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Judgment: approved by the Court for handing down
(subject to editorial corrections)

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

HENRY BROS (MAGHERAFELT) LTD, F B McKEE & CO LTD AND DESMOND SCOTT AND PHILIP EWING T/A WOODVALE CONSTRUCTION CO LTD

Plaintiffs;

and

DEPARTMENT OF EDUCATION FOR NORTHERN IRELAND [N0. 2]

Defendant.

COGHLIN J

[1] In this case the first-named plaintiff, a long established firm of building contractors, formed a consortium with the second, third and fourth-named plaintiffs for the purpose of submitting a tender for inclusion within the terms of the Northern Ireland Schools Modernisation Framework Agreement ("the framework agreement") for the provision of major construction works to be carried out in furtherance of the Northern Ireland Schools Modernisation Programme ("NISMP").

[2] The defendant is the Department of Education for Northern Ireland ("the Department") which instituted the NISMP as part of a policy aimed at reversing the historical under-investment in the schools infrastructure. The Department estimates that only 25-30% of the schools within the present schools estate meet the Department's Building Handbook standards and that an even smaller percentage could be considered to constitute modern 21st century education facilities. The Investment Strategy for Northern Ireland 2005-2015 ("ISNI"), published on 14 December 2005, set out ambitious plans for new investment in the schools estate with a view to the creation of a modern infrastructure for schools and youth facilities. On 25 October 2007 a further draft investment strategy was published for consultation allocating

some £714.5M to Schools and Youth Services over the period 2008/9 to 2010/11.

[3] The plaintiffs have been excluded by the Department from the Framework Agreement and they allege that, as a consequence, the department has acted in breach of contract, in breach of the Public Contracts Regulations 2006 ("the Regulations") and in breach of the general principles of EC Law.

[4] Mr Michael Bowsher QC and Mr Peter Girvan appeared on behalf of the plaintiffs while the Department was represented by Mr Stephen Shaw QC and Mr David McMillan. I am indebted to both sets of counsel for their carefully prepared and helpful oral and written submissions as well as their extensive research of the relevant legal principles and authorities.

The Factual Background

[5] The Central Procurement Directorate ("CPD") is concerned with the development of policy and best practice in relation to procurement for the benefit of the public sector in Northern Ireland. The CPD also serves as a central purchasing body and provides the public sector with policy advice and construction related support services including professional, advisory and project management expertise. It has also been closely involved in developing standards and practices to be applied in procurement competitions. Among its other functions CPD has been active in advising the Government as to the best procurement strategy to adopt in order to obtain best value for money. In doing so it has been instrumental in promoting the Department's contract strategy based on the establishment of framework agreements provided for under the Regulations. Once established, such framework agreements are intended to facilitate the appointment of teams of designers and contractors to undertake projects, as the need arises, by means of a secondary competition between those appointed in accordance with the framework agreement. This allows the preliminary work in procurement to be carried out in one exercise which then provides a contracting authority with a pool of contractors who have been assessed as best qualified to carry out individual contracts that are put out to tender. In the context of this litigation CPD acted as the agent of the Department in relation to the NISMP and was responsible for the issue and receipt of all correspondence with the candidates relating to the framework agreement. The Department was advised with regard to the structure and implementation of the competition to identify those who should come within the framework agreement by Messrs E C Harris at the Pre-Qualification Questionnaire ("PQQ") stage and by Chandler KBS as sub consultants to E C Harris thereafter.

[6] The procedures followed by the Department and its consultants appear to have been as follows:

(*i*) On 13 March 2007 CPD published a Contract Notice in the Official Journal of the European Communities which referred to the NISMP and invited contractor-led teams to apply for appointment to the framework agreement for the design and construction, or construction only, of schools or other projects as might be required by an educational body in Northern Ireland. The Notice stated that the framework agreement would last for a period of 48 months and that the estimated total value of projects to be awarded under the framework was £550m to £650m. The Notice also specified that the envisaged number of operators who would be invited to tender would be a minimum of 12 and maximum of 16 and that the maximum number of envisaged participants in the framework would be 8.

(*ii*) Each contractor who requested information was supplied with a copy of the Memorandum of Information and Instructions to Tenderers together with a copy of the PQQ.

(*iii*) A market information day was held on 23 March 2007 at which interested parties were informed that any specified projects would be based on the NEC3 forms of contract and that a two-stage strategy would be adopted involving a primary competition for the purpose of selecting contractors to be included within the framework agreement and, subsequently, a secondary competition for the purpose of identifying a contractor to carry out any specific project.

(*iv*) Throughout the PQQ stage the CPD dealt with all requests for clarification and, in all, eight PQQ Clarification Notes were issued.

(*v*) Contractors were required to return the completed PQQs to CPD by 3.00 pm on 4 May 2007 and they were opened on 8 May 2007. After assessment the consultants recommended to the Department that all 12 contractors had met the criteria stipulated in the PQQ and should be invited to tender.

(*vi*) On 19 June 2007 CPD Contracts Branch issued Invitation to Tender ("ITT") documents to all twelve contractors by way of e-mail. These consisted of four volumes comprising Invitation to Tender, Framework Agreement, Works and Site Information and Tender Submissions.

(*vii*) Contractors were required to return their ITT submissions to CPD by 3.00 pm on 7 August 2007. During this stage CPD issued eleven ITT Clarification Notes. In particular, Clarification Note 4 indicated that tenders would be evaluated in accordance with the weighting specified in ITT documents namely, 80% qualitative and 20% commercial. This Note confirmed that the commercial section would be based on a submission of direct fee percentages, sub-contract fee percentages and indicative fee

percentages for design services. The qualitative section was based on the response to 26 questions across seven weighted sections.

