Case No: HT-14-320

Neutral Citation Number: [2014] EWHC 3659 (TCC)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 November 2014

Before:

MR JUSTICE AKENHEAD

- -

Between:

GROUP M UK LIMITED	**Claimant**
- and -	
CABINET OFFICE	**Defendant**

- -
- -

Michael Bowsher QC and Anneliese Blackwood (instructed by **Freshfield Bruckhaus Deringer**) for the **Claimant**
Philip Moser QC, Ewan West and Daisy Mackersie (instructed by **The Treasury Solicitor**) for the **Defendant**
Valentina Sloane (instructed by **Slaughter and May**) for an **Interested Party (Carat)**

Hearing date: 4 November 2014

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JUDGMENT

Mr Justice Akenhead:

Introduction

1. This is a public procurement case relating to a proposed single supplier framework agreement for media planning and buying services ("the Media Services") in which the losing tenderer, Group M UK Ltd ("Group M"), by issuing proceedings within 30 days of being informed of its failure to win contract, has secured by operation of the Public Contract Regulations ("the Regulations") a suspension on the placing of the contract with the successful tenderer. The successful tenderer was Carat, a division of Dentsu Aegis Network Ltd. This judgment is concerned with the Cabinet Office's application as the contracting authority to lift the statutory suspension so that it can place the contract with the successful tenderer.

Background

2. The Government has for many years now had a significant budget for the provision of (non-party political) government information either to the public at large or to particular types of members of the public. This information is dispensed through many different types of media outlets, including television, radio, cinema, billboards and the Internet. Campaigns relate amongst others to Armed Forces recruitment, Violence against Women and Girls, NS&I promotions of bonds for old-age pensioners, Visit England (the encouragement of tourism), cancer awareness and treatments, submission of tax returns and payment of tax, drink and drug driving, dangers of fire and cyclist safety tips. It seems to be common ground that appropriate advertising campaigns can have major benefits for the country and the public. For instance there is evidence that the Great Britain Campaign has secured an annual economic return of between £500 million and £800 million in its first two years and that the "Think - Cyclist Safety Tips" campaign positively resulted in cyclists and drivers becoming much more consciously aware of the need for safer driving behaviour in relation to cyclists and cycling.

3. For the last four years plus, the incumbent provider of the Media Services under an existing framework agreement has been Group M, which is a subsidiary of the very much larger WPP group. That agreement was due to expire in March 2014 but, it seems, it was extended by agreement until December 2014. It is a reasonable inference that one of the reasons for this extension was to enable the current procurement to go ahead.

4. On 11 March 2014, the Crown Commercial Service ("CCS"), on behalf of the Cabinet Office, published an OJEU advertisement for the Media Services. Within a few weeks CCS had sent out to appropriate tenderers its Invitation to Tender ("ITT") in relation to the provision of the Media Services. It is common ground that there was in effect a two-stage process with the initial stage involving a "Quality Evaluation" which required tenderers who were to go through to the next stage to achieve a 70% in terms of marking. The second stage was effectively the pricing stage and, again, it is common ground that it was on price alone that the decision to award the contract was to be based. It is also common ground and indeed it is clear from the ITT that a media auditing organisation called Ebiquity was retained by CCS amongst other things to

develop what was to be called the Media Pricing Grid, which was in effect the pricing document which had to be completed by tenderers, and to evaluate the prices of the tenderers, for instance to assess whether the quoted prices were sustainable. The Media Pricing Grid set out all the different media outlets that needed to be priced for and appropriate bases for prices to be set against. Thus, I was told (without demur) that pricing for television advertisements is calculated, at least in part, by reference to a Cost per Thousand viewers basis.

5. Both Group M and Carat "passed", comfortably, the Quality Evaluation stage with scores in the 90s and two others also passed. There was, as allowed for in the ITT, then a briefing session with the four tenderers at which Ebiquity explained the Media Pricing Grids; this was done by reference to a series of displayed slides. The Pricing Evaluation process was explained and there is unchallenged evidence that no questions were raised regarding sustainability or how it was to be assessed and that no objections or comments were made by bidders in relation to the proposed Price Evaluation process. The slides reminded tenderers to "make sure your bids are sustainable" and that the prices entered into the grids are to be "your pricing guarantees for the 4 year agreement". The successful tenderers then submitted their priced tenders on the Media Pricing Grids provided. Given that this was to be a contract which was to run for four years (subject to provisions for possible earlier termination), the prices had to make allowance for projected inflation.

6. The priced Grids were passed over to Ebiquity, in particular Mr Anders the Business Director and Mr Cross the Joint Head of UK Media at Ebiquity in late May 2014. Part of the exercise which they did involved a comparison between Ebiquity's own "pool data" which was collated retail price data in relation to the different types of media outlet. This data is and was not available to the media market as it is said by Mr Anders to constitute "valuable, confidential proprietary analysis" but it did enable Ebiquity to compare whether prices offered were competitive in relation to such data. There is unchallenged evidence that at least Group M's and Carat's prices were below those available under Group M's existing contract as well as below the norms in Ebiquity's pool data. The exercise raised various queries in particular in relation to "Out of Home" and "Press" pricing, which were relatively small elements; in relation to Group M's and Carat's pricing for television over four years, the largest media outlet, the pricing, which produced totals in nine figures, was said to be sustainable. The queries were sent to each of the bidders on 18 June 2014 and they replied. On 14 August 2014 Mr Cross signed off Ebiquity's validation of the final pricing assessment which took into account the responses by the bidders to the queries. Ebiquity confirmed, amongst other things, that it was satisfied "that all four bidders have submitted sustainable pricing for the framework agreement in the grids can be used by CCS for the pricing evaluation for Media Buying". It was clear that Carat had produced the lowest pricing.

