Neutral Citation Number: [2006] IEHC 137

THE HIGH COURT

[2006 No. 83 JR]

IN THE MATTER OF COUNCIL DIRECTIVE 92/13/EC AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (REVIEW PROCEDURES FOR THE AWARD OF CONTRACTS BY ENTITIES OPERATING IN THE (WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS) REGULATIONS 1993 (S.I. No. 104 of 1993)

BETWEEN

VEOLIA WATER UK PLC, BOWEN WATER TECHNOLOGY LIMITED, SOUTH MIDLAND CONSTRUCTION LIMITED AND CLG DEVELOPMENTS LIMITED, TRADING AS THE VEOLIA WATER CONSORTIUM

APPLICANTS

AND

FINGAL COUNTY COUNCIL

RESPONDENT

Judgment of Mr. Justice Clarke delivered 2nd May, 2006.

1. Introduction

1.1 This judgment concerns a preliminary issue which arises in substantive proceedings brought by the plaintiff consortium ("Veolia") against the defendant ("Fingal") arising out of the award of a contract for the survey, design and installation of a water metering system for non-domestic water for the four Dublin local authority areas ("the contract"). Fingal acted as the lead authority in relation to the award process. Veolia was an unsuccessful tenderer and seeks, in the substantive proceedings, to challenge the award on a number of grounds. However it is contended by Fingal that Veolia are out of time for bringing the challenge.

1.2 In that context by order of the 27th February, 2005, Kelly J. directed the trial of a preliminary issue in these proceedings in the following terms:-

> "(1) As to whether the applicant has complied with the requirements of O. 84(A) r. 4 of the Rules of the Superior Courts by making this application at the earliest opportunity, and in any event within three months from the date when the grounds for the application first arose;
>
> (2) If not whether the applicant has demonstrated that there is good reason for extending such period."

This judgment is directed towards those issues. However, for reasons which will become apparent, it is necessary, in resolving those issues, to address, at least in general terms, the issues which arise in the substantive proceedings and in that context it is necessary to turn, firstly, to the background to those proceedings.

2. Background

2.1 The contract is designed to insure compliance with Ireland's obligations under E.U. law and the government's water pricing policy framework which, in accordance with E.U. law, and the "polluter pays" principle enshrined in that regime, requires charges to be levied in respect of the supply of water in certain circumstances. Thus local authorities are required to charge non-domestic customers for water and waste water services and to recover the full costs of providing such services to those customers. Local authorities are, therefore, required to achieve metering of the water supply in the non-domestic sector by 31st December, 2006.

2.2 The contract is concerned with implementing that obligation in respect of the four Dublin local authorities. The contract is of a very considerable value with the successful tender being at a price just under €50 million.

2.3 The relevant tender documentation required tenderers to price their tenders for a mix of what are described as "drive-by" and "fully fixed" meter reading technologies. In simple terms it would appear that it was anticipated that drive by technology (which involves the use of vehicles driving in the vicinity of the water user concerned and being in a position to pick up meter readings in that fashion) was likely to be less costly in terms of initial capital investment but might well involve higher running costs. There were, apparently, other perceived advantages and disadvantages of both the "drive-by" and "fully fixed" technologies. The principal perceived advantage of a fully fixed system was that it would allow more frequent meter reading without the need for the drive by of the location concerned. In those circumstances tenderers were required to submit what, in their view, amounted to the optimal mix of technologies. However the tender documents also required the submission of a price in respect of what were termed "provisional items" which included a requirement to put a price on the additional costs that would be involved for upgrading the optimal mix tendered on behalf of the tenderer concerned to a fully fixed solution.

2.4 Tenderers were to be evaluated on the basis of the most economically advantageous tender. Furthermore, and of relevance to the substantive proceedings, the tender documents entitled a tenderer who has submitted a compliant bid (that is to say a bid which was fully compliant with the requirements of the tender documentation) to also submit what was termed an alternative tender. In general terms it would appear that the purpose of permitting an alternative tender was that the tenderer could propose a solution which, at least to some extent, went outside certain of the compliance requirements of the tender documentation. It is, however clear, that, at a minimum, an alternative tender was required to meet the minimum performance requirements specified in the tender documents.

2.5 It would appear that only two tenderers (the successful tenderer and Veolia) submitted tenders. It would seem that both tenderers submitted a principal tender and two alternative tenders each so that there were three tenders each submitted by both groups. The Veolia tenders were submitted on 17th May, 2005. On 19th May, 2005, Veolia received a list of the total sums in respect of all tenders which specified that there were two compliant tenders (the Veolia tender in the sum of €56,659,877.35 and a competitor tender in the sum of €76,585,403.17.

2.6 It should be noted that at this time, as part of the tender evaluation process, a document was produced within the Fingal team conducting the evaluation which was called the "Tender Evaluation Procedures" document. This document was produced before the tenders were opened (which appears to have occurred on the 13th May). The document was internal to those involved in the evaluation process and was not made available to the tenderers. No complaint is, understandably, made about this fact in itself. However it should be noted that it was in the Tender Evaluation Procedures document that the decision not to include provisional items in the ranking process was first recorded.

2.7 The relevant letter also specified the amounts of four alternative tenders being the two additional tenders submitted on behalf of Veolia and two other additional tenders, one in the sum of €49,990,950.68 and the second in the sum of €78,871,911.02.

