

Neutral Citation Number: [2009] EWHC 3419 (TCC)

Case No: 2009-TCC

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23 December 2009

**Before :**

**THE HONOURABLE MR JUSTICE AKENHEAD**

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**Between :**

<b>EUROPEAN DYNAMICS SA</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>HM TREASURY (sued as Buying Solutions)</b>	<b><u>Defendant</u></b>

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**Sarah Hannaford QC and James Thompson (instructed by EG Arghyakis & Co) for the**  
**Claimant**  
**Michael Bowsher QC and Elisa Holmes (instructed by The Treasury Solicitor) for the**  
**Defendant**

Hearing date: 16 December 2009  
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**JUDGMENT**

**Mr Justice Akenhead:**

**Introduction**

1. In this matter, I granted to the Claimant on 10 December 2009, upon a without notice basis, an injunction to restrain the Defendant from entering into a framework agreement which it was intending to do on 11 December 2009. I have now heard both parties following the submission of witness statements and skeleton submissions. At the conclusion of that hearing, I informed the parties that I was discharging the injunction but that, due to the belated provision of six lever arch files of evidence and authorities and to the lateness of the hour, I would reserve my reasoned judgement.

**The Background**

2. The Defendant embarked on a procurement exercise by publishing a Contract Notice dated 23 May 2009 inviting tenders for the establishment of framework agreements for the delivery of software application solutions in a number of different areas for use by UK public sector bodies (including central government bodies and agencies, non-departmental bodies), National Health bodies and local authorities. There were to be six agreements to be let, referred to as Lots 1 to 6, of which Lots 1 (“Bespoke Solutions”), 3 (“Documents and Records Management Solutions”) and 6 (“Web Design and Content Management Services”) are those which affect the Claimant. Each framework agreement was to be let to a number of contractors whose services could be called upon by the (mostly public) bodies who wished to participate. So far as the Defendant was concerned, this method of procurement had advantages which included efficient and prompt purchasing and direct or indirect savings of public sector costs.
3. The Claimant is a company which specialises in the delivery of consultancy services for the design, development, maintenance and support of IT applications and software products. It is a company which is based in Greece and has an established track record in its field. It is certainly experienced in the “ins and outs” of the EU procurement process and regulatory framework; this is at least apparent from the large number of challenges which it has made in England and on mainland Europe to unfavourable procurement decisions made in relation to it or associated companies.
4. Following a pre-qualification exercise, the Claimant pre-qualified for Lots 3 and 6 but there was an issue as to whether it should have pre-qualified for Lot 1. Proceedings have been issued in the TCC (HT-09-379) in relation to this on 18 September 2009. Notwithstanding this, following receipt on 14 August 2009 of the Invitation to Tender (“ITT”), the Claimant on or shortly before 23 September 2009 submitted its tenders for all three lots. The tenders as required provided answers to numerous questions (A1-5, B1-9, C 1-4, D1-8 and E1-4) raised in the ITT.