(*viii*) The ITT submissions were assessed by the Department consultants who forwarded any request for clarification to CPD for issue to the particular contractor. The consultants forwarded a report to the Department on 8 October 2007 identifying the eight highest ranking contractors who should be appointed to the framework. It was at this point that the plaintiffs were excluded. On 6 August 2007 the plaintiffs had submitted a Supplier Satisfaction Report on CPD performance in which they expressed contentment with the adequacy of the information supplied, the quality and clarity of the documents and the timescale and adequacy of support and communication observed by CPD staff.

(i*x*) After receipt of the assessment decision from the Department, CPD's contract branch issued letters to successful and unsuccessful contractors on 17 October 2007 and all four unsuccessful contractors were afforded a debriefing session.

(x) Following the debriefing meeting correspondence ensued between the plaintiffs and the Department consultants via the offices of CPD. This took place during a standstill period between the plaintiffs' debrief on 29 October 2007 and 5.00pm on 5 November 2007. On 2 November 2007 the plaintiffs wrote to the Department requesting that the framework agreement should not be concluded and confirming that the letter should be treated as notice under Regulation 47(7) (*a)* of the Regulations indicating their intention to institute High Court proceedings. On 9 November 2007 the plaintiffs wrote to the Department formally notifying their intention to institute proceedings and on 12 November 2007 a Writ of Summons was issued.

The Legal Framework

[7] The purpose of the Regulations was to implement Directive 2004/18/EC ("the Directive") on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and the following words contained in paragraph (46) of the recitals are of general significance in this litigation:

> "Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition."

[8] Article 32 of the Directive dealt with framework agreements and sub-paragraph 2 of Article 32 provided that:

> "2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set out in accordance with Article 53."

[9] Article 53 of the Directive dealt with contract award criteria and provided as follows:

> "1. Without prejudice to national laws, Regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:
>
> *(a)* when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion; or
>
> *(b)* the lowest price only."

[10] The European Commission explanatory note dealing with framework agreements recorded that the development of effective competition in the public procurement sector was one of the objectives of the Directives dealing with this area as recalled by the established case law and noted that public procurement Directives did not operate in a legal vacuum but were subject to both Community and National competition rules. The same document also specifically stated that:

> "Under the second indent of the second paragraph of Article 32(4)*(d)*, the award of a contract is made

> `on the basis of the award criteria set out in the specifications of the framework agreement.' It should be emphasised that the award criteria do not have to be the same as those used for the conclusion of the framework agreement itself. Thus, it would be entirely possible to conclude a framework agreement exclusively on the basis of `qualitative' criteria, in terms of the most economically advantageous tender, and to base the award of specific contracts solely on the lowest price, naturally on condition that this criterion was set out in the specification of the framework agreement. Let us take the example of a framework agreement relating to computers and peripherals (printers, scanner etc), concluded on the basis of the most economically advantageous tender using criteria such as price, technical value and cost of use. For awarding a specific contract solely for the supply of printers, however, the contracting authority could conceivably set out in the specification of the framework agreement that, for such a contract, `technical value' will be measured in terms of `pages/minute' while `cost of use' will take account of energy consumption, the life of ink cartridges and their price."

[11] Paragraph 4 of the Guidance provided by the Office of Government Commerce ("OGC") of January 2006 relating to framework agreements emphasised that it would be important to consider whether a framework agreement was the right approach for the particular goods, works or services to be purchased and noted that, in particular, a framework should be capable of establishing a pricing mechanism. The Guidance pointed out that this did not mean that actual prices should always be fixed but rather that there should be a mechanism that would be applied to pricing particular requirements during the period of the framework. Paragraph 4.7 confirmed that, at the award stage, the providers to be included in the framework agreement should be chosen by applying the award criteria to establish the most economically advantageous tender or tenders in the normal way. When awarding individual contracts or "call-offs" under framework agreements the OGC advised that, while they did not have to go through the full procedural steps again, authorities needed to be careful to ensure that nothing was done that which was discriminatory, improper or which distorted competition.

[12] The provisions of the Regulations with the greatest relevance to these proceedings are:

"Regulation 2-(1) In these Regulations –

`Framework agreement' means an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies;

Regulation 4-(1) In these Regulations -

`An economic operator' means a contractor, a supplier or a services provider. …

(3) A contracting authority shall (in accordance with Article 2 of the Public Sector Directive) –

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

(b) act in a transparent way.

Regulation 19 -

(1) A contracting authority which intends to conclude a framework agreement shall comply with this Regulation.

(2) Where the contracting authority intends to conclude a framework agreement, it shall –

(a) follow one of the procedures set out in Regulations 15, 16, 17 or 18 up to (but not including) the beginning of the procedure for the award of any specific contract set out in this Regulation; and

(b) select an economic operator to be party to a framework agreement by applying award criteria set in accordance with Regulation 30.

(3) Where the contracting authority awards a specific contract based on the framework agreement it shall –

(a) comply with the procedures set out in this Regulation; and

(b) apply those procedures only to the economic operators which are party to the framework agreement.

(4) When awarding a specific contract on the basis of a framework agreement neither the contracting authority nor the economic operator shall include in that contract terms that are substantially amended from the terms laid down in that framework agreement….

(7) Where the contracting authority concludes a framework agreement with more than one economic operator, a specific contract may be awarded –

(a) by application of the terms laid down in the framework agreement without re-opening competition; or

(b) where not all the terms of the proposed contract are laid down in the framework agreement, by re-opening competition between the economic operators which are parties to that framework agreement and which are capable of performing the proposed contract in accordance with paragraphs (8) and (9).

(8) Where the contracting authority is following the procedure set out in paragraph (7)*(b)* it shall re-open the competition on the basis of the same or, if necessary, more precisely formulated terms, and where appropriate other terms referred to in the contract documents based on the framework agreement.