Having regard to the requirement that a party could only submit an alternative tender when that party had also submitted a compliant tender it is common case that the only reasonable inference to be drawn from the above communication was that there were, in substance, only two tenderers who had each submitted a compliant tender and two alternative tenders.

	Award Criteria	Maximum marks available	Marks awarded to your tender	Marks awarded to successful tenderer
A	Financial Submission	40	35.48	40
B	Technical Submission	60	55.85	59.57
	Totals	100	91.33	99.57

2.8 On the 6th September, Veolia received a letter from Fingal which informed Veolia that its tender had not been successful and that Fingal proposed awarding the contract to another tenderer. The relevant letter contained a table which set out what were described as the marks awarded against each of the award criteria in relation to both the Veolia tender and the successful tender. That table was in the following form:

2.9 The table follows the format set out in the tender document which required that each tender be evaluated both in respect of its financial and technical merits. The criteria also required that the best tender in the financial category was to receive 40 marks with the best tender in the technical category receiving 60 marks. Each tender's marks in each category was determined by the relativity between its score in that category and the best tender in that category. Thus, for example, a tender which was evaluated as being at 75% of the best tender on the financial side would have obtained 30(being 75% of 40) marks.

2.10 It is therefore clear from the table which I have set out above that the successful tender had the best financial submission and had a technical submission which was very close to the best technical submission.

2.11 Subsequent to the communication to Veolia of the fact that it had not been successful, there followed a lengthy series of communications between Veolia and Fingal. As the state of knowledge of Veolia during that period and, indeed, the responsibility for any absence of relevant knowledge, are key questions in this preliminary issue it will be necessary to return in some detail to that sequence of communication in due course. However the communications continued until a meeting on the 19th December, 2005. Thereafter these proceedings were instituted on 23rd January, 2006, Veolia having complied with its obligation to serve a notice of intention to institute proceedings some seven days earlier on 16th January.

2.12 Against that background it is also important to identify the issues which arise in the substantive proceedings for it is in relation to those issues that Veolia's state of knowledge and other allied matters needs to be assessed.

3. The substantive issues
3.1 In the substantive proceedings Veolia raise a significant number of grounds, for challenging the award of the contract to its competitor but, it is common case, all can be grouped into three broad issues.

3.2 (a) *The first issue - the exclusion of provisional items*

As will be recalled tenderers were required (at least so far as a compliant tender was concerned and, on one view also in respect of alternative tenderers) to submit with their tender a provisional item being the price for an upgrade to a fully fixed system. It is accepted by Fingal that in carrying out the evaluation of the tenderers, for the purposes of determining the most economically advantageous tender, no regard was had to the price placed by the tenderer concerned on that upgrade. It does appear that having carried out the evaluation for the purposes of determining the most economically advantageous tender, and having determined the winning tender on that basis, a further checking exercise was carried out to see what the result would have been had the upgrade to fully fixed been included in the evaluation. However it seems clear that the results of this latter evaluation could not have affected the result of the tendering process in the sense of affecting the decision as to which tender was the winning tender. The height of the evidence is to the effect that if that latter exercise (that is to say the exercise involving an evaluation including the upgrade) had shown a significantly different result it might have led those involved in the evaluation process to make a recommendation to Fingal that no award should be made on foot of the existing process.

3.3 Be that as it may Veolia contends that on a proper construction of the tender documents there was a requirement on Fingal to include in the evaluation some value in respect of the upgraded system and its price. It was accepted in the course of argument that the weight to be attached to the upgrade did not have to be (and indeed probably should not be) the same as the weight to be attached to the technology mix identified in the tender itself. The reason for this was, as was argued by Counsel for Fingal, that if the same weight were to be attached to the upgrade as to the tender mix itself then the evaluation would, in truth, be in respect of the technical merit and financial viability of the fully fixed system rather than the optimal mix identified in each individual tender. However counsel for Veolia points out that the giving of some appropriate weight to the relative merits and cost of the upgrades as and between the various tenders could have been achieved without giving rise to that difficulty. At its simplest Veolia's argument might best be explained by considering a case where two tenders were evaluated as being extremely close having regard to their technical and financial merits when evaluated in relation to the technical mix specified in each tender. If, however, the loosing tender were to have included an upgrade to a fully fixed solution which was significantly more advantageous than its competitor, Veolia argues that that fact should have been taken into account in determining whether that tender ought be regarded as the successful tender.

3.4 The issue turns upon difficult questions of construction of the tender documents and it is neither necessary nor appropriate for me to go into the arguments for and against the competing propositions at this stage. However for the purposes of assessing Veolia's state of knowledge it is sufficient to note that under this heading the case made is that Fingal wrongly excluded provisional items (and in particular the upgrade) in the evaluation process.

3.4 (b) *The second issue – the requirement for a price for upgrade*

The second set of grounds concerns an analogous but nonetheless separate issue. It is common case that the successful tender did not, in fact, make any provision for an upgrade to a fully fixed solution. It was therefore clearly not a compliant tender as such. However the successful tender was not that tenderers main tender but was one of its alternative tenderers. In those circumstances Fingal maintains that it was entitled to take that tender into the evaluation process notwithstanding the absence of any price for the

provisional item concerning an upgrade to a fully fixed system. This issue turns on a construction of the tender documents. Again it is neither necessary nor appropriate for me to go into any more detail at this stage as to the competing arguments. It is, again, sufficient merely to note that Veolia's case is that Fingal wrongly treated what turned out to be the successful tender as being a tender which it was entitled to evaluate notwithstanding the absence of any provisional item providing for the price of an upgrade to fully fixed.

