awarded in a transparent and competitive procedure. But the scope of that general assumption should be as limited as possible given that there are other less restrictive measures which can be taken to ensure that the applicability of the Regulations does not jeopardise the sensitivities involved in contracts relating to intelligence activities. The applicability of the exclusion is not necessary to achieve that purpose. Services which are incidental to intelligence activities should not be caught by the exclusion.

84. He relies on the evidence of Mr. Peto in his second witness statement that the software solution is just one of a number of components which allow or enable the SOR to function or function properly:

> "Mr. Parker refers to the SOR being *"a solution or tool that is used to coordinate and control covert surveillance operations."* This is unclear and should not be confused with the software which was the actual subject matter of the Procurement, which would be used within the SOR and which is repeatedly referred to by Mr. Parker as a "solution". The software solution for the SOR itself is, of course, distinct from the SOR itself. The software is a component of the SOR (as set out at section 4 of the SOR Manual), which includes other components such as radio systems, tracking systems, CLIO (Central Logging Intelligence Operations), hardware, infrastructure, screens, computers, phones, electronic and paper records and processes, firearms systems, open source data feeds and CCTV."

85. On that basis, Mr Patel submits that the provision of computer and IT services to a SOR is, properly analysed, incidental to the surveillance operations.

86. I accept that the software solution, the subject of the Procurement, is one part of the SOR system but I reject Excession's argument that it must therefore fall outside the exemption in regulation 7(1)(b). The object of the Procurement is to implement a software solution that collates surveillance data, manages and integrates that data with other data systems, and shares the data via a secure internet connection across diverse devices. Surveillance data is of little use if it is captured but not collected, arranged in an ordered sequence and shared timeously with the appropriate operatives. As such, the software solution is a critical part of the SOR in the conduct and control of covert surveillance operations relating to serious crime or terrorism. It follows that the purpose of the Procurement for the software solution is intelligence activities. Therefore, it falls within the scope of the exemption in regulation 7(1)(b).

87. Mr Patel makes a valid point that there is no contemporaneous record of any detailed reasons held by PDS for considering that the Procurement came within the regulation 7(1)(b) exclusion, contrary to the MoD guidance.

88. Reliance is now placed by PDS upon Mr Parker's justification for use of the regulation 7(1)(b) exemption set out in his witness statement:

> "(i) An intelligence activity is an act or operation by which you seek to collect, analyse or use valuable information about a person or a group you regard as an opponent or adversary.
>
> (ii) Conducting covert surveillance operations of organised crime groups or terrorist groups for the purposes of collecting, analysing and acting on the intelligence we secretly gather so as to understand, disrupt, prevent all successfully prosecute their criminal or terrorist activities is an intelligence activity.
>
> (iii) The CSOR is an important, central, part of the covert surveillance operations in which it is used. It is the CSOR that enables the whole covert surveillance operation to be successfully coordinated and completed. Without the CSOR the

> likelihood of the success of the covert surveillance operations would be significantly reduced.
>
> (iv) The intelligence that is gathered, collected and analysed via the CSOR will be used by the police or other agencies for a range of different purposes. Sometimes it will be used to disrupt or prevent serious criminal or terrorist operations. Sometimes it will be retained or shared with other police forces or agencies for the purposes of assisting them in their actions against organised crime or terrorist groups. Sometimes it will be used as evidence for criminal charges and prosecutions."

89. Such justification was not contained in the contemporaneous documents contrary to paragraphs 125 and 128 of the MOD Guidance. The MOD Guidance represents good practice and would assist a contracting authority seeking to rely on the exemption. However, it remains guidance; it is not part of the Regulations, it has no binding effect and could not affect the proper interpretation of the Regulations: *R (Risk Management Partners Ltd) v Brent London Borough Council* [2009] EWCA Civ 490 per Moore-Bick LJ at [227]. The test as to whether the Procurement falls within the scope of the exemption in regulation 7(1)(b) is an objective one.

90. Despite the absence of written justification, there are sufficiently clear statements in the contemporaneous documents in support of PDS's case that the Procurement fell within the regulation 7(1)(b) exemption. The PIN defined the Procurement as "Surveillance Operation Room Covert Procurement", describing the high level scope of services as including *"a suite of surveillance applications", "interoperability … and connectivity … of surveillance operations"* and *"appropriate security and restricted access to the services"*. The SQ explicitly stated that the regulation 7(1)(b) exemption applied by reason of: *"the sensitive nature of the Requirements (which entail both intelligence services and classified information)"*. That statement was repeated in the ITT.

91. Significantly, those statements are supported by the substance of the proposed framework agreement described in the detailed tender documents. An objective reading of the description of the software solution forming the subject of the Procurement set out in the ITT, including the technical requirements set out in Annex A of the ITT, summarised in paragraphs 18 to 24 above, establishes that the software solution forms an integral part of the SOR for covert surveillance operations.

92. For those reasons, therefore, in my judgment the Procurement was for the purposes of intelligence activities and the PDS was entitled to rely on the exemption under regulation 7(1)(b) of the Regulations.

Issue 2 - limitation

93. The issue is whether the claims pleaded at paragraphs 40-42, 46, 47-48 and 49 of the Particulars of Claim are subject to the statutory time-bar pursuant to regulation 53 of the Regulations.

94. Regulation 53(1) provides:

> "This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness."

95. Regulation 53(2) provides:

> "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."

96. Regulation 53(4) provides:

> "Subject to paragraph (5), the Court may extend the time limit imposed by paragraph (2) … where the Court considers that there is a good reason for doing so."

97. Regulation 53(5) provides:

> "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."

98. To ascertain whether proceedings were started within the time limit stipulated in regulation 53(2), the court must determine first, when grounds for starting the proceedings arose; and second, the date when the economic operator first had actual or constructive knowledge of those grounds.

