Case No: 3YJ 02365

IN THE HIGH COURT OF JUSTICE
BURNLEY DISTRICT REGISTRY

The Law Courts
Hammerton Street
Burnley
Lancashire

Date: 4th December 2013

District Judge Bury

Between :

SSP Health Limited	**Claimant**
- and –	
NHS East Lancashire	**Defendant**

Mr Sam Butler (instructed by Acklam Bond) for the Claimant

Mr Rob Williams (instructed by Hempsons) for the Defendant

Hearing date: 25th November 2013

JUDGMENT

District Judge Bury :

Introduction

1. On the 25th of November I heard three Applications regarding this matter.
Due to the lateness of the hour when the hearing concluded and the fact that an urgent family matter had to be dealt with I reserved judgment and indicated to the parties that I would send my draft reserved judgment at the earliest opportunity.
This accordingly is my judgment.

References in this judgment are to Tab and Page numbers within the hearing bundle with which I was provided.

2. The 3 Applications are linked and, in order of date of issue, are as follows:

2.1 an Application by the Defendant dated 4 March 2013 seeking an order that: the claim be struck out:

- on the ground that the claim is statute barred (alternatively seeking summary judgment on the ground of limitation)
- in the alternative, that the claim be struck out on the grounds that the claim form and particulars of claim disclosed no reasonable grounds for bringing the claim and/or are an abuse of process.
- additionally on the basis that the claim had been issued in the wrong court. I shall deal with that aspect below.

2.2 an Application by the Claimant dated 22 July 2013 seeking an order that they have permission to file and serve amended particulars of claim.

2.3 an Application by the Claimant dated 18 November 2013 for permission to adduce expert evidence and for an order giving them permission to rely upon (draft) re-amended particulars of claim.

Background: the Claim and the Hearing on 25.11.13

3. I need say something of the background to the claim and the procedural history to date prior to dealing with the Applications.

4. The Claimant is a company engaged in the provision of medical services and, at the material time, the Defendant provided primary health care services. (I am told – though nothing turns on it - that the identity of the Defendant has changed since the material events and the correct Defendant would now be NHS England Lancashire Area Team).
5. A tendering exercise was undertaken by the Defendant during 2012 for the provision of healthcare services. Such exercise was undertaken pursuant to the provisions of the Public Contracts Regulations 2006 (as amended) ("the Regulations"). The Claimant was a bidder within that exercise but was unsuccessful. The Claimant alleges that, in various respects, the Defendant dealt incorrectly with their Application or bid and that the (allegedly wrongful) rejection of which has caused them loss.
6. A claim form endorsed with brief details of the claim and with just nine lines of particulars (on its reverse) was date stamped as having been received at the Accrington County Court on 21 December 2012. The claim was actually issued by the Salford Business Centre of HMCTS on 4 January 2013 and was transferred to Burnley County Court following the filing of an Acknowledgement of Service by the Defendant.
7. The Defendant has filed no defence but, having filed its Acknowledgement of Service, promptly made the Application detailed at paragraph 2.1 above.
8. That Application was initially listed for hearing on 9 July 2013. In the meantime the Claimant had made an Application dated 3 May 2013 to transfer the claim to the High Court. Those 2 Applications were accordingly heard together on 9 July 2013 by me.
9. The Application by the Claimant for transfer to the High Court arose from the realisation that any proceedings relating to the tendering process and its outcome had, by reason of Regulation 47C(2), to be commenced in the High Court. The Application was supported by a witness statement [15/38] in which the solicitor acting for the Claimant conceded that, prior to issue, she had not been aware of the Regulations at all let alone the requirement contained within them that proceedings had to be issued in the High Court.
10. By the time of the hearing in July bundles, authorities and further evidence had been filed and served. There was insufficient time to deal with all of the substantive Applications on that day.