7. On 3 September 2014 the Cabinet Office notified Group M that its bid had been unsuccessful and that the contract would be awarded to Carat. The information provided with that notification demonstrated the relatively small difference between the parties on pricing, albeit that Carat's pricing was less than Group M's. The difference between the two four-year totals is contained in a Confidential Appendix to this judgment. On 12 September 2014, Group M issued proceedings in the Technology and Construction Court for a declaration that the procurement as

undertaken by the Cabinet Office and the subsequent decision to award the contract to Carat was unlawful, and an order that the award decision should be set aside and/or damages. This was followed by the service of the Particulars of Claim on 19 September 2014. The Defence was served on 17 October 2014.

The Pleadings

8. The Particulars of Claim are, primarily, based on a complaint that Carat's pricing must have been unsustainable, as understood by the terms of the ITT. This is predicated upon the basis that, because Group M has a substantially greater market share within the UK market (33%) than Carat (12%), by reference to money spent on advertising space, Carat will "generally not be able to achieve from media owners the same low Base Costs and the same level of Value Pots leading to an average final price as the Claimant does" (Paragraph 6). This is explained in earlier paragraphs:

> "3. The Claimants, in the course of its business, has to negotiate prices for the purchase of advertising space with media owners such as [BSkyB]… ordinarily the Claimant will negotiate an 'umbrella' arrangement that covers all clients, although on occasion an individual client contract may exist. In relation to both the 'umbrella' arrangements and individual client contract, the Claimant will offer a media owner either: (i) a specific volume of expenditure; or alternatively (ii) a share in its UK annual expenditure in relation to specific forms of advertising on a particular medium. For example, in relation to television, the Claimant will offer to guarantee to ITV a specific share of its total television spot expenditure (excluding sponsorship). In exchange the Claimant will require the media owner to agree a price that the advertising space it is purchasing. The Claimant will also have certain quality requirements which will need to be satisfied in relation to the advertising space it purchases from the media owner. For example, in relation to television the Claimant may require a certain percentage of the advertising space it purchases to be at peak viewing times. It is averred that other providers of media buying services ("Agencies"), including Carat…negotiate with media owners in the same or a similar way.
>
> 4. The rate media owners charge for their advertising space is known as the "Base Cost". The manner in which the Base Cost is expressed depends on the type of media in question. For example, the Base Cost in relation to television advertising can be the cost of reaching a thousand people ("CPT") and in relation to press it can be the cost of a single column centimetre. In the course of negotiations a media owner will usually agree to: (i) provide the advertising space required by the Agency at a specific negotiated Base Cost; and (ii) provide the Agency with a bonus of free advertising space or air time (a "Value Pot"). The more advertising that an agency seeks to place with the media owner the greater its ability to achieve a lower Base Cost and a larger Value Pot. However, most media owners will not allow the final price, consisting of the Base Cost and the Value Pot, to fall below a certain level (the "Freezing Point"). Media owners may sometimes retrospectively offer rebates in relation to certain contracts and the amount of those rebates will be based on factors relating to the preceding performance of the contract between the media owner and the Agency. These rebates do not form part of the Value Pots and are usually not guaranteed at the outset of the contract. As such they are not normally taken into account in assessing the price of the advertising space obtained from a particular media owner. For the avoidance of

doubt Value Pots are not rebates as they are calculated prospectively at the start of the contract and not retrospectively.

5. The Claimant, and it is averred Carat, are able to choose how to allocate the free advertising space in Value Pots between their clients. This means that they are able to offer some clients lower prices than others by allocating more of the free advertising space from Value Pots to those clients."

9. Essentially, Group M's primary case is based on an assertion that, because its Value Pots must always be substantially greater than Carat's because of their differing market shares, Carat could not conceivably (in practice) have put in sustainable prices which were lower than Group M's. Indeed, it goes further and says that Carat's prices could only have been sustainable if they were 8% (or possibly more) higher than Group M's. The breaches of the statutory duties contained in the regulations (to treat tenderers such as the Claimants "equally and in a non-discriminatory way" and to act in a transparent way, to conduct the procurement in a manner free from any manifest error, to comply with principles of good administration and to evaluate all tenders fairly and objectively) are set out in Paragraph 55. Sub-paragraph (i) contains a complaint which is that Group M was wrongly marked down at the Quality Evaluation stage but, as Group M still passed the threshold of 70% (by a substantial amount), it is, apparently, accepted that this adds little or nothing material to the case. The other breaches (subject to certain amendments underlined) are said to be:

"(ii) …the Defendant failed properly to validate the tender prices submitted by Carat in relation to the Contract;

(iii) Further…the Defendant failed to recognise that different tenderers were able to sustainably offer different levels of prices and allowed Ebiquity to evaluate the sustainability of prices submitted by tenderers without knowing which tenderer submitted which Media Pricing Grades and the spend by each tenderer at supplier level;