Legal principles

99. The test as to when grounds for starting a procurement challenge arises was considered in *Keymed Limited v Forest Healthcare NHS Trust* [1998] EuLR 71 per Langley J at pp.93-94:

> "The "grounds" could arise in two factual contexts. First, when the Regulations were simply not being observed from the outset either through ignorance or consciously; and, secondly, where despite having embarked on the procedures the contracting authority is alleged not to have observed some specific provision ...
>
> In the first case, the Regulations will be broken when the authority expects to see offers leading to the award and fails (or it is apprehended that it will fail) to notify the OJ accordingly … and when it forms the intention to seek offers and fails (or it is apprehended that it will fail) as soon as possible thereafter to publicise that intention in the OJ…
>
> In the second case, grounds will first arise when the specific failure occurs or is apprehended …

> The overriding duty on a contracting authority is to comply with the provisions of these regulations generally, and in my judgement grounds will first arise for the bringing of proceedings once it could be shown that they were not complied with from the outset of the award procedure. If it were otherwise and a supplier could select the last breach available to him, apart from obvious problems of proving causation, it would mean that he could sit back and do nothing even in respect of breaches of which he was aware or which he apprehended. That would again be contrary to much of the purpose of [the regulation]… in a case where the whole procedure is conducted in breach of the regulations (as Keymed alleges in this case) the failure to comply with them first arises and is established by failure to give the requisite notices to the OJ. Thereafter the regulatory procedures cannot effectively be complied with."

100. That analysis of the test was approved by the Court of Appeal in *Jobsin Co UK plc v Department of Health* [2001] EWCA Civ 1241 per Dyson LJ at [23]:

> "… A service provider's knowledge is plainly irrelevant to the question whether he has suffered or risks suffering loss or damage as a result of a breach of duty owed to him by a contracting authority. This was the conclusion reached by Langley J in *Keymed* … I agree with the reasoning of Langley J on this issue … Knowledge will often be relevant to whether there is good reason for extending the time within which proceedings may be brought, but it cannot be relevant to the prior question of when the right of action first arises."

101. In *Jobsin* the central complaint was that the authority failed to identify or apply clear, objective and proper criteria to assess the bids. The Court of Appeal rejected the claimant's argument that the right of action did not arise until it was excluded from the tender process per Dyson LJ:

> "[26] ... It is clear that, as soon as the Briefing Document was issued without identifying the criteria by which the most economically advantageous bid was to be assessed, there was a breach of regulation 21(3) … Moreover, it was a breach in consequence of which Jobsin, and indeed all other tenderers too, were then and there at risk of suffering loss and damage. It is true that it was no more than a risk at that stage, but that was enough to complete the cause of action. Without knowing what the criteria were, the bidders were to some extent having to compose their tenders in the dark. That feature of the tender process inevitably carried with it the seeds of potential unfairness and the possibility that it would damage the prospects of a successful tender.
>
> [27] Mr Lewis submits that neither the loss nor the risk of loss was caused by the breach of regulation 21(3) until Jobson was excluded from the tender process … I reject that submission for

> the following reasons. First, it gives no meaning to the words "risks of suffering loss or damage" in regulation 32(2). It seems to me that those words are of crucial significance. They make it clear that it is sufficient to found a claim for breach of the Regulations that there has been a breach and that the service provider may suffer damage as a result of the breach. It is implicit in this that the right of action may and usually will arise before the tender process has been completed.
>
> [28] That brings me to the second reason. 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."

102. In *Risk Management* (above), Moore-Bick LJ expressed agreement with the approach taken in *Keymed* and *Jobsin* and stated:

> "[242] When considering when grounds for proceedings first arose it is necessary to bear in mind that the 2006 Regulations prescribe the procedure which a contracting authority must follow before entering into a contract with a supplier of goods or services. The duty owed in accordance with paragraphs (1) and (2) of regulation 47 is therefore a duty to comply with that procedure. It follows that a failure by the contracting authority to comply with any step in the required procedure involves a breach of duty sufficient to support a claim under the Regulations. Moreover, because the procedure governs the whole process from the formation of the intention to procure goods or services to the award of the contract and is structured in a way that is intended to ensure equal treatment and transparency throughout, a failure to comply with the procedure at any stage inevitably undermines the integrity of all that follows.
>
> …
>
> [250] … a claim under the Regulations … is an action to vindicate private rights in the context of a procedure that in many cases will still be in progress. Moreover, as I have already observed, a failure to comply with the procedure at any stage inevitably undermines the integrity of all that follows. Accordingly, the right of action is complete immediately and cannot be improved by allowing the procedure to continue to a

> conclusion. Where there has been a failure to comply with the proper procedure the latter award of the contract does not constitute a separate breach of duty; it is merely the final step in what has already become a flawed process."

103. However, the court emphasised the importance of distinguishing between proceedings based on an apprehended breach and proceedings based on a breach that has been committed:

> "[252] Grounds for bringing anticipatory proceedings arise when there is sufficient evidence of an intention on the part of the contracting authority not to comply with the prescribed procedure. In all other cases grounds for bringing proceedings arise only when the contracting authority fails to comply with that procedure. This distinction is important because [the regulation] speaks of grounds for the bringing of *the* proceedings and thereby directs attention to the particular proceedings before the court. For these reasons I do not think that the mere existence of grounds that will support anticipatory proceedings is sufficient to start time running against a claimant who seeks relief in respect of an accrued breach of duty."