11. The outcome of the hearing on 9 July was set out in an order - a copy of which is attached to this judgment. It provided for transfer of the case to the High Court, for the listing of the balance of the Applications and gave directions as to the steps to be taken by the parties in the way that are clearly set out. It has not been appealed.
12. The Claimant complied with one of the provisions of that Order and issued its Application to amend the claim form and the particulars of claim (on 22 July).
13. An order was subsequently made, by consent, extending the time periods to provide that the evidence of the Defendant in respect of their Application to strike out was to be served by 6 September with the evidence of the Claimant coming in reply by 20 September and any final evidence coming from the Defendant by 3 October.
14. The Defendant complied by filing and serving a detailed statement of Andrew James Daly [16/41] but the Claimant failed to respond substantively either to the amended timetable to which they had agreed or, indeed, to any of the requests from the Defendant. These requests – in the form of emails and correspondence - are set out in the supplemental bundle that I was handed on the day of the hearing.
15. The Defendant enquired on a number of occasions as to the whereabouts of the Claimant's evidence. The Claimant responded on 10 October indicating a conference with counsel had been organised but this was not to take place until 15 October - though no reply was forthcoming to the Defendant's unsurprising enquiry as to why this had not been addressed at an earlier stage after the hearing in July. Their subsequent letter of 17 October promised that their witness evidence would be served by 30 October - but it seems that nothing was actually received until the Claimant served – just a few days before the adjourned hearing - their Application of 18 November (see 2.3 above). This had exhibited to it the report of a Mr Richard Audley and draft re-amended particulars of claim. There was subsequently served and filed by the Claimant a statement of a Dr Pitalia dated 18 November which was the long awaited evidence from the Claimant (& which ought to have been available eight weeks or so earlier).

16. No explanation was provided as to the breaches of the Court Orders by the Claimant but the Defendant did not seek an adjournment: it sought to address all the Applications on their merits.

Applications

17. I had the benefit of the bundle prepared by the Claimant and a supplemental bundle provided by the Defendant which addressed, in part, the deficiencies of the Claimant's compliance with the orders as I have detailed above.
18. Both sides were represented by counsel : Mr Williams representing the Defendant and Mr Butler representing the Claimant. They had each filed a skeleton argument and referred to a number of authorities which I will address where relevant in this judgment.
19. The Defendant's approach is to say that the claim as presently pleaded discloses no reasonable grounds for bringing the claim and that this is accepted and (effectively) acknowledged by the Claimant hence their Applications (made in July) to amend the claim form and the particulars and by their most recent Application (18.11.13) to rely upon (further re-) amended particulars of claim. Accordingly, it is said, that if the Claimant is unsuccessful in its Application for permission to amend its pleadings the strikeout Application must succeed due to the complete deficiency of the existing pleading.
20. Moreover, the Defendant argues that the claim is, in any event, statute barred and, if they are correct in that assertion, the Claim should be struck out (or that they should have summary judgment) on that ground alone.
21. The Defendant also opposes the Application to rely upon expert evidence and go on to say that, even if permission is granted to the Claimant to amend in the most recent form of pleading put forward (18.11.13), the claim is still largely unintelligible and should be struck out as not disclosing any reasonable grounds for bringing the claim.
22. The Claimant on the other hand maintains that by the proposed re-amended particulars of claim (as formulated in the Application of 18 November 2013) it can be seen that there is an arguable claim with reasonable prospect of success. It is said that this is a complex case both as to law and fact and it

cannot be said that the claim does not have a reasonable prospect of success. As to the point of limitation the Claimant maintains that the claim was issued in time and, in making that submission, they seek to rely upon the evidence of Mr Audrey (who is said to be an expert) and Dr Pitalia of the Claimant Company.

Application to Amend

23. I propose to deal firstly with the claimant's Application for permission to amend its particulars of claim. Much of the substantive argument before me referred to this proposed re-amended pleading and it makes sense therefore to deal with this aspect first.
24. By its Application of 18 November 2013 the Claimant sought permission to be amend the particulars of claim in the form produced to the court at the hearing.
25. The Defendant maintains that even now the proposed pleading is so bereft of detail as to be defective and that they are still in the position of not knowing the case they have to meet. They refer to the absence of detail as to the part(s) of the bidding process complained of; what breaches are alleged and what the precise consequence(s) of such breaches was. I have some sympathy for the Defendant's arguments and understand their frustration as to how, after nearly 12 months, the claimant is little nearer to properly formulating its case.
26. As I set out below I was addressed in detail in respect of the proposed re-amendments and whilst they do lack detail and precision I nonetheless have to consider them in the context of CPR 17.
27. This provision sets out the rules for amendment and the well-known guidance provided by Lord Justice Peter Gibson is set out in the footnote to that rule as follows:

    "…… amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs"

    The White Book goes on (at 17.3.6) to confirm that amendments will not be allowed if they have no prospect of success and that the correct test is that contained within CPR 24 namely the test on Summary Judgment.