(iiia) Further…the Defendant allowed Ebiquity to evaluate the sustainability of prices submitted in relation to television without ensuring that prices submitted on the basis of different inflation assumptions were adjusted so that they could be assessed on a like-for-like basis;

(iiib) Further, there were manifest errors in the Defendant's validation of the sustainability of Carat's pricing submissions in relation to the Contract in that the Defendant allowed Ebiquity:

(a) to evaluate the pricing submissions on the basis of the incorrect assumption that the Media Pricing Grids submitted by Bidder 1 was submitted by the Claimant when they were submitted by Carat;

(b) to evaluate the sustainability of the pricing submissions on the incorrect assumption is that amendments could be made to the terms and conditions of the Contract;

(iv) Further…the Defendant failed properly to exclude the tender submitted by Carat in relation to the Contract on the basis that the prices submitted by Carat

were abnormally low and/or the tender was in breach of the requirements of the ITT;

(v) Further and/or alternatively, there were manifest errors in Defendant's evaluation of pricing submissions in Carat's tender as Carat's Price Score was so low it is inferred that there must be an arithmetical error in the prices inputted into the Media Pricing Grid by Carat and/or in the calculation of Carat's Final Cost and/or in the calculation of Carat's Price Score;

(vi) Further…the Defendant amended the Original ITT in a manner which severed the functional link between the Contract being tendered and the assessment of prices for the provision of advertising space on International media without drawing this significant, irrational than internally inconsistent change the attention of the Claimant."

10. Under Paragraphs 59 to 61, Group M say that it suffered loss and damage as a result of the alleged breaches asserting that it would "have been awarded the contract, would have performed the Contract and earned profit and contribution to fixed overheads therefrom" and that it incurred wasted tendering costs. No particulars are given.

11. The Defence challenges in some detail many of the assertions which are made in the Particulars of Claim and all of the allegations of breach. I will return to a number of the defences when considering the extent to which that there is either no serious issue to be tried or Group M's claims are weak or not.

The Threshold Issue

12. Mr Bowsher QC seeks to argue that the approach of first instance courts in addressing applications to remove the statutory suspension (based on the well-known **American Cyanamid** decision) is wrong in the light of the current Remedies Directive 2007/66/EC. Paragraph 47G of the Public Contracts Regulations 2006 as amended states that the effect of the issue of a Claim Form by a dissatisfied tenderer once the contracting authority becomes aware that it has been issued and that it relates to the decision to award the contract is that the contracting authority "is required to refrain from entering into the contract". The same paragraph says that this requirement continues until the Court brings the requirement to an end by interim order. Paragraph 47H addresses the making of interim orders by the Court:

"(2) when deciding whether to make an [interim] order…

(a) the Court must consider whether, if regulation 47G(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and

(b) only if the Court considers that it would not be appropriate to make such an interim order may make an order under paragraph (1)(a) [bringing the suspension to an end]."

13. The Remedies Directive amended earlier directives including 89/665/EEC which contained a preamble which has not been deleted by amendment:

"Whereas the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at this stage when infringements can be corrected…"

Article 2 of the amended Remedies Directive states:

"1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of
any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure…

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits."

Article 2a which is entitled "Standstill period" states:

"1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c."

14. The TCC in particular over the last few years has repeatedly said that the appropriate approach when considering applications for the removal of this the statutory suspension is by way of application of the **American Cyanamid** principles, namely considering first whether there is a serious question to be tried and secondly what is

the balance of convenience; an important consideration (either as separate exercise or as part of the consideration where the balance of convenience lies) has been whether the claimant would be adequately compensated by an award of damages. Examples are **Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust** [2010] EWHC 3332 (TCC,), **Alstom Transport v Eurostar International Ltd** [2010] EWHC 2747 (Ch), **Covanta Energy Ltd v Merseyside Waste Disposal Authority** [2013] EWHC 2922 (TCC), and, most recently, **NATS (Services) Ltd v Gatwick Ltd** [2014] EWHC 3133 (TCC). In the latter case, Mr Justice Ramsey upheld the argument of Mr Bowsher QC (arguing the opposite to that which he does now) that the application of the **American Cyanamid** principles was the appropriate approach:

> "29. On that basis and considering the purpose of the Directive and applying the principles of effectiveness and equivalence, I see no difficulty in the American Cyanamid principles being consistent with Article 2(4) of the Remedies Directive. The review procedures would take into account the probable consequences of interim measure for all interests likely to be harmed, looking first at the adequacy of damages as part of the balance of convenience. There is nothing in the Directive which seeks to limit or define the way in which the national courts exercise their discretion in balancing the interests of the parties."

The Court of Appeal in **Letting International Ltd v London Borough of Newham** [2007] Civ 1522 had decided that the American Cyanamid principles were applicable (see the judgement of Moore-Bick LJ at Paragraph 12, albeit that the amended Remedies Directive had not then been implemented.