104. Once a relevant breach has occurred, time starts to run in respect of that breach - per Hughes LJ at [255]:

> "… any failure by a contracting authority to comply with *any* step in the required procedure involves an actual breach and it is accordingly not open to a putative claimant to await the last in a series of actual breaches and to contend that time runs only from then …"

105. The test as to the date when the economic operator first had actual or constructive knowledge of those grounds was considered in *Sita UK Limited v. Greater Manchester Waste Disposal Authority* [2011] EWCA Civ.156 by Elias LJ :

> "[19] … 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 … "

106. Elias LJ adopted the test formulated by Mann J in the first instance judgment (see [26] and [31]), namely:

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

107. It is knowledge of the relevant facts that is relevant, rather than knowledge of the law. Time does not start to run from the time that legal advice has or should reasonably have been taken: *Jobsin* (above) per Dyson LJ at [33]; *Mermec UK Ltd v Network Rail Infrastructure Ltd* [2011] EWHC 1847 (TCC), per Akenhead J at [18].

108. Thus, the court must consider and ascertain:

i) the relevant breach or breaches of the Regulations or other obligations forming the basis of the claim for relief in these proceedings;

ii) the date(s) on which the relevant breach(es) first occurred;

iii) the date(s) on which Excession had knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement.

109. In the event that any of the claims were started outside the period of 30 days from the date when Excession first knew or ought to have known that grounds for starting the proceedings had arisen, the court has discretion to extend the time limit in accordance with regulations 53(4) and (5).

110. In *Amey Highways Limited v. West Sussex County Council* [2018] PTSR 465 Stuart-Smith J (as he then was) provided guidance as to the exercise of the court's power to extend time at [35]:

> "A number of authorities have considered what may be a good reason for extending time limits, either in principle or on the facts of a particular case. Many have said that it would be unwise to try to provide a definitive list of what the court will or will not take into account in assessing what may be good reason for extending time limits. I agree, for the simple reason that the regulation does not impose any fetter or limitation upon what may be brought into account. For that reason I would not accept that the claimant must show good reason for not issuing in time as a necessary prerequisite to the exercise of the court's discretion … although the absence of good reason for not issuing in time is always likely to be an important consideration. And when considering what other factors *may* be brought into account if appropriate in a given case … relevant considerations will include: (a) the importance of the issues in question; (b) the strength of the claim; (c) whether a challenge at an earlier stage would have been premature, the extent to which the impact of the infringement is unclear and the claimant's knowledge of the infringement; and (d) the existence of prejudice to the defendant, third parties and good administration. For the reasons I have already given, I do not think that this should be regarded as an exhaustive catechism, even in general terms."

111. In *SRCL v. NHS Commissioning Board* [2019] PTSR 383 at [153]-[154] Fraser J emphasised the importance of rapidity in procurement cases and the strict time limits applicable but indicated that, when considering an application for an extension of time, the court would take a broad approach in all the circumstances of the particular case.

Paragraphs 40-42 – duties owed

112. Paragraphs 40-42 of the Particulars of Claim set out Excession's case as to the duties owed by PDS, including applicability of the Regulations:

> "40. The Procurement was subject, at all material times, to the Regulations. At all material times the Defendant has been under an obligation to comply with their provisions.
>
> 41. At all material times the Defendant owed the Claimant a duty pursuant to Regulation 51 of the Regulations to comply with the Regulations and any retained EU obligation that is enforceable by virtue of section 4 of the European Union (Withdrawal) Act 2018, including:
>
> 41.1. pursuant to Regulation 5(2) of the Regulations, to treat all bidders equally and without discrimination and to act in a transparent and proportionate manner;
>
> 41.2. pursuant to Regulations 31(1) and (2) of the Regulations, to award a contract on the basis of the offer which is the most economically advantageous using criteria linked to the subject matter of the contract;
>
> 41.3. to carry out its evaluation of the tenders free from manifest error.
>
> 42. Further, pursuant to Regulation 31(6), the Defendant has the power to reject a bid which is abnormally low."

113. Paragraph 2 of the Defence sets out PDS's case that the Procurement was subject to the exemption under regulation 7(1)(b) and further that:

> "(e) No claim form challenging the Defendant's decision to rely on the reg. 7(1)(b) exemption was issued within 30 days of publication of the SQ. It is averred that it follows that the particulars of breach contained in the PoC, all of which constitute complaints alleging departures from, or failures to comply with, duties imposed by the Regulations, are time-barred. Without prejudice to the generality of the foregoing averment, the Claimant had actual or constructive knowledge with effect from 23 October 2020 that the Defendant did not intend to proceed in compliance with the Regulations and that there was accordingly, if the Defendant's reliance on the reg. 7(1)(b) exemption was unlawful, a risk of loss or damage to the Claimant as a result."

114. Mr Patel submits that the applicability of the exclusion to the Procurement is a matter of law. The Procurement either comes within the exclusion (properly construed) or it does not. The issue is not an aspect of the contracting authority's decision-making. The statements in the SQ and/or the ITT do not constitute decisions which amount to a breach of the Regulations. In those circumstances, there is no basis for the contention

by PDS that the duties under the Regulations asserted are out of time. In any event, Excession's knowledge of the relevant grounds did not arise until after it had received legal advice (after receiving the contract award decision on 1 April 2021) as to the applicability of the exclusion.

115. Mr Barrett submits that all of the claims under the Regulations are time-barred. Excession had actual or constructive notice from the date of publication of the SQ that PDS was conducting the contract award in reliance on the regulation 7(1)(b) exemption, and accordingly did not intend to comply with the requirements of the Regulations. In paragraph 20 of his second witness statement, Mr Peto accepts that Excession was aware of PDS' reliance on the exemption. On its own pleaded case, Excession had actual or constructive knowledge both of the grounds of claim and, at least, the risk of loss or damage. The running of time under the Regulations is not postponed until the point in time when a claimant seeks or obtains legal advice; nor is the point at which legal advice is sought or obtained a good reason to extend time.