3.5 *The third issue – upgradeability*

The third ground concerns upgradeability. Irrespective of the question as to whether it was necessary for a bid (in order for it to be considered) that it should have contained a provisional item in respect of the cost of upgradeability, it is suggested by Veolia, and at the level of principle does not appear to be contested, that the fact that the mix tendered for was capable of being upgradeable to a fully fixed solution was a necessary requirement for any tender to be considered. It is contended by Veolia that the successful tender was not in fact upgradeable. This latter point should be distinguished from the second issue based at 2 above. Under the former the argument was made on behalf of Veolia that the successful tender was defective in failing to provide for the price of an upgrade to fully fixed. Under this latter point the argument is to the effect that the model specified in the successful tender was not, in fact, capable of being upgraded (irrespective of price).

3.6 Before passing from this third issue it should be noted that in relation to this issue (but not in respect of the two other issues) Fingal argues that Veolia has failed to establish arguable grounds for the case which it intends to make and resists any extension of time on that basis in addition to the other grounds applicable to each of the issues.

4. The Delay Application

4.1 Having identified the issues which arise in the substantive proceedings it is then necessary to turn to the legal basis for the application now brought on behalf of Fingal which, in substance, seeks a determination by the court that Veolia has failed to comply with the requirements of O. 84(A) r. 4 of the Rules of the Superior Courts and that no basis has been established for extending the period of three months as specified in that rule. The starting point is, therefore, a consideration of the rule itself.

O. 84(A) r. 4 provides as follows:

> "An application for the review of a decision to award or the award of a public contract should be made at the earliest opportunity and in any event within three months of the date when grounds for the application first arose, unless the court considers that there is good reason for extending such period."

4.2 It is clear that there are two separate obligations upon an applicant who seeks to challenge a public procurement decision in a case such as this. Firstly the application "shall be made at the earliest opportunity", and secondly the application must be made "in any event within three months of the date when grounds for the application first arose."

In addition it is clear that the question may arise under the rule as to whether, notwithstanding that the application was not made at the first opportunity or in any event within three months, there nonetheless may be good reason for extending the time period.

4.3 It should firstly be noted that Veolia argues that the proper construction of the rule (having regard, inter alia, to the jurisprudence of the legal order of the European Union) is such that time does not begin to run until the applicant has knowledge of the matter which gives rise to the cause of challenge. This is disputed by Fingal who, while accepting that the state of knowledge of a potential applicant may be a material factor in the exercise of the courts discretion to extend time, contend that the limitation period of three months provided for by the rule commences when the event giving rise to the ground of complaint occurs (irrespective of knowledge).

4.4 Thus, while both sides accept that the sequence of events which occurred between the 6th September, 2005, (when Veolia were informed that they had been unsuccessful) and the 23rd January, 2006 (when the proceedings were commenced) are material with particular regard to when Veolia knew (or on one view ought to have known) that it had a basis for its complaint, the reason why an analysis of that sequence of events is accepted as being important differs between the parties. On Veolia's case that sequence of events is urged as giving rise to a situation where time did not, in fact, begin to run for a significant portion of the relevant period. On Fingal's case it is accepted that a proper analysis of that sequence of events is necessary to determine whether it is an appropriate case to extend time. However before approaching that sequence of events it seems to me appropriate to address, firstly, the legal issue which I have identified. The resolution of that issue has the potential to affect the approach to the sequence of events to which I have referred.

5. When time begins to run

5.1 The first matter relied upon by Fingal for the contention that time begins to run as of the date of the occurrence of the matter complained of (irrespective of knowledge) it is to refer to the words of the rule itself. The rule speaks of it being necessary to bring the proceedings within three months from the date "when grounds for the application first arose". Thus, it is said, the clear wording of the rule requires that time starts to run when grounds existed irrespective of whether knowledge of those grounds was available to any applicant.

5.2 Secondly reliance is placed by Fingal on the jurisprudence of the English courts. In *Keymed (Medical and Industrial Equipment) Ltd v. Forest Health Care (NHS Trust)* [1998] E.U.LR. 71 the court had to consider the similar (but not identical) provisions governing the United Kingdom time limit. Langley J. held that the wording of the relevant time limit provision did not permit the importation of a requirement for knowledge of a breach before time begins to run. It was held that "grounds":-

> "first arise when they exist and not when their existence or occurrence is known to those who may wish to pursue them, and who might of course know of grounds at different times. The existence of the power to extend time, to the exercise of which questions of knowledge are plainly material, itself provides a mechanism for dealing with cases of the type to which I have referred…
>
> Nor do I see anything so inherently surprising or unacceptable in provisions which require a plaintiff to act promptly where he does know of a breach, but which also is a strict time (subject to extension) for proceeding when he does not, as to justify straining to give the words used a meaning which I do not think they can naturally bear."