Part 5

Criteria for the award of a public contract .

30-(1) Subject to Regulation 18(27) and to paragraphs (6) and (9) of this Regulation, a contracting authority shall award a public contract on the basis of the offer which –

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

(b) offers the lowest price.

(2) 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, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion.

(3) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.

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

(5) Where in the opinion of a contracting authority, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the contracting authority shall indicate the criteria in descending order of

importance in the contract notice or contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.

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

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

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

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

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

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

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

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

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

(*e*) the possibility of the economic operator obtained State Aid.

(8) Where a contracting authority establishes that a tender is abnormally low because the economic operator has obtained State Aid, the offer may be rejected on that ground alone only after –

(*a*) consultation with the economic operator; and

(*b*) the economic operator is unable to prove, within a reasonable time limit fixed by the contracting authority that the aid was granted in a way which is compatible with the EC Treaty.

Part 9
Applications to the Court

Enforcements of obligations

47 – (1) The obligation on-

(*a*) A contracting authority to comply with the provisions of these Regulations, other than Regulations 14(2), 30(9), 32(14), 40 and 41(1), and with any enforceable Community obligations in respect of a public contract, framework agreement or design contest (other than one excluded from the application of these Regulations by Regulation 6, 8 or 33); and

(*b*) A concessionaire to comply with the provisions of Regulation 37(3);

is a duty owed to an economic operator.

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

(7) Proceedings under this Regulation must not be brought unless –

(*a*) the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) … by that contracting authority or concessionaire and of its intention to bring proceedings under this Regulation in respect of it; and

(*b*) those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

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

(*a*) by interim order suspend the procedure leading to the award of the contract or the procedure leading to the determination of a design contest in relation to the award of which the breach of the duty owed in accordance with paragraph (1) … is alleged, or suspend the implementation of any decision or action taken by the contracting authority or concessionaire, as the case may be, in the course of following such a procedure; and

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

(*i)* order the setting aside of the decision or action or order the contracting authority to amend any document;

(*ii*) award damages to an economic operator which has suffered loss or damage as a consequence of the breach; or

(*iii*) or both of those things.

(9) In proceedings under this Regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) … if the contract in relation to which the breach occurred has been entered into."

The system adopted by the Department and its consultants

[13] As indicated above the only information directly relating to price taken into account by the Department during the primary competition was the fee percentages. The tenderers were required to specify these in relation to a number of bands of hypothetical contract values. After the primary competition identified the eight members of the framework the process adopted by the Department then provides for a secondary competition to take place once a specific contract has been identified. This involves the provision by the Department of a specific project brief, including a budget, for consideration by the tendering contractors. Each contractor is then asked to tender and comment upon the envisaged budget including the identification of areas where savings might be achieved or where the budget might be at risk. The submissions of the tendering contractors are then marked by the Department's assessment team with a view to establishing which contractor is able to deliver the best value scheme having regard to the projected budget and the quality of the project for the money available. The contract is then let to the successful tenderer. At this stage a discussion takes place between the contractor and a costs manager appointed by the Department for the purpose of developing project design and establishing specific prices of materials, plant, staff etc. The costs manager has access to a data base of market costs. This data base is drawn from costs used in actual contracts but does not disclose the identities of the relevant contracts or contractors. The costs manager may also interrogate suppliers to the market for the purpose of checking up-to-date prices. This is an "open book" discussion and the cost manager has the ability to look at the records of the successful contractor for the purpose of confirming prices and rates in the contractor's supply chain etc. In the event that prices are agreed between the contractor and the cost manager a construction notice will be issued but if such agreement is not reached the work will not proceed and discussions will be opened with a different contractor.

[14] In the course of explaining the rationale for the procedures that had been adopted witnesses on behalf of the Department referred to flaws in the earlier approach to competitive tendering based solely upon lowest price which tended to encourage a "low bid/high claim" culture in which successful contractors made unrealistically low bids on the assumption that the project could be made profitable as a consequence of a series of claims made during the course of the contract. Mr Creagh, the Programme Manager for the NISMP and the Project Manager for the Frameworks Project, confirmed that the Department had taken advice on the design of the whole tendering scheme from their external consultants, Chandler KBS, CPD and the Department Building Advisory Branch. He accepted that one of the documents that he had taken into consideration was "New Procurement and Delivery Arrangements for the Schools Estate" produced by Messrs Price Waterhouse Coopers ("PWC") in March 2005. PWC concluded that a "Strategic Partnership" arrangement had the potential to deliver significant benefits for the schools estate in Northern Ireland and recommended that the relevant Private Sector Partner/Partners ("PSP") should be procured in open competition evaluated in relation to a number of quantitative and qualitative factors one of which was likely to be fully priced designs for sample schemes which would need to be representative of the school projects to be delivered. Mr Creagh confirmed that a meeting had taken place during which the use of priced exemplar and actual historic projects was considered in relation to the framework competition but was rejected in favour of the fee percentage and banding mechanism. Unfortunately no minutes of that meeting are available. Mr Creagh pointed out that the PWC concept of strategic partnership had not been adopted and that the PWC model did not involve a secondary competition.