116. The starting point is for the court to identify the relevant breach or infringement. Paragraphs 40 to 42 of the Particulars of Claim do not allege any breach of the Regulations; they assert an obligation on the part of PDS to comply with the Regulations. That obligation is disputed by PDS, relying on the regulation 7(1)(b) exemption. Thus the issue on the pleaded case is whether the Procurement fell within the ambit of the exemption, a question of law and construction.

117. The date on which a relevant breach would occur would be when PDS failed to comply with the procedure mandated by the Regulations. As a matter of principle, this could occur at the outset of a procurement exercise in circumstances where a contracting authority stated its intention not to comply with the prescribed procedure. That would then give rise to grounds for starting anticipatory proceedings for the purpose of regulation 53(2). However, it is important to analyse the facts of each case to determine whether there exist such circumstances giving rise to an apprehended breach. In this case, such grounds did not arise. The ITT stated in terms the understanding of PDS that the regulation 7(1)(b) exemption applied and it was not obliged to comply with the Regulations *in full*; however, it also stated that it intended to run the Procurement process maintaining the structure prescribed by the Regulations. On that basis, there was no clear evidence that PDS intended not to comply with the specific parts of the Regulations which Excession contends have been breached and which form the basis of the relief claimed in these proceedings.

118. Even if it could be argued that the SQ or the ITT indicated sufficient intention on the part of PDS not to comply with the Regulations, it could not be said that Excession had knowledge of the facts which apparently clearly indicated (without necessarily proving) an infringement before such failures, by departures from the Regulations, occurred.

119. In cross-examination Mr Peto stated that he was aware from the tender documents that PDS relied on the exemption but he was not aware of what that meant. It was not until it obtained legal advice that it was aware of this ground of challenge. Having regard to the clear statements in *Jobsin* (above) at [33] and *Mermec* (above) at [18], Excession's argument that it did not acquire relevant knowledge until after it had sought and obtained legal advice would not have postponed time running for the purposes of limitation.

120. However, for the reasons set out above, the court rejects PDS's case that the assertion of duties owed under the Regulations, or all claims under the Regulations, are time-barred.

Paragraph 46 – abnormally low tender

121. Paragraph 46 of the Particulars of Claim states:

> "Wrongly and contrary to regulation 31(6) of the Regulation, the Defendant failed to verify, properly or at all, whether Airbox's bid (or parts thereof) was abnormally low; alternatively failed to reject Airbox's bid (or parts thereof) as being abnormally low."

122. Paragraph 33 of the Defence states:

> "Paragraph 46 is denied. Without prejudice to the generality of that denial, the Defendant will say as follows:
>
> (a) Paragraph 2 above is repeated. Further or alternatively, any complaint in respect of these matters is time-barred."

123. Mr Patel submits that the earliest that Excession was or should have been aware that PDS did not (wrongly) reject Airbox's bid as being abnormally low was when it received the contract award decision letter on 1 April 2021. There is therefore no basis for submitting that this claim is time-barred. In any event, PDS has not provided any proper particulars of the enquiries it undertook and/or the factors relied upon in deciding not to reject Airbox's bid. In those circumstances, Excession is still not in possession of information which "clearly indicates" an infringement.

124. Mr Barrett submits that the pleaded complaint is that regulation 31(6) imposed a statutory duty on PDS to take various detailed investigatory steps relating to the Airbox ITT response and then exclude Airbox from further consideration. However, PDS made clear from the outset of the contract award process that it was proceeding on the basis that these statutory obligations did not apply. In the circumstances, the claim is time-barred.

125. For the reasons set out above in respect of paragraphs 40 to 42 of the Particulars of Claim, I reject Mr Barrett's argument that there was any anticipatory breach. Furthermore, section 3 of the ITT expressly stated that PDS would investigate any apparently abnormally low tenders and could reject a bid on that basis, thereby indicating an intention to comply with regulation 31(6) at the outset of the exercise.

126. The relevant breach alleged is a failure to verify whether any parts of the Airbox tender were abnormally low and/or reject the bid on that basis. Such breach could not occur before the decision, if any, on the part of PDS not to verify the tender, or to ignore any apparent abnormal aspect of it when awarding the contract.

127. Finally, I accept Mr Patel's submission that the earliest that Excession could have been aware of any breach was when it received the decision letter on 1 April 2022. It follows that the pleaded case on this issue is not time-barred.

Paragraphs 47-48 - failure to provide sufficient and proper information on pricing

128. This allegation is pleaded as follows:

> "47. In accordance with the principles of transparency, the Defendant was obliged in particular to make tenderers aware of all features to be taken into account by it in identifying the most economically advantageous tender when they prepared their tenders.
>
> 48. In breach of the above obligation, the Defendant failed to provide sufficient and proper information to the bidders about the demand scenario for call-off contracts under the Contract to allow the bidders to submit prices and costs for their bids (or parts thereof) on the same basis without having to make their own (potentially) unverifiable assumptions. Had such information been provided by the Defendant at the time when the Claimant and other bidders prepared their tenders, it could have affected the preparation of those tenders."

129. The relevant part of the Defence states:

> "34. Paragraph 47 is denied. Paragraph 2 above is repeated.
>
> 35. Paragraph 48 is denied. Without prejudice to the generality of that denial:
>
> (a) Paragraph 2 above is repeated.
>
> (b) If the Regulations did apply, which they do not, the complaint would be time-barred…"

130. Mr Barratt submits that the pleaded complaint is that PDS acted unlawfully by declining to provide the demand estimate requested by Excession before it submitted its ITT response. Excession had knowledge of these grounds from the date at which PDS informed it that the information would not be provided, or alternatively at the very latest from the date on which Excession submitted its ITT response.

131. Mr Patel submits that the grounds on which this claim is based did not arise until an irrevocable act occurred. This is illustrated by PDS's conduct during the course of the tender exercise. On 18 March 2021, after tenders had been submitted, PDS issued a clarification seeking confirmation from the tenderers whether a category of 2250 users could be covered by the pricing for the 600+ band. Thus, until the decision letter was sent it was open to PDS to change its position and provide the demand information. In those circumstances, the ground crystallised at that point, and Excession's knowledge was on that date. As such, the claim is not time-barred.