The issue of limitation is not one which is relevant to consider when looking at the Claimant's stand alone application for permission to amend and I believe the proper approach is for me to decide on the amendments as put forward and simply ask whether they have no real prospect of succeeding.

28. Even though this would be the third bite of the cherry and that many of the allegations remain vague and unclear I cannot say that they have no prospect of success as they stand. Allowing the amendments also accords with the overriding objective and the dictum of Peter Gibson LJ and I accordingly grant the Claimant permission to amend its particulars of claim in the form to which I have referred.

Limitation

29. It seems to me that the starting point for consideration of the other Applications is the issue of limitation: for if the Claimant is out of time that is an end to the matter.

30. Regulation 47D of the Regulations states:

> *"(1) this regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.*
>
> *(2) subject to paragraphs 3 to 5 such proceedings must be started within 30 days* ***beginning with the date when the economic operator first knew or ought to have known that grounds of the starting of the proceedings had arisen"*** (my emphasis)

A subsequent provision allows the court to extend the time limit where it is considered that there is a good reason for doing so. No Application for an extension was made by the Claimant and the battleground between the parties, on this point of limitation, (acknowledged by both sides in their respective Skeletons) has been whether the proceedings were started within the 30 days as set out above.

31. The determination of the matter of limitation requires me to consider:

a. what level of knowledge is required by the Claimants to satisfy the statutory test set out above and
b. when they had that knowledge.

32. As the Claimant seeks to place reliance, in respect of the limitation point, on both their own witness evidence and that of Mr Audrey I must initially therefore determine whether Mr Audrey's report is admissible in dealing with the questions above and whether I should grant the Claimant permission to adduce Mr Audley's report pursuant to the other limb of the Application of 18th Nov last.

Expert Evidence

33. It will be clear from what I have already said that neither the court nor the Defendant had any inclination of the proposed reliance by the Claimant on expert evidence. It was not raised as an issue before me at the hearing in July nor had it been the subject of any subsequent inter-partes correspondence even though it seems that Mr Audrey was commissioned to prepare his report on 14 August 2013. That is clear from the preamble to his report at 20/133.
34. The document sought to be relied upon is said to be an expert report. It contains the usual CPR endorsement referring to part 35 and the obligations of an expert.
35. CPR 35 details that no party may call an expert or rely on a report without the court's permission and any expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.
36. In respect of claims especially relating to the Regulations I was referred by the Defendant to the case of BY Development Limited and others v Covent Garden Market Authority [2012] EWHC 2546 (TCC). This is a decision of Mr Justice Coulson and was handed down just over 12 months ago. It summarises the approach the court should take to Applications for expert evidence where claims are based on alleged breach of the Regulations.
37. He makes a number of observations which are, I believe, of particular value to me in this case. These are as follows:

37.1 At para 8 he sets out the approach to judicial consideration of the challenges to the process contemplated by the Regulations :

> *" under the 2006 Regulations the principal way in which an unsuccessful bidder can challenge the proposed award of a contract to another bidder is to show that the public bodies evaluation of the rival bids either involved a manifest error or was in some way unfair or arose out of unequal treatment. Accordingly in deciding such claims, the courts function is a limited one. It is reviewing the decision solely to see whether or not there was a manifest error and/or whether the process was in some way unfair. The court is not undertaking a comprehensive review of the tender evaluation process; neither is it substituting its own view as to the merits or otherwise of the rival bids for that already reached by the public body"*

An analogy is thereafter drawn between these types of claim and judicial review proceedings where the court notes the rarity with which expert evidence is allowed.