[15] Mr Rowsell, the defendant's expert, explained how the Department's approach to the design of the framework competition had been informed by the need to provide an alternative to the low bid/high claim culture consistent with the Achieving Excellence suite of procurement guides produced by the OGC in 2000. In his report dated 24 April 2008 Mr Rowsell explained how public procurement in the UK had moved away from lowest price bidding over recent years and stated that in his experience the use of sample projects had generally not worked well because in practice many contractors subsequently sought to find reasons why the sample projects were not representative of the actual projects. In doing so contractors who had been successful in tendering then sought opportunities for amending rates and prices in their favour. Mr Rowsell expressed the opinion in his report that the "defendant's overall approach to the assessment of the most economically advantageous tenders including the assumption that Defined Costs will remain constant between bidders is entirely reasonable and appropriate." In cross-examination he modified this view by expressing the opinion that it would be reasonable to assume that costs would become harmonised over time after the framework had been implemented. He

accepted that fee percentage in itself would not determine outturn cost and that further information would be required but, in his view, determination of outturn cost was neither essential nor required by the Regulations at the primary competition stage. In his opinion it was important to bear in mind that, in deciding which was the most economically advantageous offer, the Department was concerned with potential benefits arising from experience and partnership over the duration of the whole framework. For example, a discount of 20% on the cost of bricks offered by a particular contractor did not necessarily mean that appointment of that contractor would represent best value over the working relationship of the whole framework. Defined Costs at the primary stage would be subject to change and it was not in the Department's interest to fix costs established at the time of the primary competition. Competitive tension would be maintained by the Department requiring contractors to demonstrate improved efficiency, reduced costs and better rates over time.

[16] Mr Rowsell pointed out that a further advantage of assuming constancy of costs in the assessment process was that it eliminated any manipulation of the prices by bidders seeking to win the contract by means of unrealistic and unsustainable low prices. In his view it was important to distinguish between the primary framework competition and any specific contract in relation to which the actual prices would be established at a later stage. He emphasised the need to understand that the purpose of the exercise was not to procure a contractor to deliver a single project for the lowest cost but to identify contractors who would be able to work with the contracting authority in the context of the Framework Agreement over a long period of time to develop optimal solutions which best achieved the objectives of the authority in terms of delivering solutions as efficiently as possible and achieving continual improvement in terms of experience, and improvements in rates/prices etc. In his report Mr Rowsell criticised the plaintiff for failing to recognise that the ultimate contract price would be developed from a "pricing process" rather than as part of a competition at secondary competition stage and he expressed the belief that the contracting authority needed to identify the most economically advantageous offer over the whole life of the framework. Such a view was consistent with that expressed by Mr Taylor, a partner in Chandler KBS, who confirmed that specific prices were to be established "after contract". On the other hand it is not entirely easy to reconcile this approach with paragraph 8(ii) of the Defence which, after denying that it had been assumed that Defined Cost would remain constant between bidders, proceeded to maintain that more detailed questions would be asked "At the Secondary Competition Stage……in order to determine which Contractor will be able to construct the school at the lowest Defined Cost."

[17] While the expert retained on behalf of the plaintiff, Mr David Kyte, accepted that percentage fee was a measure for differentiating between

contractors, he maintained that it was defective in a number of ways and that it was not capable of providing an accurate assessment of outturn cost, a factor which, in his view, was an essential element in measuring the most economically advantageous offer. He maintained that use of the bands to which the fee percentage was to be applied during the primary competition was not legitimate in that it was unrealistic to assume that Defined Costs would be consistent across all contractors and that the failure to obtain more detailed information was flawed. He agreed with Mr Shaw QC in cross-examination that the critical difference between his view and that of Mr Roswell was as to whether or not the Department had acquired sufficient material at the primary competition stage to permit a proper determination as to which was the most economically advantageous offer. By way of a simple example he postulated the case of contractor A with a fee of 4% but a defined cost of £1m on a contract the total price of which would then be £1,040,000.00. By contrast a contractor who had a 2% higher fee at 6% but a 2% lower defined cost at £980,000 would produce a total price of £1,038,800.00.

[18] In the course of his original affidavit Mr Taylor, the partner in Chandler KBS responsible for the procurement services provided to the Department, referred to fee percentages as providing the "key financial differentiators between contractors when NEC 3 contracts are used." He said that the fee was a "very clear indication of the most economically advantageous offer" and he provided the example of a saving of £26M being reflected by a difference between a fee of 8% and 12% on the overall programme of £650M. Mr Taylor asserted that there was no requirement or any need for an assessment of overall cost and went on to explain in his affidavit how it was not possible to assess overall cost when the vast majority of schemes to be constructed in accordance with the framework had been neither identified nor designed. He went on to point out that it was a matter of record that contractor A and contractor B would source their material and their labour force from the same market and, accordingly "Contractor A will pay the same for a cube of concrete or a quantity of bricks as Contractor B". According to Mr Taylor the result was that the basic "cost of the work" should not vary greatly. At paragraph [24] Mr Taylor noted that the definition of Defined Cost was different in NEC 3 option A and NEC option C but emphasised that:

> "This does not alter the fact universally recognised in the construction industry that the cost to build the scheme will always be the same whether NEC 3 option A or NEC 3 option C is used. Therefore the fee percentages when calculating the Contract Price will be applied to the same cost to build by every contractor."

[19] It seems clear that, despite paragraph 8(ii) of the Defence, delivered subsequent to Mr Taylor's affidavit, this assumption was the basis upon which fee percentages were applied to the hypothetical bands of contract value as a means of discriminating between contractors at the primary

competition stage as "a very clear indication of the most economically advantageous offer." That was the approach deliberately chosen by the Department in consultation with their experts rather than the use of representative samples or historic cases. It is also clear that it was regarded as a very significant factor by the Department and its advisers as is illustrated by the remarks of Mr Taylor to which I have referred. Indeed it is possible that assumption may have contributed to the original justification for the Department's view that there was no real need for further competition in relation to specific prices at the secondary competition stage.