132. The relevant breach is a failure to provide information on pricing. The request for clarification in respect of the pricing schedule in the ITT was made by Excession on 21 December 2020. PDS responded to that request in the ITT clarification log on 28 January 2021, refusing to provide further information. Mr Peto's evidence is that in January 2021 Excession's solicitors raised comments on the proposed framework and

call-off contracts but they were met by "an almost blanket rejection". Excession submitted its tender on 4 February 2021.

133. If PDS were obliged to provide such information, it would be in breach by 28 January 2021. Even if it could be said that the request gave rise to a continuing obligation during preparation of the tenders, on the case as pleaded it was in breach by 4 February 2021 when the tender was submitted. Mr Patel's reliance on the 'irrevocable act' does not assist in light of *Keymed* (above) at p.94, *Jobsin* (above) at [27]-[28]; *Risk Management* (above) at [244]-[250] and [255].

134. I accept Mr Barratt's submission that Excession must have had knowledge of any breach when PDS refused to supply further pricing information.

135. Proceedings were not started by Excession until 26 April 2021, outside the time period stipulated in regulation 53(2).

136. I have considered whether it would be an appropriate case in which to extend time but conclude that it would not. Firstly, the length of the delay is significant; almost 3 months after the alleged breach as against the stipulated period of 30 days. Secondly, no good reason has been offered for the delay; understandably Excession concentrated on the merits of its bid but there is no evidence of any attempt to pursue a claim prior to April 2021. Thirdly, there is no suggestion that PDS bore any responsibility for any delay in starting the proceedings. Fourthly, the Procurement concerns a substantial project but the issues in the proceedings do not raise new, significant points of principle. Finally, PDS would suffer prejudice if an extension of time were granted. Not only would it lose the time-bar defence but also it would lose the opportunity to rectify any failure to provide information during the tender process.

137. For those reasons, in my judgment, the claim at paragraphs 47 to 48 of the Particulars of Claim is subject to the statutory time-bar in regulation 53(2) of the Regulations.

Paragraph 49 – manifest error in Demonstration Day scores

138. Excession's case is that there were manifest errors in the evaluation of its tender and Airbox's tender against the Demonstration Day requirements, as set out in Paragraph 49 of the Particulars of Claim:

> "49. In further breach of its obligation to assess the tenders rationally, the Defendant has made manifest errors in its assessment of the Claimant's tender by underscoring, alternatively in its assessment of Airbox's tender by overscoring. Given the limited information and disclosure provided by the Defendant at this stage (and the inconsistencies in the varying pieces of feedback provided), the Claimant is unable to plead this ground comprehensively. The Claimant therefore relies at present on the following as non-exhaustive illustrations of the Defendant's manifest errors in scoring:
>
> 49.1. E-logging. The Claimant relies upon the following:

49.1.1. The Claimant's E-logging capability meets requirement M82 and its sub-requirements (as set out in Appendix 1 – Annex A of the ITT) in full. Its main significant, relevant, added value is that data is stored using a technique called 'Merkle Trees', which guarantees immutability and thus renders the e-logs impervious to challenge in court. Further, significant added value is in its functionality which includes mobile sign-off, remote working / debrief and a personal log book. In light of the above matters, the only appropriate score (based upon the scoring table) for the Claimant would have been 5, and the Defendant erred in scoring the Claimant a 4.

49.2 Visibility of assets and situational awareness…had the Defendant properly understood them, the only appropriate score (based on the scoring table) for the Claimant would have been 5, rather than a 3 for item 4 …

49.3 Live real-time asset tracking…

49.3.2 As acknowledged by the assessors themselves, this is significant added value and the only appropriate score for the Defendant for this item would, therefore, have been a 5 rather than a 4…

49.3.3 During Airbox's Demo Day, the software on several occasions lost contact with its tracking beacon. This should have resulted in a partial non-compliance on this requirement from which the only appropriate score would have been 2 rather than the score of 3 given to Airbox…

49.4 Integration of agreed legacy equipment (video and GPS tracking) …

49.4.2 … The Claimant's case is that, in light of the significant value added of its solution (which are absent from Airbox's solution), it was a clear error by the Defendant to award the same score to it and Airbox for this question…

49.5 Cross-agencies connectivity …

> 49.5.2 … These additional features are not present in Airbox's software;
>
> 49.5.3 In the circumstances, it was a clear error by the Defendant to award the same score (3) to both the Claimant and Airbox for this question…"

139. The manifest error claim is linked to the Demonstration Day assessment as set out in paragraph 30 of the Particulars of Claim:

> "During the Demo Day, no questions were raised of the Claimant as to whether the capabilities demonstrated by its solution were fully implemented or were essentially 'mock-ups'. For example, with regard to 'E- Logging', the capability is to allow surveillance officers to enter logs via a mobile phone, tablet or desktop during operations. That element is straightforward to implement in software. However, a key technical requirement is that logs once entered should be unable to be changed without evidence of the change, who made it and for what reason. This immutability is not straightforward to implement in software, requiring advanced cryptography. Its presence was, however, invisible during the type of demonstration conducted during the Demo Day, and this significant added-value was not demonstrable during the exercise. The Claimant's software is immutable and this could have been established by the assessors during the Demo Day, if the question had been raised."

140. Paragraph 36 of the Defence states:

> "Paragraph 49 is denied. The Defendant pleads further to the Claimant's specific pleas of breach of duty below. It is averred that the Claimant's purported averment of right is irrelevant and of no effect. Without prejudice to the generality of the foregoing: (i) paragraph 2 above is repeated, and (ii) further and alternatively, it is averred that each of the complaints in paragraph 49 is time-barred."