5. On 16 November 2009, the Defendant informed the Claimant that it had been unsuccessful on all three tenders; it was 17<sup>th</sup> out of 17 in Lot 1, 12<sup>th</sup> out of 16 in Lot 3 and 17<sup>th</sup> out of 19 on Lot 6. It has emerged that the Claimant may have been 12<sup>th</sup> on Lot 3 but that there were two parties in equal 10<sup>th</sup> position who made it through but, as far as I can see, nothing turns on that for the purposes of this injunction application.
6. On 20 November 2009, the Claimant wrote a detailed letter to the Defendant complaining as to its treatment and asking for explanations as to why it had been marked as it had been. It said that “the whole process is totally unfair, infringing the free and fair competition, while also harming the interests of the taxpayer...” That letter was responded to by the Defendant on 25 November 2009 in a 7 page letter which denied that the process had been irregular or unfair. That was answered by the Claimant on 26 November 2009; this was responded to by the Defendant which provided a table setting out the scores of each successful bidder. The Claimant’s solicitors wrote on 4 December 2009 complaining that the Defendant had not given sufficient details of the characteristics and relative advantages of the successful tenderers. That was answered on 7 December 2009 by the Defendant. The Claimant’s Solicitors asked for more information as to how the tenders were marked. On 7 December 2009, they sent their own breakdown of the marks which the Claimant believed it should have received on each of its three tenders which in essence showed that it should have been amongst the winning tenderers. Later that day, the Defendant provided by email their response. Yet more information was asked for by the Claimant’s solicitors in a letter dated 9 December 2009.
7. Because the so-called “standstill period”(before tenders were accepted) was due to expire and the Defendant was due to sign contracts with the successful tenderers on the following day, the Claimant on 10 December 2009 sought a without notice injunction to prevent that happening. I granted the injunction sought on **Cyanamid** principles upon the basis that there was reason to believe that there was a serious issue to be tried albeit that at that stage only examples had been given of breach of the relevant Regulations; I entertained some doubts as to whether damages would not be an adequate remedy, in relation to the balance of convenience and the value of the cross undertaking as to damages but considered that the Claimant had done just sufficient to satisfy me on those three matters. I called for a return date 11 December 2009 but, following agreement between the parties, adjourned that date to 16 December 2009.
8. The parties exchanged skeleton arguments and evidence albeit that the evidence was supplemented by further evidence produced during the hearing. After the conclusion of the argument, I told the parties that the injunction would be discharged on the basis that although there were serious issues to be tried some of the complaints were weak, that damages would be an adequate remedy and that the balance of convenience favoured no injunction being continued.

## **The Statutory Framework**

9. The Public Contracts Regulations 2006 govern the tendering process in this case. I set out those sections which are most relevant at this stage:

“(1) In these Regulations, an "economic operator" means a contractor, a supplier or a services provider.

(2) When these Regulations apply, a contracting authority shall not treat a person who is not a national of a relevant State and established in a relevant State more favourably than one who is.

(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.

5 (1) Subject to paragraph (3), these Regulations apply whenever a contracting authority seeks offers in relation to a proposed public supply contract, public works contract, Part A services contract, framework agreement or dynamic purchasing system other than a contract, framework agreement or dynamic purchasing system excluded from the application of these Regulations by regulation 6 or 8.

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 regulation 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.

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.

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 obligation 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

(2) The duty owed to an economic operator in accordance with paragraph (1), except in relation to—

(a) a Part B services contract...

is a duty owed also to a GPA economic operator.

(3) The duty owed to a GPA economic operator referred to in paragraph (2) shall only be owed by the Secretary of State for Defence in relation to public supply contracts for the purchase or hire of goods specified in Schedule 5...

(5) In this regulation and notwithstanding regulation 4, references to an "economic operator" include, where the duty owed in accordance with paragraph (1) is the obligation on a concessionaire to comply with regulation 37(3), any person—

(a) who sought, who seeks or would have wished, to be the person to whom a contract to which regulation 37(3) applies is awarded; and

(b) who is a national of a relevant State and established in a relevant State.

(6) A breach of the duty owed in accordance with paragraph (1) or (2) 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) or (2) 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 3 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) or (2) 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) or (2)—

(i) order the setting aside of that 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) do 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) or (2) if the contract in relation to which the breach occurred has been entered into.

(10) Notwithstanding sections 21 and 42 of the Crown Proceedings Act 1947, in proceedings brought under this regulation against the Crown the Court shall have power to grant an injunction.”

10. The Defendant is a contracting “authority” and the Claimant is an “economic operator” and thus the Regulations apply to the transaction in this case. There are thus duties imposed on the Defendant as to transparency in the tendering process and to provide what was said during argument to be a “level playing field”, that is treating tenderers equally. However, proceedings when brought must be brought promptly and in any event within three months from the time when grounds first arose unless there is a good reason to extend the period. The Court has power to suspend the award of the contract in question and damages can be awarded when appropriate.