The reasoning in Keymed has been applied in subsequent decisions in The United Kingdom: see for example *Matra Communication v. The Home Office* [1993] 3 R.E.R. 562; *Jobsin Internet Services v. Department of Health* [2002] 1 C.M.L.R. 44; and *Holleran v. Severn Trent Water Limited* [2004] E.W.H.C. 2508.

5.3 There can be little doubt but that, as the courts in England have held, the use of the phrase "when grounds… first arose" seems to clearly imply that time begins to run when the complained of act on the part of the awarding authority actually occurs irrespective of knowledge. It does not seem to me that the reference in the English Regulation to "grounds for the bringing of the proceedings" differentiates that rule from the Irish requirement which refers to "grounds for the application". On what basis might it then be said that time does not begin to run until the applicant had knowledge. In this regard a number of arguments are put forward on behalf of Veolia. I propose addressing them in turn.

5.4 Firstly it is contended that within the legal order of the European Union, time begins to run against persons seeking to challenge administrative decisions from the time that the relevant decision is communicated to the person concerned provided that the potential challenger is furnished with an appropriate account of the contents of the measure notified and other materials necessary to consider a challenge. See for example 6/72 *Europemballage & Continental Can v. Commission* [1973] E.C.R. 215; *Olbrechts v. Commission* [1989] E.C.R. 2643 and *Commission v. Socurte* [1997] E.C.R. 1. However I did not understand counsel for Fingal to argue to the contrary. It may well, therefore, be the case that within the legal order of the European Union questions of absence of reasonable knowledge are dealt with by determining that time limits do not begin to run until the potential challenger to the matter concerned has appropriate knowledge.

5.5 However it was accepted by counsel on behalf of Veolia that in *Santex SpA v. USSL* [2003] E.C.R. 1-C1877 the court of justice would appear to have accepted that the community legal order leaves the question of the procedural rules in respect of remedies in the area of public procurement up to the Member States, subject to the overriding requirement that such national rules may be invalid where they render the application of community law "impossible or excessively difficult".

5.6 There is not, therefore, in my view any requirement in the jurisprudence of the European Union which would require that national procedural measures are cast in a form which is similar to those adopted in the analogous area by the Union itself. Provided that the national procedural rules are not in breach of the principal of effectiveness (and also, though not argued as being relevant in this case, to the principle of equivalence whereby the procedural rules applicable to the enforcement of community rights should not be any more onerous than those applicable in an analogous areas within the domestic legal order) such rules are a matter for the Member State concerned to determine. For the purposes of this case I am, therefore, satisfied that provided Order 84A meets the test of effectiveness there is no requirement of European law that would necessitate that it should be interpreted as preventing time from starting until the applicant had knowledge.

5.7 Secondly, reliance is placed upon the fact, as is indeed the case, that an applicant is required, in accordance with the procedural provisions of O. 84A, to set out in some considerable detail the basis for the applicant's contentions and to support those contentions with a detailed affidavit verifying the factual matters giving rise to its contentions. In those circumstances, it is said, the rule necessarily contemplates that the applicant will have a detailed knowledge of the basis for his complaint prior to commencing the proceedings. Thus, it is said, it must be inferred that time could not begin to run until the party had that knowledge.

5.8 It does not seem to me that the latter proposition follows. A party who brings an application outside time and thus requires to seek an extension of time and who relies, as the basis for that extension, on the fact of not having had adequate knowledge will, in my view, be equally able to comply with the requirement of the order in relation to providing detailed grounds and evidence. That requirement (in respect of the provision of grounds and evidence) is, therefore, in my view, consistent with either interpretation.

5.9 Reliance is also placed on certain aspects of the constitutional jurisprudence of the courts in this jurisdiction. In *White v. Dublin City Council* [2004] 1 I.R. 545, the Supreme Court held that the two month time limit provided for in s. 82(3B)(a)(i) of the Local Government (Planning and Development) Act, 1963, as amended, impermissibly operated to deprive certain potential applicants who wished to challenge planning decisions of any reasonable opportunity to mount such a challenge. There is, again, no doubt but that such a principle would be equally applicable to the public procurement area. However it should be noted that the section under challenge made no provision for an extension of time. Current planning legislation, while retaining a short time limit for challenge, also incorporates an entitlement on the part of the court to extend time in an appropriate case. There is no reason to believe that a challenge similar to that which succeeded in *White* would succeed in relation to the equivalent provisions of the 2000 Planning Act having regard to the presence of such a discretion.

5.10 Next Veolia places reliance upon certain passages from those judgments of the courts in this jurisdiction which, it is said, may imply a view on the part of the court that time only begins to run as to the date of knowledge.

In *Dekra Éireann Teo v. Minister for Environment and Local Government* [2003]2 I.R. 270 at p. 301 Fennelly J. commented as follows:-

> "The fact of the matter is that the application was made ten days outside the three-month limit. In this respect, I differ from the judge's analysis. He was correct to hold that the decision was made on 24th November, but did not draw the correct conclusion from his correct finding that the grounds were not known until 15th December. It is to the decision of the High Court Judge to extend the time in these circumstances that I must now turn."

It is clear from the judgment that the proceedings were commenced on 25th March of the following year, so that the reference to "ten days outside the three-month limit" seems to imply that that limit may have been considered by Fennelly J. to have expired on the 15th March and thus have commenced to run on 15th December, being the date of knowledge.