37.2 At para 15 he sets out the correct approach to the test of manifest error and recites with approval the decision of Mr Justice Morgan in Lion Apparel Systems Ltd v Firebuy Limted [2007] EWHC 2179 (Ch) which states :

> *" if the Authority has not complied with its obligations as to quality transparency or objectivity then there is no scope for that body to have "a margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.*
> *In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so the court should only disturb the decision where it has committed a " manifest error".*

He then conducts a review of cases regarding expert evidence and at paragraph 20 says this:

> *" in summary, I consider that the authorities demonstrate that, where the issues are concerned with manifest error or unfairness, expert evidence will not generally be admissible or relevant in judicial review or procurement cases. That is in part because the court is carrying out a limited review of the decision reached by the relevant public body and is not substituting its own view for that previously reached; in part because the public body is likely either to be made up of experts or will have taken expert advice itself in reaching a decision; and in part because such evidence may usurp the courts function"*

The possibility of exceptions to this general approach are considered at para 21 but at paragraph 22 he asks himself the question:

> *" is this a claim where the technical background is so complex that explanatory expert evidence is required, and/or is this an unusual case where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the court to reach a proper view on the issues of manifest error or unfairness?"*

38 My appreciation therefore of that case is that expert evidence should not be allowed unless either:

38.1 the claim is so technically complex that explanatory expert evidence is required or

38.2 it is an unusual case where expert evidence on the tender evaluation process is required to allow the court to carry out its proper function.

Mr Butler for the Claimant accepts these propositions in his written submissions and contends also that this is a case of manifest error.

39 As Mr Justice Coulson did in BY Development I have looked at the questions which were raised of the expert, on whom reliance is now sought to be placed, to allow me to consider the 'tests' set out above.

There are 3 questions and they are detailed at 20/133.

40 The first question is : "When did the Claimant know or ought to have known that he had a potential claim against the Defendants?"

41 In my judgment this question is a matter purely and entirely for the court. It is not a matter susceptible to expert evidence or opinion. It falls into neither of the categories identified at paragraph 38 above.

42 The second question is : " in comparing the bid submitted from the Claimant and the party awarded the contract can you please provide an opinion on whether the scores granted by the Defendants were fair and reasonable for the two submissions made by the two bidding organisations. Was the scoring fair and reasonable and in keeping with the two submissions or in your opinion is their concern about the scoring?"

43 In my judgment this question also falls outwith the categories identified at paragraph 38. It seems to me that the proposed expert is simply being asked for a third-party view as to the approach of the Defendant body. There is no suggestion that this is a highly technical matter nor is there any assertion that it is in some way so unusual that expert evidence is required. The question seems to have been posed for one purpose: to seek evidence to review the tendering process – which is expressly **not** part of the Court's function in any event (see BY Developments above).

44 The third question is : " was the process and standards (sic) followed by the Defendant in keeping with best practice?"

45 This question seems to me speculative and irrelevant. I was not addressed by the Claimant as to the significance or otherwise of whether the process was (or was not) undertaken by reference to "best practice". The Defendant asserted that "best practice" has got nothing to do with the Regulations and I agree.

46 As the evidence of the proposed expert relates entirely to matters where expert evidence ought not to be admitted I reject the Claimant's Application to adduce such expert evidence.

47 This means that in addressing the question of limitation I must rely only on the evidence within the bundle comprising the statements of the acting solicitors and Dr Pitalia.

Knowledge and Limitation

48 Although it had been contended that the proceedings were not in fact "issued" until they were processed by the Salford Business Centre on 4 January 2013 the Defendant sensibly agreed that they should be deemed to have been issued on delivery to the counter at Accrington County Court on 21 December 2012.

49 Accordingly the issue was whether the Claimant had the appropriate level of knowledge only within the 30 days preceding that date or whether the Claimant actually had knowledge at an earlier time.

50 The starting point for this consideration is the witness statement of the claimant's solicitor dated 2 July 2013 at 15/38. The statement was prepared with regard to the transfer Application that I dealt with at the hearing on 9 July. As noted its author was unfamiliar with the Regulations at the date of commencing the proceedings and she accepted that she did not know that they required the commencement of the proceedings in the High Court. However, she does assert she was aware of the 30 day limitation period but gives no indication as to when she thought limitation arose nor why.