11. In **Jobsin Co UK plc v Department of Health** [2001] EWCA 1241 Civ the Court of Appeal considered the application of this three month limitation period, albeit in relation to an earlier version of the Regulations. Lord Justice Dyson materially said in a judgement with which the other members of the Court agreed:

“28...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. Mr. Lewis suggests that there is such a reason. He points out that if, in a case such as this, the limitation period runs from the date of publication of the tender documents, it will be possible for the contracting authority to rule out any real possibility of a challenge by issuing an invitation in breach of the

regulations and then not taking any further steps in relation to tenders until after the three months period has expired. I confess that I find this an unlikely state of affairs, but I can see that it might conceivably happen. If it did, a service provider who wished to bring proceedings might have a good case for an extension of time: it would all depend on the facts. In my view, this cannot affect the plain meaning of regulation 32(2). I would therefore hold that the right of action which Jobsin asserts in the present case first arose on or about 14th August 2000. The essential complaint which lies at the heart of the proceedings is that there was a breach of regulation 21(3), in that the Briefing Document did not identify the criteria by which the DOH would assess the most economically advantageous bid.”

12. In relation to extension of time, he went on:

“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 14th 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 short list. 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 the interests of all those who have participated in the tender process have to be taken into account. It is also because there is a wider public interest in ensuring that tenders which public authorities have invited for a public project should be processed as quickly as possible. A balance has to be struck between two competing interests: the need to allow challenges to be made to an unlawful tender process, and the need to ensure that any such challenges are made expeditiously. Regulation 32(4)(b) is the result of that

balancing exercise. It may often be the case that a service provider is not aware of the intricacies of regulations such as the 1992 regulations, and has little or no understanding of how they should be interpreted. If ignorance of such matters were routinely to be regarded as a good reason for extending the time for starting proceedings, the clear intent of regulation 32(4)(b), that proceedings should normally be started promptly and in any event not later than three months after the right of action first arose, would be frustrated.”

### **The Law and Practice**

12. The principles laid down in **American Cyanamid Co (No 1) v Ethicon Ltd** [1975 AC 396] are well known. An interim injunction is permissible when the applicant establishes that there is a serious issue to be tried and the balance of convenience favours the grant of the injunction in question. As Lord Diplock said in the leading judgement:

“It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

As to balance of convenience, he went on to say:

“As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's under-taking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.”

So far as is material to this case, that remains the law and practice.

13. In **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] 1 WLR, the Privy Council provided some practical advice as to how to proceed on interim injunctions. Lord Hoffmann, delivering the judgement said:

“16. The second feature is the basis upon which Jones J decided to refuse an interlocutory injunction and the Court of Appeal decided to grant one. It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:

"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where

the balance lies, let alone to suggest the relative weight to be attached to them."

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

19...What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irreparable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted." ...

21...Factors which the court might have taken into account in this case if there had been a triable issue were, first, that the injunction required the bank to continue against its will to provide confidential services for the plaintiffs; secondly, that the injunction would require the bank to continue to incur reputational risks and possible exposure to legal action; thirdly, that it was by no means clear that the plaintiffs would be able to satisfy a claim under the cross-undertaking in damages; fourthly, that the plaintiffs' case was, even if not (as their Lordships think) hopeless, certainly very weak, and fifthly, that the plaintiffs could no doubt have obtained alternative banking services from any bank whom they could persuade that they were not running a fraudulent scheme. It is unnecessary to say what should have been the outcome of a weighing of these factors because that was a matter for the discretion of the judge but they suggest that, even if there had been a serious issue to be tried, it is by no means obvious that Jones J was wrong to refuse an injunction."

### **Serious Issues to be Tried**

14. There are essentially two areas of argument which are put forward by the Claimant. The first relates to the allegedly unfair way in which the Claimant's tenders were marked and the second relates to the alleged inadequacies in the tender documentation. It is fair to say that the complaints are not yet absolutely finalised and I strongly suspect that the extent and definition of the complaints will be amplified and refined by the time that any Particulars of Claim are drafted.