[20] However, both the degree to which fee percentages were likely to accurately predict eventual cost and the "universally recognised" fact in the construction industry that costs would always be the same irrespective of contractor were the subject of robust debate during the course of the hearing. In cross-examination Mr Taylor accepted that fee percentage by itself could not predict outturn cost without the addition of further information and that, depending on the circumstances, different contractors might be in a position to provide discounts and more advantageous prices. He agreed that not all contractors were equally efficient and, when taxed about the assertion in his affidavit that it was neither required nor necessary to assess overall cost at the primary competition stage, he accepted that capital cost was an element in determining the "most economically advantageous offer". Mr Taylor was also referred to the Venn diagram prepared by the plaintiff in relation to the question as to how individual contractors might have come to calculate their quoted percentage fees. He accepted that there might be significant differences according to the manner in which a contractor allocated staff between the office and the working area which, in turn, would be reflected in a difference between the allowance for profit and cost. He agreed that, generally, more and better quality management would tend to make a contractor more efficient. However, he also agreed that since the contractual Defined Costs were linked to employees in the "working area" there was no way of telling whether, in the case of a contractor with management staff at head office, whether an increased fee reflected a greater profit margin or higher overhead costs. Ultimately, Mr Taylor conceived of the process as designed to identify the contractor most likely to have the skill sets necessary to produce a good value scheme of which capital cost would be a part although he conceded that the scheme did not include any mechanism designed to identify competitive capital costs, an analysis that was rather different from that set out in his original affidavit.

The submissions of the parties

[21] It seems to me that the fundamental case made on behalf of the plaintiffs by Mr Bowsher QC and Mr Girvan is contained in paragraph 47 of their written closing submissions which reads as follows:

> "While price is not expressed as a mandatory element of the most economically advantageous offer criterion, the natural meaning of the word 'economically' means that a component of the assessment must involve analysis of the comparative price or cost of each bid. Any analysis of the most economically advantageous offer or the best value for money bid involves comparison of what is to be provided for the price or cost to be paid. Without comparison of the price the comparison is meaningless as any bidder can promise whatever it likes if it is not subject to the relevant financial constraints and comparisons of what it will expect to be paid to provide that which it is promised."

[22] The plaintiffs criticised the Department's omission to require the competing tenderers at the primary stage to submit a price for or to cost a representative sample or historic contract as being flawed in the following respects:

(*i*) That it was contrary to the natural interpretation of the Regulations derived from the relevant case law and other materials.

(*ii*) That it was contrary to the application of the general principles of procurement law and, in particular, the principles of equal treatment and transparency.

(*iii*) That, in the context of the scheme adopted by the Department, it permitted specific contract prices to be established through a one to one negotiation or discussion between the Department and the successful contractor which was contrary to the general principles of competition law.

(*iv*) That it represented a manifest error of assessment.

(*v*) That it was contrary to the principles of EU law relating to State Aid.

[22] On behalf of the Department Mr Shaw QC relied upon four propositions that he submitted could be distilled from the relevant legislation and case law:

(*i*) As a contracting authority, the Department had a wide discretion to choose the criteria to which it proposed to have regard for the purpose of determining the most economically advantageous offer from its point of view.

(*ii*) That, in order to be validly employed, such criteria would have to be linked to the subject matter of the contract, satisfy all relevant procedural rules and comply with any relevant fundamental principle of EU law such as transparency, law and discrimination etc.

(*iii*) However, the list of criteria set out at Regulation 30(2) was clearly not exclusive and might include matters that were unrelated to either price or cost such as aesthetic and functional characteristics, environmental characteristics etc.

(*iv*) The competition for a multi-party framework would have to include at least a mechanism relevant to the establishment of prices.

Discussion

[23] It is not in dispute between the parties that the Department chose to award the framework agreement to which this litigation relates on the basis of the offer which was the most economically advantageous from the point of view of the Department in accordance with Regulation 30(1) (*a*) of the Regulations. In so doing the Department was bound to use criteria linked to the subject matter of the contract in accordance with Regulation 30(2). Apart from being so linked, the European jurisprudence also requires such criteria to be applied in conformity with all relevant procedural rules, to comply with the fundamental principles of community law and not to be such as to confer upon the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer (<u>Gebroeders Beentjes v Netherlands</u> [1988] ECR 4636, <u>Commission v France</u> [2000] ECER 1/7445 and <u>SIAC Construction</u> [2001] ECR 1-7725). Subject to those qualifications the authority has discretion as to the criteria that it chooses and the list set out in Regulation 30(2) is not exhaustive (<u>SIAC Construction</u> and <u>Concordia Bus Finland</u> v <u>HKL</u> ECHR [2002] 1-07213). In addition, it is not necessary for each of the selected criteria to be of a purely economic nature and factors which are not purely economic may influence the value of a tender from the point of view of a contracting authority (<u>Concordia Bus Finland</u>, <u>Renco Spa v Council of the European Union</u> ECR [2003] 11-00171).

[24] During the course of the argument and, in particular, in their original skeleton, the Department's advisers submitted that in the case of a competition for inclusion on the basis of the most economically advantageous offer it would not be necessary for a contracting authority to include any criteria relating to price. In advancing this submission they relied upon, inter alia;

(a) A passage from Arrowsmith "The Law of Public and Utilities Procurement" (2nd ed. 2005) at para 7.101 in which the author stated that:

> "Where the authority chooses the most economically advantageous offer, it may take into account other factors as well as (or instead of) price: for example, quality, delivery date or product life."

(b) The Siac Construction case.

(c) The Renco case.

(*d*) Strabag Benelux NV v Council of the European Union [2003] ECR 11-135.