5.11 However it is clear from a reading of the judgment that the question of whether a lack of knowledge prevents time from starting to run in the first place or is a proper factor to be taken into account in deciding to extend time, was not an issue raised in those proceedings. Clearly a highly important consideration for the court, in either event, would be to consider whether the proceedings were brought within three months of the date of knowledge. While the passage from the judgment of Fennelly J. is open to the interpretation sought to be placed upon it on behalf of Veolia it does not appear to me that the issue was truly before the court in any meaningful sense in that case and in those circumstances it does not seem to me to be appropriate to read too much in to the wording of the passage to which I have referred. In cases where knowledge became available on a single easily identifiable occasion and where no portion of the blame for any lack of knowledge may attach to the applicant, there may be little difference in practice between the approaches urged by Fingal and Veolia respectively. Where knowledge arises incrementally and where some blame may attach to the applicant significant differences may result from the respective approaches.

5.12 It is also illustrative to note that Denham J., at p. 288 of her judgment in *Dekra* upheld the finding of O'Neill J. in this court to the effect that, up to a certain point in time, both parties had contributed to delay but that thereafter the delay was entirely the responsibility of the applicant. That finding in *Dekra* illustrates the fact that the range of issues concerning knowledge that may arise in the public procurement field can vary significantly. There are certain types of issues which will (or at least ought to be) clear to

parties as soon as they arise. For example a complaint concerning the content of the tender documentation itself is almost certainly a matter of which any potential tenderer ought to be aware as soon as the tender documentation is furnished.

5.13 Other matters may not be clear on their face. An unsuccessful tenderer who is given information as to the ranking between the parties may or may not have sufficient information to enable it to formulate grounds of challenge. At the other end of the spectrum may be matters which, if they were, unfortunately, to occur would almost certainly remain secret until discovered. For example if it were to be suggested that there was some impropriety in the tendering process whereby a conscious and deliberate attempt to favour a particular tenderer (for example by revealing information material to the tender process to a favoured tenderer) had occurred, it is unlikely that any grounds of potential challenge on that basis would become known to an unsuccessful tenderer unless they happened upon evidence or information suggesting such impropriety.

5.14 In the intermediate category of case (that is where the necessary information may consist partly of information formally imparted to the tenderers and partly of information which may have to be ascertained from the awarding authority) the court will have to assess responsibility for any absence of knowledge. As is clear from the passage from Denham J. in *Dekra* referred to above it may well be appropriate, in some cases, for blame to be attributed jointly (with perhaps more weight being attached to one or other) to both sides. The necessary information may emerge piecemeal. The fault for that may be singular or joint. In all those circumstances it seems to me that, in any event, there is much merit in a system which allows the court to take into account all proper factors in extending time. How otherwise, for example, would it be appropriate to deal with a case where (say) full knowledge only arose three months after the event but, after a proper analysis of what had occurred in the intervening period, almost all of the blame for such knowledge not emerging was found to lie on the part of the applicant. On the basis of Veolia's submissions the only way in which an applicant might not benefit by its own default in those circumstances would be if the court were to assume that time began to run when the applicant concerned ought to have discovered the necessary information. However it seems to me to be preferable (particularly in cases where both sides may bear some of the responsibility) to deal with the matter on the basis that time begins to run when the events occur (irrespective of knowledge) but also by allowing the court to place all due weight on the absence of knowledge and the responsibility for that state of affairs in considering whether to extend time.

5.15 Finally before departing from this aspect of the matter I should note that reliance was placed upon the undoubted fact that there is an obligation placed, as a matter of EU law, upon awarding authorities to act in a transparent fashion in conducting public procurement matters. Indeed, to a limited extent, certain of the grounds sought to be put forward on behalf of Veolia appear to raise transparency issues as a separate ground for challenge in these proceedings. It does not seem to me that, in truth, any such separate grounds can really be said to exist on the facts of this case and I did not understand that point to be pressed. Neither did I understand Fingal to contest, at the level of principle, the obligation of transparency. The relevance of that principle to a time issue such as the one with which I am concerned is, it seems to me, that the assessment of the responsibility of the parties for any lack of knowledge which, it might be argued, contributed to a delay in commencing proceedings must be assessed having regard to the disclosure obligations which are placed upon the awarding authority. Put another way an absence of disclosure which might not rebound to the discredit of a party engaged in a private process might legitimately be held against an awarding authority sufficient to lead to it having to accept the blame (or in an appropriate case a greater share of the blame) for a lack of knowledge on the part of an applicant who seeks to explain delay. The obligation of transparency on the awarding authority does not absolve a potential applicant from an obligation to make reasonable enquiries if he is not to be fixed with any delay. The obligation of transparency may, however, effect the calibration of any blame and may also effect the extent of the obligation to enquire.

5.16 The final issue that arises in respect of the question of when time may be said to run stems from the submission made by Veolia to the effect that if Fingal is correct in its submissions as to when time began to run, the facts of this case would lead to a conclusion that the period commenced in May when Fingal adopted the assessment procedures for the evaluation of the tenders. It will be recalled that those procedures were not published to the parties at the time and operated as an internal guide for those involved in the assessment process within Fingal. It was those procedures which first recorded the intention not to include provisional items in the ranking process. In that context it seems to me to be necessary to address different types of decisions which may be made in the course of the process leading to the award of a contract within the public procurement field.