51 Her second witness statement is dated 8 July 2013 and is at 17/50. She says this:

> *" I believe the limitation in this matter was 24th of December 2012. This is due to the fact that the Claimant only had all (sic) relevant information and knowledge that the process had not been undertaken a fairly and equitably when it received full and final disclosure including the Freedom of Information disclosure which was received by the Claimant on 27 November 2012"*

52 It provides no greater detail as to what was received nor why this crystallised the Claimant's knowledge.

53 The evidence of Dr Pitalia in his statement of 18 November 2013 at 19/129 largely recites matters of law but on the question of knowledge he says this:

> *" I can confirm that (the claimant) was not in a position to know that they had a claim against (the Defendant) until we had received an actual copy of the bid submitted by the preferred bidder on 27th of*

November 2012. Until this stage SSP did not have knowledge of the facts which clearly indicated what standard of information or bid content the preferred bidder had been evaluated against, and whether the scores attributed to the bid by the evaluators were a fair reflection of the standard and the strength of the bid submitted. It was only at this stage that I had knowledge of the facts which indicated an infringement of the 2006 Regulations".

That is the extent of the admissible evidence from the Claimant.

54 The Defendant's response is set out principally in the second witness statement of the Defendant's solicitor Andrew James Daly dated 4 September 2013 at 18/54. This also exhibits a detailed bundle of the relevant correspondence between the parties and their advisers.

55 The chronology set out in Mr Daly's witness statement is important and in summary it details the following:

55.1 the Claimant was told it had been unsuccessful in its bid on 11 September 2012.

55.2 the Claimant received a written debrief on 13 September 2013 and a verbal debrief on 21 September 2013. On 9 October the Claimant was provided with their own scores, the scores of the winning bidder and the characteristics and relative advantages of the winning bidder.

55.3 The Claimant's then solicitors wrote in detail to the Defendant's solicitor on the 10th and 19th of October requesting further information, threatening the issue of a claim and the likelihood of protective proceedings being issued should there be an unsatisfactory reply from the Defendant.

56 A consideration of the correspondence discloses the following:

56.1 by their letter of 10 October the claimant's solicitors sought information that had not been provided in the debriefs specifically:

a) the scores awarded by each evaluator for both bids
b) the notes and minutes of the evaluators of Claimant's bid
c) the notes of the evaluators during the consolidation meeting

d) copies of correspondence between the evaluators about the claimant's bid

56.2 by their letter of 17 October the Defendant's solicitor replied to each of the numbered points above either enclosing the required documents or, in respect of c) confirming no such notes existed.

56.3 the Claimant responded through their solicitors by letter of 19 October setting out their dissatisfaction with the quality and extent of some of the information provided and asking for a copy of the successful bid relying on the Freedom of Information Act.

Thus by 19th October the issues underpinning the Claimant's re- amended pleading were already the subject of detailed correspondence.

56.4 the Defendant's solicitors provided a redacted copy of the winning bid under cover of their letter of 21 November but withheld significant parts of that document citing confidentiality and other reasons.

57 To assess the issue of the claimant's knowledge I was addressed by both parties with regard to the final allegations on which the Claimant proposes to rely and which are set out in the re- amended pleading in respect of which I have given the Claimant permission to rely.

58 A consideration of the breaches therein alleged permits me to address the issue of limitation on the basis that these allegations now constitute the high water mark of the possible claim.

59 The Claimant makes six separate allegations of breach which I detail below and in respect of which I need to make findings as to the date of knowledge.

60 The six allegations set out in para 14 of the Particulars of Claim are as follows, that :

60.1 (i) Dr Angela Manning was involved in the process. She apparently is a person involved with the Defendant and with whom the Claimant had had prior dealings - and which had been the subject of prior proceedings.

The Claimant accepted that this allegation could not be sustained: it accepted that the proceedings in respect of this allegation were out of time by the time the proceedings were lodged at Accrington County Court. I need not therefore consider this further.