[25] I was not persuaded by this submission. While these cases all confirm that a contracting authority enjoys a wide discretion in choosing contract award criteria and that such discretion may include criteria that are not of a purely economic nature, in my view, they do not provide support for the proposition that some criterion related to price/cost may be omitted altogether at the primary competition stage. Indeed, each of the cases cited by the Department involved an assessment of cost. In SIAC cost was one of the specific criteria chosen by the Council and in Renco the price of the tender was regarded by the General Secretariat of the Council as being one of the "especially important" criteria. The Strabag case, amongst other authorities, supported Mr Shaw QC's submission relating to the width of discretion open to the Department – see, in particular, paragraph 77 of the Court of First Instance judgment. However in that case, which involved a contract to be awarded to the most economically advantageous tender, price constituted a quantitative criterion that the Court considered to provide an objective basis for comparing the financial costs of the tenders. Regulation 19(2)*(b)* requires the contracting authorities to select economic operators to be a party to such agreements by applying the award criteria set out in accordance with Regulation 30. In addition the definition of framework agreement contained in Regulation 2(1) clearly refers to an agreement or other arrangement which establishes the terms and, in particular, the terms as to price. At paragraph 38 of his closing submissions Mr Shaw QC somewhat refined his argument in relation to the effect of those provisions:

> "This does not, however, mean that the award criterion must necessarily be the lowest price or that the criteria must on necessity include price as an aspect. Its simply means that the process of setting up the framework should include a mechanism for establishing the prices to be paid under the `one or more contracts' which the economic operator will enter into with the

contracting authority during the framework agreement."

It seems to me that, unless the cost or price of the relevant goods or service was fixed or not in dispute, it would be very difficult to reach any objective determination of what was or was not economically advantageous without some reasonably reliable indication of price or cost in relation to which other non-price advantages might be taken into account. As His Honour Judge Humphrey Lloyd QC observed at paragraph 182 of his judgment in Harmon v House of Commons [1999] All ER (D) 1178 with regard to the exercise of determining which tender/offer was most economically advantageous:

"Price is the starting point for the exercise."

However it is not necessary for me to finally determine the point since, as I have already stated, it is clear that the Department, ultimately, conceded that at pricing mechanism was necessary and opted to employ a criterion related to price at the primary competition stage.

[26] Mr Shaw QC went on to argue that the establishment of this "pricing mechanism" is something that takes place over the whole of the procurement of the framework and is not a process that needs to be established during the initial stages of the award of a framework agreement or necessarily at the first or primary competition stage of a multi-party framework which expressly does not establish all the terms of the framework. In such circumstances, the permitted award criteria may properly relate to the procurement as a whole, when this is appropriate, for selecting the best tender or tenders. Thus a criterion involving price, or the establishment of prices, is not required at the initial stage of a framework. I must admit to having some difficulty in comprehending all the nuances of this submission and, in particular, how it is to be reconciled with the argument that he advanced at paragraph 38 of his written submission in which he described the mechanism as being included in the process of setting up the framework. Essentially it appears to amount to the argument that a price mechanism may be legitimately used as an award criterion during the primary competition which may then be applied later in the framework for the purpose of determining overall or outturn price/cost to the contracting authority. This would appear to be consistent with paragraph 2.2 of the Commission explanatory note relating to framework agreements CC2005/03 of 14 July 2005. It should be noted that this guidance refers to certain aspects such as price that may be left to one side in order to be established later upon reopening competition under multiple framework agreements.

[27] The fee percentages submitted by the successful tenderers will continue to function as part of the mechanism for determining overall costs/price during the course of the framework. However the department's

expert and witnesses accepted that, in itself, such a percentage fee cannot determine the actual cost of any individual project without the addition of further information. The further information necessary to bring the percentage fee pricing mechanism into operation consists of the specific rates and costs agreed as a consequence of the discussions that take place between the successful tenderer for a particular project and the Department's cost manager. In his closing written submissions Mr Shaw QC referred to the establishment of such prices at paragraph 55 under the heading "Secondary Competition". In that paragraph he argued that the prices payable under each particular contract awarded at the secondary competition stage are established in accordance with Regulation 19(7)*(b)* of the 2006 Regulations and within the limits imposed by Regulation 19(4) pursuant to the system set out in the NEC3 Contract. The Department's scheme does not provide for such terms to be established until after a particular project has been let to the successful contractor. However, Regulation 19(7)*(b)* relates to the award of a specific contract where not all the terms of the proposed contract have been laid down in the framework agreement and requires such a contract to be awarded by "re-opening competition between the economic operators" and Regulation 19(12) requires that "…the contracting authority shall not use a framework agreement…..in such a way as to prevent, restrict or distort competition." Article 32 paragraph 4 of Directive 2004/18/EC provides for the award of contracts in multiple framework agreements to be made "where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and where appropriate, other terms referred to in the specification of the framework agreement …". As Mr Shaw QC formally conceded the secondary competition between the tendering contractors under the Department's scheme is concluded once a successful contractor has been identified and before specific rates and costs have been agreed during a meeting between the successful contractor and the costs manager. He advanced the proposition that there was no need for such prices to be established by competition amongst contractors, but, in my view, such a procedure does not comply with the Regulations and is not consistent with transparency, the equal treatment of tenderers or the development of effective competition in the public procurement sector in accordance with community competition principles.

[28] In summary, despite the rather more sophisticated manner in which the Department's case was developed in the defence and oral and written submissions, I am satisfied that the original decision to rely upon the percentage fees and bands was based upon an incorrect factual assumption sufficient to amount to a manifest error, namely, that costs would always be the same in the construction industry whether NEC option A or NEC option C was used. Mr Kyte's simple exercise to which I refer at paragraph [17] above serves to illustrate how fallible fee percentage alone might be as a guide to the most economic outturn price/cost. However, that is not to say,

given the discretion afforded to the Department, that it is always necessary to require tenderers to carry out costing of examples or otherwise produce detailed outturn costs at the primary competition stage or that fee percentages could never be legitimately used as a pricing mechanism but in my view, as a minimum requirement, in order to comply with the Regulations and the relevant principles of community law they could only so function in conjunction with the competitive establishment of specific prices/costs at the secondary competition stage, possibly followed by a countercheck by the costs manager to safeguard against abnormally low bids etc. Otherwise the defect of using such percentages without the additional information conceded as necessary by the Department is compounded by the non-competitive establishment of specific prices/costs. The fee percentages are established in competition but the information to which they must be applied in order to function efficiently is not. The fourth principle of the Code of Practice Principles issued by CPD in 2007 referred to Competitive Supply as requiring procurement by competition unless there are convincing reasons to the contrary. The only reason of substance advanced by the Department in this litigation was the need to avoid the problems generated by the earlier claims culture tendering. While change was undoubtedly desirable, I am not persuaded, in the circumstances of this case, that it was lawfully achieved by the establishment of costs/prices after the completion of the competition exercise.