There may be decisions which have a greater or lesser degree of formality and which may be binding and irreversible to a greater or lesser extent. The decision to award is of course a formal and relatively final decision. The determination as to the tender criteria might, normally, be similarly categorised. In certain tendering processes there may be other formal stages. For example it is not unusual for a tender process to contain a formal pre-qualification during which tenderers have to establish a capacity to perform the contractual obligations which would fall upon them if they were to be successful in order that they might be permitted to move to the next stage and make a formal tender. Thus parties who fail to establish sufficient technical or financial (or other appropriate) capacity may not be permitted to make a formal tender at all. A decision to refuse such pre-qualification to a party is clearly also a formal decision.

5.17 At the other extreme there will be many informal and internal stages in the evaluation of tenders, at least in cases where that evaluation requires a variety of factors to be taken into account. It will be common that the awarding authority will appoint a committee or group of persons to carry out the evaluation. That body will normally be requested to make recommendations to the awarding authority. Within that body specific tasks may well be devolved to individuals with particular expertise. An individual might well, for example, be given the task of carrying out certain financial or other economic calculations for the purposes of evaluating tenders. Such a person might produce a paper setting out their conclusions. In the event that there was an error in that paper, could it be said that grounds for a challenge had, by that fact alone, arisen. It seems to me that the answer to that question must necessarily be no. On the other hand if the error was not noticed, the consequences of the error were incorporated in a material way into the conclusions of the assessment committee, and that assessment acted on by the awarding authority, then there could be little doubt that, in the words of junior counsel for Fingal in the course of closing submissions, the matter would then have "crystallised".

5.18 It seems to me that the question of whether grounds may be said to have arisen on the facts of any individual case should be determined by reference to whether there has been a formal adverse consequence which has crystallised to the extent of a formal step in the process being taken adverse to the interests of the applicant concerned. The fact that informal steps, capable of reversal, have been taken does not, it seems to me, give rise to grounds for challenge because it should not be assumed that any such informal error (if it be an error) will not be discovered and corrected before the process comes to an end.

6. Conclusions on Time Issue

6.1 For the above reasons I am therefore satisfied that on its ordinary reading O. 84A requires that time begin to run in relation to the making of an application for judicial review when the events giving rise to the grounds upon which the challenge is intended to be brought occur. Those events may be said to have occurred when any formal adverse consequence has crystallised to the extent of a formal step in the process being taken adverse to the interests of the applicant concerned. In my view the provision for an extension

of time adequately meets the requirements of European law for the provision of an effective remedy. In that regard it seems to me that amongst the matters that must properly be taken into account by the court in considering whether to extend time is to ensure that time will be extended in any case where a refusal to extend time could be said to establish a breach of the principle of effectiveness. Similarly it does not seem to me that any requirement of the Constitution necessitates interpreting the rule in a manner different from its clear wording. Finally it does not seem to me to be correct to seek to characterise a discretionary extension as not amounting to a right in a proper case. A discretion conferred upon a court must be exercised judicially. It must be exercised in accordance with recognised principles. There are, indeed, grounds for believing that a discretion (which allows the court, acting judicially, to take into account a variety of material factors), may, in many cases, be a preferable method for dealing with issues of extension of time particularly where the issues are less than clear cut.

6.2 In all those circumstances I am satisfied that the grounds for the applicant's case were in existence from at least the 6th September, 2005 and that time began to run from that date. It is clear, therefore, that the applicant is, *prima facie*, out of time and that I must, therefore, go on to a consideration of whether it is appropriate to extend time. I now turn to that issue.

7. Extension of Time

The basis put forward on behalf of Veolia for an extension of time is that it did not have knowledge, or at least adequate knowledge, of the matters giving rise to the grounds of complaint until, it is said, the 19th December. I will turn to the sequence of events that passed between the 6th September, 2005 and the 19th December, 2005, in due course. However it is important to note at this stage that the parties are agreed, and I concur, that it is appropriate to assess the circumstances which might lead to an extension of time separately in respect of each group of grounds put forward. As noted above the Supreme Court had occasion to consider the question of an extension of time in public procurement matters in *Dekra*. The principle behind the strict time limits in public procurement was stated in the following terms by Fennelly J.:-

> "Public procurement decisions are a peculiarly appropriate subject matter for a comparatively strict approach to time limits. They relate to decisions in a commercial field, where there should be very little excuse for delay."

7.2 It should also be noted that the above approach was found by Fennelly J. to be equally applicable to claims (such as the claim in these proceedings) which are confined to damages (and not merely, therefore, to claims which seek the setting aside of the award) on the basis that the existence of such a claim would have an "upsetting and disruptive" effect on the contractual relations established by the awarding decision.

7.3 It is an interesting aside to note that the rationale adopted by the Supreme Court in *Dekra* has been adopted on a number of occasions by the courts in the United Kingdom as a basis for a strict approach to time limits in public procurement matters.