141. Excession's case is that there were, in respect of certain aspects of the Demonstration Day, clear errors in the scoring. Excession complains that certain aspects of the functionality of its software were not recognised in the evaluation, and PDS made manifest errors when allocating marks. It was only when the scores and reasons for the scores were received in the letter dated 1 April 2021 that Excession was or ought to have been aware of the complaints. In those circumstances, it is irrelevant whether Excession was, or ought to have been, aware that the Demonstration Day evaluation would not comprise evaluation of certain aspects of the functionality of its software. In any event, Excession was not so aware nor ought it to have been; it considered that all aspects of the functionality of the software would be evaluated during the Demonstration Day.

142. Mr Peto's evidence was that he believed that an "under the hood" assessment of the functionality of the software would be carried out as part of the Demonstration Day assessment:

> "Nowhere else in the extensive set of documents comprising the ITT … was there an ability for bidders to demonstrate how their software met the 224 requirements … The Demo Day was therefore the only available opportunity for bidders to demonstrate this and for PictCo to properly assess this functionality…
>
> …
>
> Further, if a full assessment of bidders was not carried out on the Demo Day… it would be difficult for PictCo to ascertain whether the software being presented to it on the Demo Day was simply a mocked up function of a system (with basic user interface functions only) or an actual working, scalable, secure and legally compliant surveillance operation room solution.
>
> …
>
> For these reasons I (and the Excession team) reasonably believed and expected that PictCo would be undertaking a similar level of technical assessment during the Demo Day that had been undertaken on previous assessment days Excession had participated in…
>
> …
>
> The Demo Day Brief reaffirmed to Excession that its expectation was that compliance with both technical and legal requirements would form part of the assessment of each part of the core functionality being tested on the Demo Day. It is not clear to me how PictCo could otherwise score each of the ten categories by reference to whether or not they met the requirements for the SOR software as set out in the ITT. That was certainly how we understood PictCo would be assessing our bid."

143. In cross-examination, Mr Peto accepted that E.logging was demonstrated but that the scale of the system was not tested. He accepted that functionality such as vessels, heat mapping and historical analysis could not be tested during the Demonstration Day but stated that reliability was part of the requirements. He stated that it was only after the scores were received, following the contract award notice, that he became aware that such matters had not been taken into account.

144. PDS's case is that the allegations at paragraph 49 of the Particulars of Claim are time-barred. Excession knew, or should have known, that the matters now complained about could not be assessed during the Demonstration Day as explained by Mr Parker in his witness evidence:

> "It would have been clear to the Claimant that all they were required to do for the purpose of the demonstration was to link up their system to the screen and sound system. There was no requirement to link their hardware with any third party testing equipment for example. As stated in the Demo Day Bidder Information, the bidders were expected to bring all of their own hardware. That being the case, the Defendant had no facility available to it to test any aspect of the bidder's solution other than by observing how it performed on the screen and on hand held devices provided by the potential providers for those evaluators based in Hendon or on the hand held devices provided by the bidder for those evaluators based in Oxford. This was clear to the Claimant. I do not believe there is any basis on which the Claimant could have understood or believed the Defendant was assessing or testing any part of their solution other than what was visible from the screen hand held devices provided by the bidders.
>
> …
>
> The evaluation was based purely on what the evaluators saw and heard during the demonstration itself. There was no facility whereby the Defendant could test "*hidden"* technical aspects of the bidder's solution. If it could not be observed during the demonstration on the day, it could not be assessed.
>
> …
>
> At paragraph 49 of the Particulars of Claim, the Claimant refers to certain features of its solution which, it claims, provided added value and which ought to have been taken into consideration by the Defendant when scoring its bid during the Demo Day. However these matters were not being assessed as part of the Demo Day and I believe that the Claimant was and is well aware of this. As the Claimant stated in paragraph 29 of its Particulars of Claim, there was no scope for the Defendant to look under the hood of the Claimant's solution (or that of any other bidder). "

145. Mr Barrett draws attention to the fact that Mr Peto's evidence on this issue is at odds with Excession's pre-action correspondence and the pleaded case, in which it stated that it understood from the format of the Demonstration Day that aspects of significant relevant value would not be demonstrated because they were "under the hood".

146. It is not necessary for the court to resolve any issues of credibility regarding what was anticipated or stated at or around the Demonstration Day. Those are matters that might well need to be considered as part of any determination of the substantive allegations but they do not resolve this issue of limitation.

147. The relevant breaches pleaded in paragraph 49 of the Particulars of Claim are manifest errors in the marking of the tenders submitted by Excession and Airbox. Reference is made to matters that were, or were not; and to matters that could be, or could not be,

assessed as part of the Demonstration Day. The reasons for particular scores might be explained by the opportunities (or lack thereof) given at the Demonstration Day or other information in the bids. However, the failures alleged are errors in the scores allocated to the bidders against particular functional requirements. There could be a dispute as to whether the relevant breach(es) first occurred on or subsequent to the Demonstration Day exercises, or when the final evaluation of the tenders occurred. However, it was not until the letter dated 1 April 2021 that Excession had knowledge of the facts on which it relies as indicating an infringement, namely, the scores awarded to the tenders.

148. For those reasons, the claims based on manifest error were brought within 30 days of the date when Excession first knew or ought to have known that grounds for starting the proceedings had arisen.

Issue 3 – implied contract / implied terms

149. The issue is whether the Procurement was governed by an alleged implied contract between Excession and PDS containing the terms alleged by Excession in the Particulars of Claim.