State Aid

[29] The plaintiffs included in their written submissions a carefully reasoned section relating to the need in a public procurement context to show the establishment of contractual prices by open competition as the safest way of avoiding potential infringement of Articles 87 and 88 of the EU Treaty relating to state aid. However the plaintiffs accept that this analysis essentially serves as an aid to understanding and underlining the importance of their primary submissions rather than forming the basis of a separate claim of substance.

Scope of the Claim

[30] On behalf of the Department Mr Shaw QC referred to paragraph 34 of the Statement of Claim and submitted that the scope of the plaintiffs' claim should be restricted to the breaches set out in the plaintiffs' letter of 2 November 2007. In so doing, Mr Shaw QC relied upon Regulation 47(7)*(a)* which provides that:

> "Proceedings under this Regulation must not be brought unless –

> *(a)* the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2) by that contracting authority or concessionaire and of its intention to bring proceedings under this Regulation in respect of it;"

While there may well be some substance in the submission that the plaintiffs' claim as pleaded in the Statement of Claim and subsequently developed in the skeleton argument and oral hearings covered more detailed and extensive ground than envisaged in the original letter of 2 November 2007, in my view that development was not such in terms of either nature or extent as to deprive the court of jurisdiction. The proper approach to determining the most economically advantageous offer and the role of price/cost therein was always a key issue and recognised as such by the Department. Furthermore, whilst excessive complication of litigation is generally to be avoided, it is hardly surprising that the submissions and propositions advanced in this case became more focussed and sophisticated as they were developed given the relatively short history of this type of litigation in this jurisdiction. In addition, given the very real public interest in procurement involving extremely large sums of public funds it is important that all relevant aspects of the legal issues concerned should be adequately explored.

Time Limits

[31] Regulation 47(7)*(b)* provides as follows:

> "(7) Proceedings under this Regulation must not be brought unless –
>
> *(b)* those proceedings are brought promptly and in any event within three months from the date when grounds for bring of the proceedings first arose unless the court considers that there is good reason for extending the period within which proceedings may be brought."

On behalf of the Department Mr Shaw QC submitted that any alleged breach of the Regulations or legal principles resulting from the framework procedure detailed in the ITT would have occurred no later than 19 June 2007 when the ITT documents were sent to tenderers. Mr Shaw QC based this submission upon the decision of the Court of Appeal in England and Wales in <u>Jobsin Co UK v Department of Health</u> [2002] 1 CMLR 44.

[32] In Jobsin the plaintiff alleged that the Department had failed to comply with the Regulations in omitting to set out the criteria upon which it intended to base its decision in the tendering document issued on 14 August 2000. On 17 November 2000 the plaintiff had been excluding from the tendering process. Inter alia, the Department relied upon a limitation defence contained in the Public Service Contracts Regulations 1993 (the equivalent of Regulation 47(6) and (7)*(b)* of the current Regulations) in relation to which Dyson LJ, who delivered the judgment of the court, made the following observations:

> "26. I cannot accept that the right of action alleged by Jobsin first arose on 17 November. In my view it arose on or about 14 August. 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). I do not understand Mr Lewis (counsel for the appellant) to dispute this. 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 Jobsin was excluded from the tender process on 17 November. I reject that submission for the following reasons. First, it gave 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."

[33] After ruling that the relevant breach had taken place on 14 August 2000, Dyson LJ then proceeded to deal with the arguments put forward on behalf of the plaintiff for an extension of time at paragraph 33 of the judgment in the following terms:

> "33. These arguments are formidable and were compellingly presented. But I am in no doubt that the judge was wrong to exercise his discretion to extend time in the circumstances of this case. First I do not accept that it was unreasonable to expect Jobsin to start proceedings before they were excluded from the tender process. On or about 14 August they were aware of all the facts that they needed to know in order to start proceedings. The judge seems to have been influenced by two factors in deciding that there was a reasonable objective excuse for Jobsin's failure to start proceedings before they were excluded from the shortlist. These were that *(a)* they had no reason to believe that there had been any breach of the Regulations and therefore no reason to consult solicitors to obtain advice as to the true legal position, and *(b)* even if they had known that there was a breach of the Regulations there were strong commercial reasons why it would have been reasonable for them to decide not to start proceedings until the tender process had been completed. I do not accept that either of these was a sufficient reason to extend time. As regards *(a)*, in my view the lack of knowledge of the legal significance of facts of which a bidder is aware will

> not usually be a good reason for extending time. Although the maxim `ignorance of the law is no excuse' is not a universal truth, it should not in my view be lightly brushed aside. Regulation 32(4) specifies a short limitation period. That is no doubt for the good policy reason that it is in the public interest that challenges to the tender process of a public service contract should be made promptly so as to cause as little disruption and delay as possible. It is not merely because of the interests of all those who have participated in the tender process have to be taken into account. It is also because there is a wider public interest in ensuring that tenders which public authorities have invited where a public project should be processed as quickly as possible. A balance has to be struck between two competing interests: the need to allow challenges to be made to an unlawful tender process and the need to ensure that any such challenges are made expeditiously. Regulation 32(4)*(b)* (the equivalent of Regulation 47(7)*(b)*) is the result of that balancing exercise. It may often be the case that a service provider is not aware of the intricacies of Regulations such as the 1993 Regulations, and has little or no understanding of how they should be interpreted. If ignorance of such matters were routinely to be regarded as a good reason for extending the time for starting proceedings, the clear intent of Regulation 32(4)*(b)*, that proceedings should normally be started promptly and in any event not later than 3 months after the right of action first arose, would be frustrated."