15. Dealing with the alleged inadequacies in the tender documentation, these currently include a complaint that the ITT was wrong to include in it pre-qualification or selection criteria to be applied and considered at the award stage. Without even commenting on the validity of this complaint, it would seem that this is a very weak complaint in the light of the limitation requirements of Section 47 of the Regulations. The Claimant had the ITT on 14 August 2009 about 4 months before the without notice application for injunction was made; it may be that it was aware even earlier what the tender selection criteria would be. Although the Claimant submitted its tender on about 23 September 2009 which is less than 3 months before the injunction application was made, it seems unlikely that bringing proceedings 10 weeks later can be said to be acting promptly; it is also unlikely that the date of the submission of the tenders will be the date which will be the “date when grounds for the bringing of the proceedings first arose” as laid down in Section 47; one would have thought that that date would be either at the date of issue of the ITT to the Claimant or the earliest date when a tenderer could reasonably have appreciated that there was a material deficiency in the ITT, which would have been in logic well before the actual submission of the tenders. For this reason, I consider that this aspect of the case does not raise a serious issue to be tried. I wish to make it clear that my views in this paragraph are not intended to create an issue estoppel so as to prevent the Claimant from running these points in the substantive proceedings, if it really thinks that it is worthwhile and proper to do so.
16. The ITT identified in at least broad terms how tenders were to be evaluated. The Statements of Requirement were to be answered by tenderers. These comprised 5 Sections (A to E) which each had various requirements or questions to be answered, A (People Requirements) having 5, B (Customer Requirements) 9, C (Buying Solutions Requirements) 4, D (Delivery of Solutions) 9 and E (Pricing) 5. The “Marking” part of the ITT stated at Paragraph 3;

“Each requirement...in the ITT is subject to evaluation and will be assessed on a scale of 0 to 5 as specified below; all values within this range may be used by the evaluators.

0	Unanswered or inadequate response representing 0% of the stated Maximum Available Mark
1	Indicates a marginal response representing 10% of the stated Maximum Available Mark
2	Represents 30% of the stated Maximum Available Mark
3	Indicates a reasonable response representing 50% of the stated Maximum Available Mark
4	Represents 70% of the stated Maximum Available Mark
5	Indicates an excellent response representing 100% of the stated Maximum Available Mark

17. Paragraph 4 which was headed “Weighting Scheme for the Invitation to Tender” identified what percentage of the overall mark was to be attributed to the Sections A to E (A-15%, B- 20%, C-5%, D-35% and E-25%). The total marks within each Section for the different questions or requirements were spelt out. Thus for Section A, each of the 5 questions or requirements were to be given a maximum mark of 20; if each of the responses to each of the 5 was “an excellent” one, 100 marks would be received and 15% overall would be scored. A mark of 3 on each would net only 50% of the overall 15% available. It is clear that there was a weighting on each mark for each response and there was an overall weighting as between the Sections so that, for instance, if a tenderer scored full marks on Section C but only 50% on Section E, that would have a greater impact on the overall score as the two Sections account for 5% and 35% respectively.
18. There were various Annexes which provided in more detail guidance as to the responses being sought on the various questions in each Section and on how marks could or would be allocated. One or more worked examples were given.
19. The Claimant by its Counsel and through the evidence of its Solicitor, Mr Arghyrakis, has put forward evidence that, by reference to other tenderers, about the marking of whose tenders the Claimant has been provided information by the Defendant, the Claimant was unreasonably and irrationally marked down to such an extent that, if marked fairly, it would have been within the ranks of the successful tenderers. The argument is based on three basic points, the first and second being that the way in which the consensus scoring system was actually operated by the Claimant was not disclosed to the tenderers, lacked transparency, did not result in the fair and equal treatment of tenderers and was said to be wrong. This relates, it is argued, to what appears to have happened in the marking exercise carried out by the Defendant. It seems that each tender was evaluated by two evaluators whose work was then checked by a consensus scorer who then apparently consulted with the two evaluators and if it appeared that the score on any given answer was too high or too low it was adjusted upwards or downwards as the case warranted.
20. Although Mr Ross, the Defendant’s project manager, sought in his witness statement to assert otherwise, evidence was presented by the Claimant which shows (at least to the threshold point of establishing a serious issue to be tried) that there may have been a sufficient number of discrepancies in the marking to support an assertion that the marking and system of evaluation and consensus checking was or may have been flawed. The Claimant pointed to apparent discrepancies in the system adopted; for instance one tenderer gets a 4 for a particular question for putting what is described as “reasonable response” whilst the Claimant only gets a 3 for a “reasonable response”. Another example is where the evaluators’ scores are both marked down by the consensus scorer. There may well be wholly innocent explanations on the facts or other justification for the scoring. However, I can not resolve those issues on an application like this when there is no live evidence and indeed when a detailed albeit preliminary review on