150. The alleged implied contract is pleaded at paragraph 44 of the Particulars of Claim:

> "Alternatively, the Procurement is governed by an implied contract between the Claimant and the Defendant, arising in consequence of the Defendant issuing the ITT on 20 December 2020, and the submission of the Claimant's tender on 4 February 2021 in response to the ITT. The terms of the implied contract required the Defendant to observe all obligations on it arising under the terms of the ITT, all of the ITT's associated appendices and any other documents created under the requirements of the ITT, and to consider and evaluate the bids submitted in good faith. Such obligations included:
>
> 44.1. scoring the tender responses of the bidders in accordance with the scoring tables in and attached to the ITT. The Claimant repeats paragraphs 20.4 and 20.5 above;
>
> 44.2. ensuring the tenders submitted complied with the solution requirements in Appendix 1 to the ITT;
>
> 44.3. where the prices or costs offered by a bidder were apparently abnormally low, requiring the bidder to provide an explanation of such prices or costs and, where an explanation provided was unsatisfactory, rejecting an abnormally low bid (or parts thereof). The Claimant repeats paragraph 20.6 above."

151. The implied contract is disputed in paragraph 31 of the Defence:

> "Paragraph 44 is denied. It is noted that no particulars are provided as to the basis on which it is alleged that the contractual

> obligations referred to fall to be "implied" as a matter of law. Paragraph 2 above is repeated. Without prejudice to the generality of the foregoing, it is averred that the alleged obligations are contrary to, and inconsistent with the terms of the ITT and other tender documents. Paragraph 2 above is repeated."

Legal principles

152. It is well-established that a contract can be implied governing the conduct of a tender exercise: *Blackpool and Flyde Aero Club Limited v. Blackpool Borough Council* [1990] 1 WLR 1195 per Bingham LJ at p.1202:

> "… where, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure – draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and to identify the tender in question, and an absolute deadline – the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all the conforming tender or at least his tender will be considered if others are. Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with the others, I feel quite sure that the answer would have been 'of course'. The law would I think defective if it did not give effect to that."

153. In *Marks & Spencer plc v. BNP Paribas Securities Services Trust* [2015] UKSC 72, the Supreme Court set out the requirements for implying a term into a commercial contract, approving at [18] the test set out in the Privy Council case *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* [1978] 52 ALJR 20 by Lord Simon of Glaisdale that:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

154. Having approved the above summary, Lord Neuberger added six comments at [21]:

> "First, In *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459 Lord Steyn rightly observed that the implication of a term was 'not critically dependent on proof of an actual intention of the parties' when negotiating the contract. If one approaches the question by reference to what the parties would

> have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it had it been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, … although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is 'vital to formulate the question to be posed by [him] with the utmost care… Sixthly, necessity for business efficacy involves a value judgment… the test is not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is … that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

155. In *JBW Group Limited v. Ministry of Justice* [2012] 2 CMLR 10, the Court of Appeal considered the applicable principles when determining whether to imply any contract governing the tender exercise - per Elias LJ:

> "[57] The argument here was that by offering the contract out to tender, the MoJ was impliedly entering into a contract which would oblige it to treat all tenders equally and with transparency and in accordance with the terms of the tender document.
>
> [58] Mr Knox accepted that if he had succeeded in establishing that there was a service contract, this would add nothing to his case. It would then be unnecessary to imply any contract … and conceded that it would be inconsistent with the purpose of the Directive to imply any such contractual right.
>
> [59] That concession was, in my view, rightly made and is consistent with the decisions of two first instance judges, Morgan J in *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179(Ch), para 212 and Flaux J in *Varney and Sons Waste Management Ltd v Hertfordshire County Council* [2010] EWHC 1404, paras 232-235 citing *Monro v HMRC* [2009] Ch 69.

[60] However if, as I have found, the Regulations are not applicable, the same argument cannot be advanced. I reject a submission of Mr. Vajda that it would be illogical to find that an implied term can be excluded if the arrangement is analysed as a service contract but not if it is a concession. The reason it would be excluded in the first situation is that it is unnecessary and would, if implied, be inconsistent with the statutory scheme. Those arguments do not apply where the arrangements constitute a concession. Nor do I accept an argument he advanced, which was accepted by the judge below, that by excluding concessions from the scope of the Directive and hence the Regulations, the draftsman intended that provisions of a kind found in the Regulations positively ought not to apply to them. I would not be prepared to read the effect of the exclusion in that way. A tendering authority is not obliged to comply with the Regulations where a service concession is in play, but there is in principle no reason why it could not choose to do so and I do not see how it could be illegal for it to do so. The parties could expressly agree to contractual terms mirroring the Directive and the Regulations if they so wished, and therefore there is no reason in principle why implied terms could not cover the same ground. Having said that, the difficulty in implying terms akin to those found in the Regulations, terms necessarily premised on the assumption that this was the common intention of the parties, in circumstances where the MoJ has throughout been acting on the assumption that the Regulations did not apply, is obvious.

[61] When considering the implied contract question, two issues arise for consideration: first, is there any implied contract? Second, if so, what is its scope? As to the first issue, I would be prepared to accept, in line with the well-known judgment of Bingham LJ, as he then was, in *Blackpool Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 that the MoJ would in principle be under an obligation to consider the tender. Also, contrary to the submissions of the MoJ, I would have no difficulty in implying that any such consideration should be in good faith. Mr Vajda contended that this was an obligation under public rather than private law, but I do not see why this should preclude the obligation arising in private law also. Indeed, if a tender is not considered in good faith, I do not think that it can sensibly be said to have been considered at all.