15. Essentially Mr Bowsher QC argues that the Remedies Directive is paramount and that the wording is such that the **American Cyanamid** approach runs counter to it. He argues that the Remedies Directive provides simply for a balance of interests test which does not provide for a separate total of whether damages are an adequate remedy and does not permit the Court to require the provision of undertakings (or at least disproportionate undertakings) in damages in return for the continuance of an automatic suspension. This latter point may well not arise in any event since his client is prepared to give an unlimited cross undertaking in damages. He relies on the wording of the Remedies Directive and the Irish first instance decision in **OCS v Dublin Airport Authority [2014] IEHC 306** and by an article by the Irish judge at the EU General Court (entitled *"Damages in Public Procurement – An Illusory Remedy?).*

16. In my judgment, there is no separate "balance of interests" test and the **American Cyanamid** approach not only is not excluded by the wording of the amended Remedies Directive but also is an approach which is clearly consistent with the wording. I adopt the reasoning of Mr Justice Ramsey in the NATS case and would add the following as additional reasons:

    (a) The adoption at an initial stage of the test of the need for it to be established that the proceedings raise relevant serious issues to be tried must be a sensible and pragmatic test. It can not have been intended that the Remedies Directive can or should be used to disrupt public procurements with clearly weak or unsustainable challenges. The serious issue test is a pragmatic approach to weed out weak cases whereby suspension of public procurements has been triggered.

Mr Bowsher QC accepted (correctly) that at least as part of the overall exercise the Court must have a right to take into account the weakness of a claim in deciding whether to lift the suspension.

(b) The purpose of Article 2(1)(a) is primarily to ensure that there are procedures in place ("interlocutory procedures") which have as their aim the correction of "the alleged infringement" and the prevention of " further damage to the interests concerned". These procedures are to include measures to suspend or to ensure the suspension of the placing of the relevant contract pending the Court's "interlocutory" or indeed later decisions. Article 2(4) makes it clear that the review procedures do not have to be automatic. These procedures are encompassed within Paragraphs 47G and 47H of the Public Contracts Regulations. They obviously satisfy Article 2.

(c) Article 2(1)(b) provides for powers to set aside decisions unlawfully taken. Again, there are such powers in the Public Contract Regulations.

(d) It is a primarily in Article 2(5) that provision is made for the Court (in this country responsible for review procedures) in effect to lift or as the case may be continue the suspension. It is not unimportant to note that Article 2(5) is actually permissive, with the use of the word "may" three times in the wording. This demonstrates that the Court is clearly to have a discretion and that discretion is not in any way inconsistent with the **American Cyanamid** approach. The use of the expression "the probable consequences of interim measures for all interests likely to be harmed" as the factors which the Court may take into account points very strongly to the Court being entitled to have regard to the probabilities. It is not inconsistent and indeed it is wholly consistent with this wording that the Court conducts a review of the probable strength or corresponding weakness of the claim that there has been a material infringement of the Public Contract Regulations. That review is encompassed within the **American Cyanamid** approach both at the first stage (the consideration of whether there is a serious issue to be tried) and also at the balance of convenience stage in a consideration (amongst what may be many other factors) as to whether the claim is a weak one even where there has just about been established a serious issue to be tried.

(e) Article 2(5) identifies that the public interest can legitimately be taken into account and, indeed, it is well established in these Courts that the public interest is a factor, in appropriate cases, to be taken into account. It is indeed properly accepted that a part of the public interest is the securing of fair and transparent public procurement processes. National interests are also, in appropriate cases, an aspect of public contracts which can be taken into account.

(f) It must be legitimate, in considering "all interests likely to be harmed", to have regard to whether, if the lifting of the suspension is ordered, the complaining claimant tenderer is still left with a remedy and that must include an effective remedy. Article 2(1)(c) does require that review procedures provide a power to award damages. If there is no ready or easily proved entitlement to damages, that must be a factor which the Court should take into account. The reverse is also true in that, if damages would be an adequate remedy, that must be a factor which a court should take into account. The fact that English courts attach weight to the

adequacy of damages does not make that practice incompatible with the Remedies Directive.

(g) Article 2(5) finally endorses as acceptable the deployment of the discretion not to grant suspension (or in the English context a discretion to lift the statutory suspension imposed following the issue of appropriate court proceedings). Overall, the taking into account of "all interests likely to be harmed" in this exercise is in reality the application of the "balance of convenience" test.

(h) Mr Bowsher QC relied upon the decision of the Court of Justice of the European Union in **European Commission v Ireland** (Case C -455/08) but this case does not obviously assist. There is nothing in the Court’s reasoning which suggests that the analysis of the Remedies Directive set out above is wrong. Similarly, reliance was placed on a decision by the Irish High Court in **OCS v Dublin Airport Authority** [2014] IEHC 306 but it has been accepted that this has been overtaken by the decision of the Irish Supreme Court; this is not therefore a particularly helpful decision. Similarly reliance is placed on the German regime which is said to be different to the English regime; again, the German regime may or may not be consistent with the Remedies Directive and, I strongly suspect, there are likely to be differences in the approach of different countries within the European Union on dealing with public procurement challenges and it may well be that many such different approaches are all consistent or at least not inconsistent with the Remedies Directive. Within reason and of course having regard to the meaning of the wording in the Remedies Directive, it must be open to different countries to adopt somewhat different review and interim measures procedures with somewhat different emphases.

17. I therefore conclude that the **American Cyanamid** approach is an appropriate one which not only the Courts have followed in public procurement cases for a number of years but also is consistent (or at worst not inconsistent) with the relevant provisions of the Remedies Directive.