Dyson LJ also rejected the plaintiff's concern that his commercial relationship with the contracting authority might be imperilled or that such a short limitation period had the potential to stifle the plaintiff's rights as constituting good reasons for extending the period.

[34] By way of response Mr Bowsher QC relied upon the analysis of Regulation 47 and the earlier authorities carried out by Stanley Burnton LJ in the course of giving judgment in Risk Management Partners Ltd v The Council of the London Borough of Brent [2008] EWHC 1094 (Admin). In the course of delivering judgment the learned Lord Justice noted the close similarity between the wording of Regulation 47(7) *(b)* and the current wording of CPR Part 54.5 in England and Wales. The equivalent of the latter

provision in this jurisdiction would be Order 53 rule 4(1). He then proceeded to give careful consideration to the decision of the Court of Appeal in Jobsin noting that it had been decided before the decision of the House of Lords in R (Burkett) v London Borough of Hammersmith and Fulham [2003] 1 WLR 1593 in which their Lordships had considered the application of RSC Order 53(4) (1) to a claim that a grant of planning permission had been unlawful. In the latter case the court below had held that time began to run for the purposes of an application for judicial review when the local authority resolved to grant the planning permission in question. The House of Lords held that time did not run, or more specifically, the grounds for the application first arose, when the planning permission was granted, and not before. The learned Lord Justice referred to paragraph 39 of the judgment of Lord Steyn and then proceeded to make the following observations at paragraph 91:

> "91 Translating these references from the planning context to the present context, in a case in which there is a claim that there has been an actual breach of the Regulations, the grounds for the bringing of proceedings arise when the first breach actually takes place. Jobsin is authority that those arise even if at that date the claimant has not suffered loss, but only risks suffering loss. The context of Burkett differs from the present. In particular the liability of a contracting authority for damages under the Regulations is a reason to require a claimant to bring proceedings as soon as a breach is apprehended, and in this connection I refer to paragraphs 33 and 38 of Dyson LJ's judgment in Jobsin. However, given the identity of wording between Regulation 47(7) and the former RSC Order 53 rule 4(1) and the present CPR Part 54.5, that difference does not justify a departure from the principles laid down in Burkett. If Parliament or the draftsmen of the Regulations had intended a different result from that applicable in judicial review proceedings, a different form of words would have been used. In my judgment, therefore, for the purposes of the Regulations in the present case `grounds for the bringing of the proceedings' first arose when the breach which forms the subject of the claim occurred. It would have been different if the claim were for an injunction to restrain a breach of the Regulations; but it is not."

[35] I respectfully adopt the analysis formulated by Stanley Burnton LJ in the Risk Management case. In his closing submissions Mr Shaw QC submitted that the relevant breach of the Regulations took place when the ITT was distributed to the tenderers on 19 June 2007, if not earlier in March 2007 when the Memorandum of Information and Instructions to Tenderers was furnished. In my view such distribution did not, in itself, amount to a breach of the Regulations despite the fact that the documentation referred to a procedure that I have held to be unlawful. In Jobsin one of the "building blocks" upon which the plaintiff based its case was the failure of the contracting authority to publish the criteria according to which the relevant tenders were to be assessed contrary to Regulation 21(3) of the 1993 Regulations. The plaintiff accepted that such a breach occurred when the briefing document was issued. In this case there was no equivalent breach at the time of distribution of the ITT documents and it seems to me that the more accurate analogy is with the resolution of the local authority to grant planning permission in Burkett and the information given to RMP at the pre-tender meeting on 7 November 2006 that Brent were committed to going to LAML. In the circumstances of this case it does not seem to me that the relevant unlawful act took place until the impugned procedure was implemented by the Department and its consultants with the result that Henry Bros were excluded. It was open to the Department to amend or otherwise modify the criteria and the manner in which they were to be applied at any stage prior to the impugned decision, a right that was specifically reserved at paragraph 8 of the Memorandum of Information and Instructions to Tenderers.

[36] If I am wrong about the effect of Regulation 47(7) *(b)* in this case and the plaintiffs' claim is, prima facia, time barred the plaintiff has applied to the court for an extension of time. The court may grant such an extension where there is good reason for so doing. In such circumstances I would be inclined to exercise my discretion in favour of the plaintiff upon the following grounds:

(a) The Northern Ireland Schools Modernisation Programme involves the expenditure of a great deal of public money over a significant period of time for the purpose of providing a modern education infrastructure that will benefit this society. It is a matter of considerable importance and public interest that any concern about the legality of procedures adopted to achieve that goal should be dealt with at the earliest opportunity.

(b) The procedures examined during the course of this litigation may well have been or are about to be utilised by Government Departments in relation to other projects and, again, it would be important to ensure that any potential defects are timeously remedied.

(c) The merits of these proceedings have been fully and exhaustively argued over a number of days by the parties both of whom have displayed an impressive level of forensic skill and research. It seems to me that it would be somewhat regrettable if the matter were to be ultimately resolved at this stage on the basis of a limitation issue.

[37] I anticipate that both parties may wish to consider these findings and, in any event, both reserved the right to address the court further in respect of relief and remedies should the necessity arise.