60.2 (ii) the Claimant's scores were inconsistent and disproportionate to the information supplied; the Claimant having a track record of managing and delivering services whereas the preferred bidder did not.

60.3 (iii) the preferred bidder was treated more favourably than the Claimant as their scores had been moderated upwards whereas the Claimant's scores had not.

60.4 (iv) the evaluation and marking process lacked fairness openness and transparency in that no notes had been made

60.5 (v) a generalised assertion of manifest error saying that if the Defendant had correctly assessed the Claimant's bid they would have been successful

60.6 (vi) the moderated scores revealed inconsistencies resulting in the successful bidders scores being moderated upwards and the claimant's scores downwards.

61. The claimant's approach is that until they received a copy of the winning bid in late November they did not have sufficient knowledge to enable them to bring a claim. They rely on Nationwide and Gritting Services Limited v The Scottish Ministers [2013] CSOH 119. That is a decision of the Outer House of the Court of Session. It is accordingly not binding on me but the Claimant says it is authority for the proposition that "mere suspicion" is not enough to found a claim.

62. The Defendant says:

62.1 that they were actually under no obligation to provide a copy of the winning bid under the Regulations and that they did so only arising from the Claimant's request under the Freedom of Information Act.

62.2 they went beyond their obligations under the Regulations to provide "follow up" information to the debriefs thus providing the Claimant with more than was needed for them to ascertain whether to claim

62.3 that, in any event, the Claimant had been provided with all of the information upon which they now propose to make their claims at the latest by the end of October 2012.

63. Dr Pitalia maintains that until he saw the winning bid he did not know that he had grounds for a claim. This is the crucial issue. Yet :

63.1 he fails to provide any details as to what he saw within the winning bid – and which he had not seen before - that provided him with sufficient knowledge to only then found a claim. In view of the absence of this vital information I enquired specifically of counsel as to what feature of or item within the other bid provided this key knowledge. He was similarly unable to assist. This is especially important in the light of the Defendant's contentions that no "new" material was provided (in respect of the matters now pleaded) with the copy winning bid provided to the Claimant.

63.2 he makes no comment on the Defendant's evidence that the Claimant had knowledge of the matters now complained about at a much earlier stage and, indeed, that they had been raised in the correspondence detailed above before the copy of the winning bid had been received.

63.3 he makes no comment on the Defendant's (unchallenged) position set out in Hempsons letter of 11th October 2012 that the Defendant had gone beyond the requirement of Regulation 32 in providing information to the Claimant in respect of his complaints and queries.

64. Looking therefore at the individual allegations now sought to be relied upon I have concluded as follows:

i) (Dr Manning – not now pursued)

ii) (60.2) : this is a generalised complaint about scoring. It makes no specific complaints about any unfairness or manifest error. Even assuming that this is a matter properly reviewable by the court, in my judgment the Claimant had been provided in early October with information as to how its bid had been scored and on what basis it had been scored. The 30 day period in respect of this allegation began with the Claimant's receipt of the scoring information which was no later than 19th October. This is the date that the claimant's solicitors replied to the Defendant solicitors following receipt of Hempsons' letter of 17 October. This allegation is accordingly out of time at the date of issue.

iii) (60.3) : this is an allegation simply that the Claimant's scores have not been moderated upwards. It is not clear to me what error or unfairness is alleged thereby. The fact however of the absence of moderation had been known to the Claimant following their receipt of the letter from Hempsons

dated 17 October and my conclusion is that this allegation is similarly out of time.

iv) (60.4) : this allegation is that no notes were taken nor minutes kept. This seems to me to be a matter of evidence rather than substantive claim. In any event it was similarly known following the letter of 17 October. It is also statute barred.

v) (60.5) : this simply asserts that the Defendant made manifest errors without providing any information as to the basis of that assertion. As such, and in the absence of any further information from Dr Pitalia, I am of the view that it adds nothing to the other allegations and is simply a generalised complaint with no detail at all. It is plain from the claimant's then solicitor's letter of 19 October 2012 that they were already asserting unfairness(or potential unfairness) and time therefore runs in my view from the receipt of the letter of 17 October. This allegation is statute barred.

vi) (60.6) : Counsel for the Claimant accepted that this simply repeated iii) above and my conclusion is therefore the same.