Serious Issue to be Tried

18. As indicated above, there is no serious issue to be tried in relation to the complaint about the Quality Evaluation Stage. Group M passed the Quality Evaluation Stage and the fact that it was a few percentage points less than Carat is neither here nor there; there is no pleaded complaint that Carat should have been excluded at that stage and there is no suggestion that in some way Group M was correspondingly marked down at the Price Evaluation Stage. Put another way, this complaint is on its face immaterial because, even if established, the fact that it did not secure a few more marks at the Quality Evaluation Stage did not represent and is not effectively pleaded to have represented any reason why Group M did not "win" the tendering process. Indeed, Paragraph 11.6.1 of the ITT expressly said that provided that a tenderer had passed the Quality evaluation Stage its score "will have no bearing on the Price Evaluation Process, except in the event of a tie"; it is not suggested that there ever would have been a tie. I did not understand Mr Bowsher QC to challenge this.

19. As for the remainder, it is necessary first to consider the relevant terms of the ITT in Paragraph 11.6 entitled "Price Evaluation Process":

“11.6.1…this final stage of the Award Evaluation will be determined by the Media Pricing Grids…

11.6.2 The pricing comprises a spreadsheet containing a series of Media Pricing Grades which must be fully populated…

11.6.3 Ebiquity will run a 2 hour session for Potential Providers to enable full transparency of how these overall channel total is are calculated…

11.6.6 Pricing Guarantees are based on Gross Media Value…and when combined with the Supplier’s Commission Rates…should be inclusive of all profit, overheads and agency fees and should factor in the likely resource costs…

11.6.8 Each item is weighted- as detailed in the Media Pricing Grids spreadsheet. This waiting is based on historical spend data. The weightings are for assessment purposes only and do not provide any guarantee of volumes for the framework.

11.6.9 Each weighted line item is added together to produce an overall channel total across each of the media grids…

11.6.10 Each channel total is then fed into the Master Spreadsheet An added together to generate a subtotal…

11.6.11…commission rates are applied to the indicative spend volumes…to give a second subtotal…

11.6.12 The overall Final Cost for comparison is generated by adding the buying subtotal…to the commission subtotal… giving a Final Cost for comparison…This Final Cost will be used for the Pricing Evaluation.

11.6.13 All prices submitted will be shared with Ebiquity…This will be under a full Non-Disclosure Agreement and for the sole purpose of validating each rate provided against Ebiquity’s pool prices to ensure they are sustainable for the full four-year term. Any unsustainable rates identified by Ebiquity will be highlighted to the Authority and clarified with the Potential Provider and any unsustainable rates may be deemed to be non-compliant. Ebiquity will use their market knowledge and expertise to determine with the Authority if any rates are unsustainable. Any inflation/deflation indices were also be verified by Ebiquity to ensure they are aligned to market forecasts for the term of the Framework Agreement. The Authority retains the right to remove any non-compliant bids from the process.

11.6.14 Once the Authority is satisfied that all tenders are compliant, the Price Evaluation Process will be undertaken by different individual(s) evaluators to those individuals involved with the Quality Evaluation Process. Theseevaluators will be representatives from the Authority.

11.6.15 The Potential Provider with the lowest overall Final Cost…which has been deemed compliant by the Authority shall be awarded the Framework Agreement…

11.6.21 Potential Providers must commit to the Pricing Guarantees offered if awarded the Framework Agreement. Pricing Guarantees must be fixed (as per the respective indices) for the duration of term…The Pricing Guarantees that will be incorporated into Framework Schedule 3 (Charging Structure) are those on the following terms of the Media Pricing Grids spreadsheet:

- Radio
- Cinema
- OOH
- TV Specials
- TV late bookings
- TV CPTs
- TV Summary
- Press Summary
- Press
- Online – Display
- Online – VOD
- Online - ad serving and tech costs"

"Pricing Guarantees" were defined in the draft framework agreement as "the maximum price given to each of the Performance Guarantees as specified in Annex A to Schedule 3 (Charging Structure)"; this Schedule 3 seems to have been the one into which the accepted prices or rates would be transposed once the winning tender had been accepted. "Performance Guarantee" is defined as meaning "the minimum result (in terms of audience views, clicks or similar) the supplier agrees to deliver each Price Guarantee as set out to each media channel in Annex A of Schedule 3…" That Schedule provided for a "penalty" or liquidated damages provision in relation to under delivery against the Performance Guarantee by the Supplier from 1% for a 0% to 2.5% level of under-delivery to 20% for a 7.51% to 10% under-delivery; these penalties were to be applied to Commissions received by the Supplier.

20. It seems clear from all these provisions that all tenderers including Group M would and must have been aware that they had to submit prices which were inclusive of any profit and overheads and indeed any costs which they considered they might have to incur (see for example Paragraph 11.6.6 of the ITT). There was no requirement (and indeed it is not suggested) that it was incumbent on tenderers to identify what their likely net costs were or were likely to be; this was not some sort of cost plus contract. There was however no provision in the ITT whereby CCS was entitled to ask let alone require tenderers to identify what its likely or estimated net costs would be. There can be little or no doubt that such information would not generally been known by any

particular tenderer's competitors in the market and, indeed it is not and could not sensibly be suggested that Ebiquity either must or could be expected to know what each tenderers projected costs (as opposed to their tender prices) were. Indeed, such information would have been highly confidential to the individual tenderers themselves. Paragraph 11.6.13 identified that it was by reference to Ebiquity's "pool prices" that sustainability was to be checked. It is common ground that the mutual expectation of CCS and the tenderers was that the pricing was likely to be keen and competitive. Indeed, as indicated elsewhere, Group M's pricing represented a very substantial discount on the prices which it has been charging historically under the existing framework contract.