[62] However, Mr Knox does not contend that there has been a breach of this limited duty. The question is whether the implied obligations can extend beyond that limited requirement to embrace the much fuller set of duties relied upon by Mr Knox. I see no conceivable basis for concluding that it can. There is simply no basis on which it can be contended that these terms necessarily have to be implied to give efficacy to the contract; and nor can there be a common intention that they should given

> that the MoJ has always been denying that the regulations apply. Moreover, as Mr. Vajda pointed out, the specific power conferred on the MoJ to depart from the terms of the tendering document is itself inconsistent with the EU principle of transparency which would require strict adherence to the published terms.
>
> [63] Mr Knox relied upon the fact that there are fundamental EU principles of transparency and equality, and he submitted that these would mould the nature of the implied term. However, I agree with Mr Vajda that there is no proper basis for assuming that EU principles can alter the way in which terms are implied at common law. It is common ground that these principles are not engaged as a matter of EU law, since there is no cross-border element in the arrangement. In effect Mr Knox is seeking to use the implied term as a means of expanding the reach of EU law and that is not, in my judgment, a legitimate exercise."

156. Mr Patel submits that this issue only arises in the event that the court determines that the exclusion in regulation 7(1)(b) applies to the tender exercise. It is well-established from the case-law that PDS, by sending to Excession and the other bidders the ITT (and associated documents, including the invitation to the Demo Day) and the return of the tender and participation in the Demo Day, undertook a contractual obligation to consider and evaluate the tender submitted by Excession and Excession's presentation at the Demo Day in accordance with the terms of the ITT (including Demo Day information). He submits that PDS's attempt to rely upon the terms of section 3 of the SQ as negating a common intention on the part of the parties for an implied contract to arise is misconceived. First, those terms only apply to the SQ. Second, upon proper analysis, the terms do not oust an implied contract that PDS undertake to consider and evaluate Excession's bid in accordance with the terms of the ITT. Insofar as it goes, it would prevent an enforceable obligation to award the framework agreement. Furthermore, the fact that PDS reserved the right to change the basis of, or the procedures for, the tender process does not negate an implied contract governing the tender process and the terms which are applicable (where PDS has not changed the basis of, or the procedures for the tender process).

157. Mr Barrett submits that the implied tender contract claim is fatally flawed as a matter of (i) pleading, (ii) law, and (iii) fact. In relation to Excession's Particulars of Claim, there is no operative plea as to a legal basis on which an implied tender contract could arise – there is no averment that it was either obvious or necessary that such an implied tender contract should be implied. As to the law, it is submitted that the binding (or alternatively highly persuasive) reasoning and decision of the Court of Appeal in *JBW* is fatal to the implied tender contract claim. As to the facts, Excession's case would involve imposing legal obligations where the evidence makes clear that it was PDS's positive intention and belief throughout the tender process that no such legal obligations would be owed to bidders. There is no legitimate or sustainable basis for a court to purport to impose far-reaching legal obligations in circumstances of this sort under the rubric of "contract".

158. Following the hearing in this case, judgment was handed down in *Adferiad Recovery Limited v Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC). The

court is grateful to the parties for their further written submissions and notes the helpful analysis of the relevant authorities by His Honour Judge Keyser QC, sitting as a Judge of the High Court, in particular at [130] to [139]. However, it is important to bear in mind that the relevant facts in each case must be considered against the general principles identified.

159. In this case, the court has found that PDS was entitled to rely on the exemption in regulation 7(1)(b); therefore, the Regulations did not apply to the Procurement. On that basis, there would be an implied contract that Excession's tender, if compliant with any tender requirements and submitted by the deadline, would be considered if other such tenders were considered and that such consideration should be undertaken in good faith.

160. However, the obligations which Excession seeks to rely upon go much further than this; they extend to implied obligations to (i) apply the scoring tables, (ii) ensure the tenders complied with the solution requirements in Appendix 1 to the ITT and (iii) investigate and/or reject any abnormally low bids.

161. The court rejects Excession's argument that such obligations would be implied. Firstly, they are not necessary to give an implied tender contract commercial or practical coherence. An obligation to consider all compliant and timeous bids in good faith, if any are considered, does not require any additional detailed terms as to the basis on which the bids should be evaluated, rejected or accepted.

162. Secondly, such implied obligations would be contrary to the express statement in the ITT:

> "This procurement is being run under the Defence and Security Public Contracts Regulations 2011 due to the nature of the SOR Services. However, owing to the sensitive nature of the Requirements (which entail both intelligence services and classified information), the exemption set out in Regulation 7(1)(b) DSPCR 2011 applies.
>
> Notwithstanding the above, the Authority considers it helpful to Applicants to maintain the structure of having an SQ and ITT stage and therefore intends to run the Process adopting these two stages. For the avoidance of doubt, this is to assist all parties to manage their engagement with the procurement utilising a process which is familiar. This does not however in any way oblige the Authority to comply with the DSPCR 2011 in full, and the Authority reserves the right in its sole discretion to change the Process at any time."

163. The reservation of a power to change the process at any time is inconsistent with the pleaded obligations to conduct the process on particular terms. It is not material that PDS did not change the process during the Procurement. It is sufficient that it retained the power to do so at any time. That power indicated that it was not bound by the process rules set out in the tender documents. Therefore, it would not be possible for Excession to establish any common intention to imply such obligations.

164. It follows that the court rejects Excession's case that the Procurement was governed by an implied contract on the terms pleaded at paragraph 44 of the Particulars of Claim.

Conclusion

165. For the reasons set out above, in respect of the issues:

i) PDS was entitled to rely on the exemption under regulation 7(1)(b) of the Regulations in relation to the Procurement.

ii) If the Regulations applied, the claims pleaded at paragraphs 47-48 of the Particulars of Claim would be time-barred under regulation 53 of the Regulations and it would not be appropriate for the court to extend time for bringing those claims.

iii) The claims pleaded at paragraphs 40-42, 46 and 49 of the Particulars of Claim would not be subject to the statutory time-bar pursuant to regulation 53 of the Regulations.

iv) The Procurement is not governed by an alleged implied contract between Excession and PDS containing the terms alleged by Excession in the Particulars of Claim.

166. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for permission to appeal, and any time limits are extended until such hearing or further order.