65 . In approaching these conclusions I have in mind obiter dicta from two cases. The first of these is Sita UK Ltd v Greater Manchester Waste Disposal Authority [2011] EWCA Civ 156 where the Court of Appeal approved the test of knowledge for commencement of proceedings under the regulations which predated the regulations with which I am concerned. The trial judge had formulated the test in these terms:

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

Lord Justice Elias goes on to comment (at para 30) that the parties should not confuse the issue of having knowledge of the :

> *" detailed facts which might be deployed in support of the claim with the essential facts sufficient to constitute a cause of action".*

It is only the latter that is required to come to a decision on the commencement of proceedings.

66. This approach is also reflected by the Court of Appeal in the earlier case of Jobsin Co UK PLC v Department of Health [2001] EWCA Civ 1241 where Lord Justice Dyson clearly set out in this strong policy grounds for the early commencement of proceedings were breach of the Regulations is alleged. He says this (para 38) :

> *" it seems to me that a tenderer who finds himself in such a situation faces a stark choice. He must either make his challenge or accept the validity of the process and take his chance on being successful, knowing that the other tenderers are in the same boat. In my view, it is unreasonable that he should sit on his rights and wait to see the results of the bidding process on the basis that, if he is successful he will remain quiet, but otherwise he will start proceedings……"*

This reflects the harsh reality of these Regulations: that an unsuccessful bidder has only very limited 'rights' to information yet only a very short period within which to decide whether there has been an infringement of the Regulations (and one which is "sufficient to constitute a cause of action"). In this case the Defendant went beyond (well beyond it could be argued) its obligations in providing information to the Claimant after its bid and thereby provided to the Claimant the material it needed to form a view as to whether it could bring a claim.

Whilst dealing with different facts in this case the message from the two cases referred to above is clear: that disaffected tenderers must issue sooner rather than later or risk falling outside of the statutory period of limitation however short that may be. The Scottish case that the Claimant relies upon seems to me plainly distinguishable on its facts, not binding upon me and is less persuasive than the approach of the English courts as noted above.
Accordingly to be applied in answer to the issue posed at para 31 (a) above is that set out in the case of Sita.

Conclusions

67. Having concluded that the claimants had received all the information necessary to give them the requisite state of knowledge (i.e. that *which apparently*

clearly indicated that there had been an infringement) by no later than the end of October 2012 the claim as issued by them on 21 December 2012 is out of time. The Claimant therefore has no real prospect of succeeding on its claim and no other compelling reason was put forward as to why the claim should be disposed of at trial. Accordingly the Defendant is in my judgment entitled to summary judgment pursuant to CPR 24.

684. I propose therefore to make an order giving such judgment to the Defendant which disposes of the claim entirely.

69. That leaves the issue of costs. I heard no representations as to costs because of the reserving of this judgment but I indicated I would give some provisional view of costs which I now do.

70. Whilst the Claimant has succeeded in its Application for permission to rely upon its re amended pleading the usual consequence of such permission would be that the Defendant would be entitled to its costs of and in connection with such an amendment and that should be the order in this case in respect of that discrete issue.

71. The Defendant has however succeeded on its principal Application and defeated the Claimant's claim. In the absence of good reason I believe that the usual consequence should apply: costs should follow the event.

72. This judgment is to be e-mailed to the parties and will be formally handed down on the date and time set out above. The attendance of the parties is excused provided no less than five days before that handing down a draft order is submitted incorporating the terms agreed between the parties consequent upon this judgment. If there is no agreement as to the form or content of the order then the court should be advised by the five-day period noted above. I will then vacate the hearing and list the matter for formal handing down and for further submissions to be made in respect of the order and/or costs. I propose that any such hearing should take place by telephone provided it can be attended by the advocates who appeared before me but if either party disagrees and seeks a hearing in person I will then make the necessary listing arrangements.

……..

C.R.J. Bury, District Judge

Burnley Combined Court