21. Whilst not seeking to make any final judgment on what Paragraph 11.6.13 means, it seems likely that the purpose of "sharing" the tendered prices with Ebiquity was to enable that firm to "validate" each rate against its "pool prices" to "ensure that they are sustainable". It seems clear that it was to be Ebiquity, described as "an independent media auditor", whose function it would be to identify "any unsustainable rates" and to use its "market knowledge and expertise to determine with the Authority" what if any rates were unsustainable. There was some debate about what the word "unsustainable" means. Meanings could range from prices being so low that the Supplier could financially simply be unable to support them with a real risk that it might fail financially or prices being so low that Performance Guarantees could not regularly be maintained. It seems clear however that the Authority was not obliged to reject tenders which contained one or more "unsustainable" rates or to treat "unsustainable" rates as non-compliant.

22. The Court needs to be conscious that, in considering whether or not there is a serious issue to be tried, if that consideration depends on materially different facts and evidence put before it (assuming that the evidence on each side is broadly credible), it is likely that the conclusion will be that there remains a serious issue to be tried. Indeed, this has been made clear in a number of TCC cases such as **Pearson Driving Assessments Ltd v the Minister for the Cabinet** [2013] EWHC 2082 and **NP Aerospace Ltd v Ministry of Defence** [2014] EWHC 2741 (TCC); this is an almost invariable corollary of the **American Cyanamid** case. Different considerations apply if one side's evidence is not credible, for instance if it is flatly contradicted by what that side was saying or doing earlier or if it is inherently unlikely.

23. What one can however have regard to in reviewing whether or not there is a serious issue is the ways in which, in these public procurement suspension lifting applications, the case is pleaded by the Claimant and the case is supported by its own evidence, as well as fact which is or is likely to be common ground. In essence, Group M argues through its pleadings and asserts through its evidence (in particular Mr Theakstone its Chief Executive) that, whilst its prices were "sustainable", Carat's prices must have been unsustainable on analysis, simply, because Carat could not effectively maintain the standards required by the framework agreement (and in particular the Performance Guarantees) without the disproportionate allocation of its "Value Pots", which, because its market share is significantly below that of Group M, were much smaller than Group M's Value Pots. Indeed, Mr Theakstone goes on to suggest that Carat must have tendered on the basis that it was going to have to pay the 1% to 20% penalty charges if its tender was successful.

24. I have to express surprise in relation to these arguments and assertions. Whilst one can understand the natural discontentment that Group M feel in not having secured this contract, the overall tender difference between the two lowest tenderers (see Confidential Appendix) would suggest comparable pricing which on its face would not suggest that the lowest tender was significantly less sustainable than the second lowest. The other strong factor is that no evidence has been proffered as to what profit margin each of these two tenderers budgeted for. If, hypothetically, Group M had tendered on the basis of securing a 15% profit return and Carat had tendered on the basis of a 6% profit return, that could readily explain the differences in the pricing. I hasten to say that I do not criticise either Group M or Carat for not putting this highly sensitive commercial information into a public arena. Press reports relied upon by Mr Theakstone ("More about Advertising" 4 September 2014) suggest that WPP (Group M's parent) is "insistent on achieving its margins" and that "it is aiming for 15% - quarter by quarter" whilst Carat's parent is prepared to cut its margins to secure work; I do not attach particular importance to the accuracy of reports such as this but it provides a potential explanation for Group M coming second on this occasion. It is common ground that in previous tendering (albeit not in relation to any significant government work) Carat has "beaten" Group M on price on substantial commercial projects over the last 9 or 10 years.

25. The question of unsustainability of rates was addressed by Mr Moser QC in refreshingly simple terms. He says that it is to Paragraph 11.6.13 of the ITT to which one must turn, taking into account that all parties were aware that Ebiquity would take the primary role in determining, against its pool prices, the extent to which prices were unsustainable. It would necessarily look at the tendered prices by reference to the pool prices; there is no hint or suggestion in Paragraph 11.6.13 or indeed elsewhere that the exercise to be done on sustainability would be one which involved a verification in the nature of an audit against tenderers as to whether what was being offered was sufficient to ensure that the overall contract requirements could be met without penalty. Paragraph 11.6 generally indicated that the tendered prices were to be all-inclusive and there is no suggestion that they were to be or indeed were broken down by tenderers into cost, overheads, resources and profit heads. There was no ITT requirement that Value Pots or their respective sizes should be disclosed by way of tender or that the exercise to be done by Ebiquity would or should involve some sort of analysis of how the Value Pots were to be deployed. So, Mr Moser QC suggests that the analysis called for by the ITT was obviously never intended to extend to the sort of analysis which would produce the conclusions upon which Group M's case is based.