7.4 Such a strict approach, it seems to me, mandates a separate consideration as to whether time should be extended in respect of different grounds or groups of grounds, put forward. It may well be, on the facts of any particular case, that an applicant may have a justifiable reason for not having brought proceedings in respect of one set of grounds (for example a lack of knowledge until a late date of the existence of such grounds) but may not have a justifiable reason for a challenge based on other grounds whose existence were, for example, known of at an earlier date. The fact that there may be justifiable reasons for extending time in respect of the former grounds would not, in my view, and in particular having regard to the strict approach to time limits identified by the Supreme Court in *Dekra*, justify also extending time in respect of other grounds which, if they were the sole basis for the applicant's challenge, would not have been the subject of an extension order.

7.5 An applicant should not be permitted to "piggy back" a set of grounds in respect of which an extension order would not properly be made on other grounds where it is appropriate to make such an order. I therefore propose considering whether it is appropriate to grant an extension of time separately in respect of each of the three sets of grounds put forward on behalf of Veolia in the substantive proceedings and which I have referred to above. However before so doing I should set out in brief terms the course of dealing between the parties, between the notification of the result of the tender process on the 6th September, 2005 and the commencement of proceedings.

8. The Course of Dealing

8.1 On the 15th September, 2005, Mr. Richard Dujardin (who was the person dealing directly with this matter on behalf of Veolia) phoned Mr. Kevin Murray (who was the principal person dealing with the matter on behalf of Fingal) in which the phone conversation it is accepted that Mr. Dujardin raised issues in relation to the process including the way in which provisional items were treated. It should be noted that prior to making that phone call Mr. Dujardin had been in contact with other persons within the Veolia consortium by email of the 9th September, in which he informed his colleagues of the fact that the contract had gone to their competitor and in which he indicated his belief that the winning tender was "the €50 million alternative from Viterra".

8.2 It is clear, therefore, that Veolia was well aware of whom its competitor was. It should also be recalled that, of the tenders which had been already been notified to Veolia by that time, the cheapest was one in the sum of just under €50 million. Mr. Dujardin gave evidence that the contents of that email represented an initial unconsidered response to the fact that Veolia had lost the tender. His evidence, which I accept, was to the effect that very soon thereafter (as a result of discussions with colleagues) he came to the view that the €50 million tender could not have been the successful tender. This fact (i.e. the belief on the part of the Veolia consortium that one of the higher tenders from its competitor had been successful) is amply evidenced by the internal contemporary documentation generated within the Veolia consortium which was proved at the hearing. While Veolia's belief is not decisive I am satisfied, as a matter of fact, that at all material times between a period of just a few days after the 6th September and the 19th December, Veolia were of the view that the successful tender was one of the higher tenders submitted by their competitor.

8.3 In any event Mr. Dujardin followed up on his phone call with a letter on the 16th September. Some of the matters raised in that letter are, it is accepted by Mr. Dujardin, based on a mistaken interpretation of the process. Nothing, it seems to me, now turns on that fact. However it is of some materiality that the final substantive paragraph in the letter of the 16th September, makes the following request:-

> "Finally it should be clarified which tenders are referred to in your letter dated 6th September to establish if your award of the contract is in compliance with the EU procurement rules (restricted procedure)."

8.4 It should be recalled that the letter of the 6th September simply set out a comparative table showing the marks for a Veolia tender and those of the successful tender. The letter did not indicate which Veolia tender was referred to and, perhaps more critically, which of the successful tenderers three tenders was in fact the winner.

8.5 It would then appear that Mr. Dujardin and Mr. Murray discussed the contract on the 23rd September, 2005, when both of them

were involved in a meeting about other matters in Roscommon. There are a number of internal emails on the Fingal side which were written by Mr. Murray subsequent to that meeting and which set out the concerns as expressed at the meeting by Mr. Dujardin. There is a conflict of evidence between Mr. Murray and Mr. Dujardin as to whether Mr. Murray confirmed at that meeting that provisional items were not included in the form of evaluation of the competing tenders leading to the selection of the winning tender. It is correct to state that none of these subsequent emails record that Mr. Murray gave any such information. On balance I have come to the view that Mr. Murray did not give any confirmation at the relevant meeting but was more concerned with identifying Mr. Dujardin's concerns. It should, however, also be noted that it is clear that Mr. Dujardin was of the belief or at least of a strong suspicion (having regard to the questions which he asked) that provisional items had not been included in the evaluation.

8.6 Fingal did not reply to the letter of the 16th September from Mr. Dujardin until the 18th October, 2005. While appreciating the need for care in making replies in relation to the sort of issues that were being raise I must comment that it seems to me to be unsatisfactory for an awarding authority to delay for so long in making a reply. The policy reasons behind the strict time limits in public procurement seem to me to cut both ways. They place a clear obligation upon any party who might be contemplating a challenge to act with all due expedition. But they also place a clear obligation on the awarding authority to deal with any reasonable queries in a timely fashion. Timely needs, in that context, to be considered in the light of the three month time limit. In that context the delay in replying to the letter of the 16th September, by a period of almost five weeks was, in my view, unacceptable.