the subject submitted to the Defendant by letter dated 14 December 2009 has not been responded to by the Defendant in any detail (which is not surprising given the timing).

21. The third point raised by the Claimant which is said to have had an effect on the scores obtained is a less arguable point which does not achieve the “serious issue to be tried” threshold in my view. This is that it was not given its true entitlement at the pre-qualification stage on the three Lots for which it eventually tendered. That runs into the same limitation difficulty as the complaints about the ITT, because the pre-qualification stage, I assume occurred before the ITT was sent out and in any event well before the tenders were submitted.

### **Damages as an Adequate Remedy**

22. I have formed the very clear view that damages are an adequate remedy here. My reasons are as follows:

- (a) The main argument has been that damages would be difficult or nearly impossible to assess and given cases such as **Letting International Ltd v London Borough of Newham** [2007] EWCA Civ 1522 that is or may be sufficient to avoid or overcome the “damages as an adequate remedy” hurdle.

- (b) I do not see however that damages are or should be difficult to assess. The fact that damages may not be a perfect remedy is not material (see **Peaudouce SA v Kimberly Clark Ltd** [1996] FSR 680).

- (c) Although there may well be other ways of assessing damages in this case, at least a sensible way could well be:

- (i) In English law, damages can always be and are often assessed on a loss of chance basis (see **Chaplin v Hicks**); the Court does the “best that it can” to assess damages when it is clear that there must have been some loss but it is difficult to assess.

- (ii) One can assess on the basis of projections and previous framework type agreements entered into by the Defendant and indeed on the actual operation of the proposed new framework agreements (say, in 2010 before any damages are assessed) what the likely value or range of values of the work will be over the period of the new agreements. For instance there is evidence that some £84m’s worth of work was let through the earlier Lots 1, 3 and 6 agreements in the last financial year.

- (iii) Given that there are some 10 contractors who will be available under each framework agreement, it will be necessary to assess

what the share of the Claimant (if successful on liability) would be over the period of the agreements. That can be done on a number of different bases; it may be that statistically the 7<sup>th</sup> or 10<sup>th</sup> or 1<sup>st</sup> in these types of agreements receive a particular percentage or range of the contracts and jobs which are going. It may be that based on say the first year of operation of the new framework agreements the contractor who is in the position in which the Claimant would have been if successful does attract, say, 5% or 15% of the work in value terms.

(iv) Once one has a figure or range of figures for the value of the overall work available over the lifetime of the framework agreements and one has a likely share available to the Claimant if it had been successful (or a range say between 5% and 10%), one then turns to assessing what the profit and possibly overhead share was or would have been. That is a relatively standard expert task; that percentage can be assessed by looking at the pricing actually adopted by the Claimant, other similar projects and its historic trading performance.

(v) One can then discount the figure to allow for the receipt of the damages before some of the return would have been earned.

(d) There may well be other ways of calculating damages and I do not say that the above is necessarily the right way in this case because I do not have all the facts. However judged at this very early stage, there is no obviously insuperable difficulty in assessing damages.

22. An argument has been advanced that in effect there is a presumption that injunctive relief is the primary remedy and that therefore adequacy of damages should not weigh heavily in the balance, if at all. That is not the law and practice in this country as I am bound by the **Cyanamid** decision. One has to bear in mind that, if any public procurement could be stopped by injunction because there was merely a serious issue to be tried about the procurement, without more, the public authorities would be invariably targeted by the unsuccessful tenderers and public procurements would or could grind to a halt.