26. I consider that this approach and analysis is strongly supported by the wording of the ITT. It is also supported by the contemporaneous evidence and in particular that attached to Exhibit VB1 to Ms Brown's statement (internal Page Nos 33 to 39) which are the Ebiquity contemporaneous documents which (albeit with some redactions) show the exercises which they carried out both on their initial review of the tendered prices and following the return by the tenderers of the answers to queries. I refer to the Confidential Appendix to this judgment for some more detail. This strongly suggests that Ebiquity did no more and no less than was called for in Paragraph 11.6. There was no visibility for Ebiquity or CCS as to the underlying costs of individual tenderers or the availability or size of their Value Pots. It can also be observed and it seems to be common ground that the size of Value Pots can go up and down

depending on market share and it would follow from that, even if currently Group M's share and its Value Pot is significantly greater than Carat's, the position can change if Carat's market share increases in the UK. It follows that, if Mr Moser QC is right, the sustainability exercise to be done and actually apparently done by Ebiquity was that which was called for in the ITT and simply because another independent media auditor might have reached a different view is neither here nor there; there is no manifest error. There is considerable force in Mr Moser QC's submission that one can not extract from the wording of Paragraph 11.6.13 or indeed generally from the Public Contract Regulations some overarching obligation to carry out any other verification exercise, along the lines suggested by Group M, Mr Theakstone and its legal team, or at all. There is a very strong case for saying that the tenderers could not reasonably have expected or that they did not expect that their prices would be subject to the sort of analysis and audit which is now suggested on behalf of Group M; this is because there is nothing in the ITT which suggests that this would be done.

27. I observed during the course of argument, and indeed, both sides' Counsel accepted, that the consequence and ramification of Group M's case is that assuming that each qualified tenderer put in competitive bids (which was clearly expected) Group M was bound to win by reason of its more dominant position in the market and of the size of its Value Pots and that this would give rise to a strongly arguable valid charge that the whole procurement process was neither fair nor transparent (and was accordingly in breach of the Public Contract Regulations as a result) because it was consciously or otherwise slanted to ensure that only one tenderer won. That would be very surprising.

28. Mr Bowsher QC's alternative argument is that Carat's tender was "abnormally low" within the meaning of the Public Contract Regulations. That argument suffers to a large extent from the same basic objections as that relating to the unsustainability arguments. The Public Contract Regulations as amended contain relatively limited references to "abnormally low tenders", the most material being:

> "(6) If an offer for a contract is abnormally low the contracting authority may reject that offer but only if it has –
>
> (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;
>
> (b) taken an 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."

As a number of authorities have indicated, this does not obviously impose obligations on the contracting authority either to determine that an offer is "abnormally low" or to reject "abnormally low" offers. It seems relatively clear that these provisions are primarily concerned with giving a tenderer who is considered to have submitted and "abnormally low" tender an opportunity to respond. Cases such as **Fratelli** [1989] ECR 1-1839, **Impresa Lombardini SpA** [2001] ECR 1-9233, TQ3 **Travel Solutions**

Belgium SA [2005] II-2627 and **SAG ELV Slovensko** [2012] 2 CMLR 36 are in point. Even if there was some sort of obligation to ascertain if there was an "abnormally low tender" from Carat, it would be unlikely that anything other than the sustainability exercise to be and actually apparently carried out by Ebiquity could reasonably be expected to have been done, which (it would be very strongly arguable) would lead in all probability to exactly the same result.

29. There are some other relatively minor points pleaded in the draft Amended Particulars of Claim which, in my judgement do not add up to a serious issue to be tried. Paragraph 55(vi) which has not been particularly pressed on behalf of Group M is met by a simple and not obviously challenged fact that Group M was informed of the amendment in relation to international media by notification dated 17 April 2014 from CCS. If there is a complaint and any separable cause of action, it is time barred because the proceedings were issued more than 30 days thereafter. As for the other amendments in effect to Paragraph 51(iii)(a) and (b), for which see above, these have either been effectively addressed above or they do not obviously or demonstrably lead to any logical conclusion that on their own if established Group M would have secured this contract or that Carat pricing's would have ended up being more than Group M's.

30. It is not necessary or indeed desirable for the Court at this time to make any final or binding conclusion as to what the final result on these issues will be. The "serious issue to be tried" simply involves an assessment and judgment by the Court whether the law and the pleaded, disputed or not readily disputable facts as presented demonstrate a serious issue to be tried. I am satisfied that there is no serious issue to be tried.

Balance of Convenience/Adequacy of Damages

31. In the light of my conclusion above, it may not be necessary to go to the second and/or third stages of considering the adequacy of damages as an appropriate remedy and the balance of convenience. However, even if I had decided that there was a serious issue to be tried, I would have concluded firmly that these factors supported the lifting of the suspension.

32. Starting with adequacy of damages, I have absolutely no doubt that damages would be an adequate remedy for Group M. The heads of damage pleaded are in effect loss of profit and head office overhead contribution and wasted tendering costs. In terms of the latter, they must be readily ascertainable; this is not obviously or at all a case in which damages would be difficult to assess. In relation to the loss of return, one would start on a consideration of what profit margin was anticipated by Group M and whether that was realistic; the tenor of Mr Theakstone's evidence is that this exercise would not be peculiarly difficult although he does say that the level of call off under the framework contract in the future would be uncertain. If there was a trial in March 2015 (which is possible albeit with a tight timetable), the call off for what are accepted to be the busy months of January to March 2015 will be available. However, it is unlikely that there would be a trial on quantum in March because the trial then, if expedited, in all probability would only deal with liability and broad causation issues; there will therefore be a further period to examine what call off there has been. The Court is used to dealing with future uncertainty in cases such as this and regard would

be had historically to what had been ordered in the past and it is unlikely that much if any debit would be made for unexpectedly lesser levels of business.

33. It is suggested that damages would not be an adequate remedy because M4C, the sub-group with Group M, would have to close down if the suspension was lifted. However, that group was set up specifically to service the incumbent framework contract and there was always going to be a risk that if Group M did not succeed on this latest contract that sub-group would have to fold. It is unlikely that employees within the M4C team (said to number somewhere between 34 and 40) would individually suffer because either they would have the benefit of TUPE transfer to Carat or, as likely, redeployment within Group M or the wider WPP group (which is very large). This is in any event not a case in which it can be said that Group M will close down and indeed it has not been suggested that the team could not be deployed on to other profitable work within the group.

34. It is argued that there will be a reputational loss if Group M failed to secure this contract. I find that very difficult to see. The fact of it not securing one of many contracts would, in logic, simply tell the market that someone bid lower than it did. Mr Theakstone says that its billings from September 2013 to August 2014 were £2.9 billion in the UK; the framework contract would amount to a relatively small proportion of this sort of figure. Mr Theakstone suggests that this framework contract would be a "trophy" contract that would bring "with its significant prestige to the incumbent supplier", going on to say that there would be damage to its reputation if it could not challenge the decision to award the contract to Carat. However, even if the suspension is lifted, it can still challenge the procurement decision if it is peculiarly concerned about this reputational aspect. It is clear from his evidence in any event that Group M and its parent work with and have relationships with the UK government and "with nearly every Whitehall department". That would suggest that Group M has the opportunity and facilities to maintain and even build upon its reputation.

35. I broadly accept the evidence and argument proffered by and on behalf of the Cabinet Office to the effect that compensation through a cross undertaking as to damages would not be an adequate remedy for it. That suggests that, if the suspension remained in place, a number of important media campaigns may not be able to go ahead and other campaigns will be delayed. There is, it is said, a substantial backlog of campaigns (currently around £55 million's worth) which will need to be run in the January to March 2015 period (and before the "purdah" run-up period to the General Election); it is said that it is not in the public interest that these important campaigns are delayed and I agree. I do not consider that it is an adequate response for Group M to offer to provide the required media services until judgment on liability, albeit the offer is on the basis of their tender prices, for the following reasons:

(a) The current contract, as extended is due to expire in December 2014. That has already been extended.

(b) Although I do not have to decide the point, it is at least properly arguable that the extension of time which was agreed to as between the Cabinet Office and Group M in March 2014 was unlawful, in effect because it was not subject to a further public procurement exercise. In point are at least two authorities: **Metropolitan Resources North West Ltd v Secretary of State for Home Department** [2011] EWHC 1186 (Ch) and **Indigo Services UK Ltd v**

Colchester Institute [2010] EWHC 3237 (QB). It is certainly arguable that any further extension would be unlawful and open to challenge, not least by Carat. I do not consider that it is appropriate to put the Cabinet Office to some sort of election when one of the two choices would involve them in pursuing an arguably unlawful course of action.

(c) Although the Court has not determined the substantive issues between the parties, if it turns out after a full trial that Group M's challenge was unjustified, it will have secured at its own prices a substantial amount of business to which it was not otherwise entitled. Given the views expressed above as to there being no serious issue to be tried, there is a not insignificant chance that such an unacceptable outcome would have been secured by the pursuance of an arguably unacceptable challenge.

36. When one comes on to consider the balance of convenience, I would in any event have taken into account the weakness of Group M's claim, even if it had established that there was a serious issue to be tried. That factor would have pointed in favour of the suspension being lifted.

37. Another material factor, related to the last point, is the fact that the tender prices of all tenderers are only to be held until about Christmas Eve 2014. In practice, the trial could not fairly take place until about March 2015 (Mr Bowsher QC suggested February 2015); certainly, on the TCC lists, an obvious trial slot is not available until March 2015. That would mean in all probability that, win or lose, there could well have to be a completely new tender process which could take the 5 to 6 months which the current process under review took. That could well mean that the Government had no framework contract for what is mutually accepted as being the nationally important purpose of disseminating what used to be called public service information. That is bound to cost very much more than has been negotiated; it has been said by Ms Lisett that the government would lose very substantial discounts (possibly up to £25 million) and some £2 million of additional costs would be incurred as a result of late booking fees. There would also be a very real risk that important information would not be disseminated when it should be. If campaigns which are designed to limit or prevent accidents, injuries or illness do not go ahead, there is obviously a risk that avoidable problems will arise. All these sort of factors point in the public interest to the suspension being lifted.

38. Of course, I do bear in mind the public interest in ensuring that public procurements carried out lawfully but that is one factor which, when weighed in the balance with all the other factors which support the lifting of the suspension, I have no doubt that the balance of convenience and the availability of the damages remedy to Group M point very strongly indeed towards lifting the suspension in this case.

Decision

39. For all the above reasons, my judgment is that the statutory suspension on the placing of this framework contract should be lifted.