### **Balance of Convenience**

23. I am wholly satisfied that the balance of convenience favours the discharge of the without notice injunction. My reasons are:
- (a) There would be substantial prejudice to the Defendant. The old framework agreements are said to have expired and there are customers who are waiting for the new framework agreements to be in place. Some of those customers would in all probability go elsewhere to acquire the

services which they would have secured through the new framework agreements.

(b) The earliest in practice that there could be a court resolution of the disputes between the parties in relation to liability is about 6 months, assuming that the Court could find time in a very busy diary. A six month delay would or could result in irreparable harm being done to the Defendant's reputation.

(c) There is a general public interest in a central and common public procurement route for services such as are on offer under the framework arrangements in this case; that arises in terms of cost savings as well as the use of similar and compatible products and services. If that route is effectively suspended for 6 months or more, damage will be done. Some of that damage would be particularly difficult to identify and prove, such as whether a particular customer would have placed an order with or through the Defendant within the period of any injunction.

(d) There is no reliable evidence of reputational damage to the Claimant if it does not obtain an injunction. A statement from Mr Velentzas, the Managing Director, dated 16 December 2009 was belatedly handed in by the Claimant part way through the hearing on 16 December 2009 which says, without amplification, that the exclusion of the Claimant from these framework agreements "will defame the Company in the whole market and to its strategic partners which will impact its work all over Europe"; this is so vague that it does not assist the Court at this stage. The trial on liability will determine if the Claimant was rightly or wrongly excluded from the final lists of successful tenderers and that could be only 6 months away.

(e) There is no evidence that the Claimant will not be able to seek or obtain other works to replace what it might have secured if it had been successful here. There is no obvious or clear evidence that the Claimant will lose market share.

(f) If it succeeds on liability, damages will adequately compensate the Claimant for such loss as is established without any commercial risk other than having to prove its quantum case in court.

(g) There is an added difficulty that, if an injunction was granted for, say, 6 months, there must be real risk that the whole tender process would have to be re-run and, given the knowledge acquired by the Claimant, it might be necessary to exclude the Claimant and indeed others who tendered on the basis that there would not and could not be equality of opportunity in the new tender process. Having had a tender process that was presumably intended to produce the best qualified at least to tender, it would be

unfortunate and probably contrary to the public interest if the second tendering exercise had to exclude the best tenderers.

### **Miscellaneous**

24. Although it is unnecessary to decide this, I would have held that the Claimant's cross undertaking in damages was sufficient. The obviously provable losses over, say, a 6 month period to be suffered by the Defendant would not have exceeded £1m-2m. The evidence proffered by the Claimant which was not seriously challenged showed a sufficient balance sheet and trading position to accommodate that level of losses.

### **Decision**

25. In the light of the above, I discharge the injunction which was granted on 10 December 2009; this is an inappropriate case to continue any injunction to restrain the Defendant from placing its framework agreements on Lots 1, 3 and 6 as and when it considers fit.

### **Costs**

26. It is accepted, properly, that costs should follow the event and that accordingly the Claimant would pay the costs of the without notice and on notice applications and hearings. It was agreed that cost submissions would be in writing. The Defendant has put in a costs bill of £18,399.78 of which some £10,600 is Counsel's fees and, apart from a small fee for forensic accountancy services, the balance is attributable to work done by solicitors. It is challenged on a general basis (too high given only a half day hearing) and on various specific grounds (attendance on client and Counsel and Counsel's fees too high and no need for two solicitors to attend the hearing). That challenge was responded to in a note dated the 21 December 2009 to the effect that the Defendant's bill is modest and reflects intensive work done over four working days.
27. I have formed the view that the bill put in by the Defendant is relatively modest and only a small reduction is required or justified to reflect what this bill might have been assessed down to on a detailed cost assessment. For instance 21 hours attendance on the client would probably be considered excessive in terms of it not being reasonable that the Claimant should have to pay for all of it. In all circumstances, I summarily assess the costs at £17,000 which should be payable by 8 January 2009. The Claimant should draw up the requisite order for agreement and sealing by the Court.