8.7 In the reply of 18th October Fingal indicated that it was satisfied that the evaluation criteria described in the instructions to tenderers had been observed. In relation to the critical question of provisional items, the letter stated the following:-

> "In this case certain provisional items represented a significant proportion of some tenders. The evaluation of the Tenderers was conducted in accordance with the Instructions to Tenderers and the ranking was determined by the formula in 1.3.22 exclusive of provisional items in accordance with the predetermined criteria.
>
> The Provisional Items were considered separately; also in accordance with the pre-determined criteria.
>
> We are satisfied that the financial evaluation incorporated Net Present Valuation calculations in accordance with the pre-determined criteria.
>
> The Tenders referred to in our letter of 6th September are your 18 month tender, plus the leading tender of the remaining compliant tenders. Your tender also scored lower than one other tender. We examined all of your tenders and of those found your compliant 18 month tender the most economically advantageous. We are satisfied that this evaluation is in accordance with the EU Procurement Directives and rules set out in the Instructions to Tenderers".

Finally it should be noted that a meeting was suggested. The possibility of a meeting had already been broached by Fingal and the reasons why such a meeting did not, in fact, take place until 19th December is a matter to which I will return.

8.8 In respect of the key issues it should be noted that while the letter did identify which of the Veolia tenderers was the one whose marks had been disclosed in the earlier letter of 6th September, the letter of 18th October noticeably fails to identify which of the successful tenderers individual tenders was the successful one. Had the letter taken the trouble to inform Veolia that it was the "€50 million" tender that had been successful many of the issues which had to be addressed at this hearing would not have arisen.

8.9 Secondly I have to say that the description in the letter of 18th October of the manner in which provisional items were dealt with is less clear than would have been desirable. Precisely what was meant by the statement that tenders were ranked "exclusive of provisional items" with the provisional items being considered "separately in accordance with the predetermined criteria" is by no means clear.

However it does have to be said that as of the receipt of the letter of 18th October it should have been clear to Veolia that provisional items were not evaluated for the purposes of determining the ranking of the competing tenders.

8.10 On 24th October, 2005 Veolia raised a further series of detailed queries (32 in number). These were replied to on 10th November, 2005. Of particular relevance is the fact that Veolia again reiterated (in question 6) a question as to which tender was "the leading tender". Again a straight answer was not given to that question. While it is true to state that the Veolia letter appears to suggest that Veolia was under a mistaken impression that, in the course of the process, the identity of the leading tenderer might have changed (a fact that Fingal was anxious to clarify in the reply) it nonetheless remains the case that a second clear request for the identification of the winning tender was not met with a clear answer.

8.11 In evidence Mr. Murray indicated that he had concerns about disclosing confidential information and that those concerns may have influenced him in being reluctant to identify the successful tenderer. I have to confess that it was not clear to me, at the conclusion of his evidence, as to whether his position was that he had taken a conscious decision not to identify the successful tenderer (by reason of the confidentiality concerns to which I have referred) or that his failure to identify the successful tenderer was due to inadvertence at least partly brought on by the fact that he was engaged in his replying correspondence in attempting to dispel some misapprehensions inherent in the Veolia questions.

8.12 I also have to confess that I found the confidentiality argument difficult to understand. It is, of course, the case that an awarding authority is constrained as to how it deals with detailed confidential information that may be contained in tenders and which it may not properly reveal to competitors. However Fingal had already made the decision to disclose the total tender prices of each of the tenders to all of the competitors. The only additional piece of information sought was as to which of those tenders was successful. It is difficult to see how any significant impartation of confidential commercial information would have occurred by revealing that fact.

All in all it seems to me that I must regard Fingal as being culpable in having twice failed to give a straight answer to a straight question.

8.13 In any event on the 18th November Veolia wrote threatening the institution of proceedings. It is clear from that letter that the basic contention upon which the threat of proceedings was based was the exclusion from the evaluation process of the provisional items. That letter in turn was replied to by a holding letter of 25th November which noted that the letter of 18th raised "serious issues which are being given due consideration". A substantive reply followed on 30th November which asserted that there had been full compliance with all obligations in the tender evaluation process.

8.14 It should be noted that the letter of 30th November reiterated an offer set out in the original notification of the result of the

tender of 6th September of a meeting to discuss matters. On 6th December Veolia took up the offer of a meeting. Unfortunately the meeting did not take place until 19th December. It would appear that the delay was occasioned by difficulties on the Veolia side in making logistical arrangements for the attendance of representatives of each of the members of the consortium. There is no evidence on which it could be concluded that Fingal were at any way at fault in the delay which occurred between the 30th November and 19th December.

8.15 It is also necessary to address the general question of the offers made by Fingal of a meeting and the fact that such a meeting did not take place until well over three months after the initial offer was made. It is clear that Veolia made a conscious decision to pursue the matter in correspondence for the period between the 6th September and the 6th December. There obviously are advantages and disadvantages to pursuing lines of enquiry such as those with which Veolia was involved, on the one hand in writing and on the other hand at a meeting. The obvious advantage of the written process is the absence of any possible dispute as to the contents of the communications between the parties although, as the analysis of the facts to which I have just referred demonstrates, issues of the interpretation of those written communications may still remain. A principal advantage of a meeting is that issues can be pursued with much greater speed than through a series of correspondence.

8.16 Having regard to the strict time limits for challenge it seems to me that a premium must be placed upon any reasonable method of enquiry which is likely to reveal relevant information in a timely fashion. In that regard it seems to me that Veolia must accept some of the responsibility for the overall delay in obtaining information by virtue of declining the offer of a meeting. While appreciating that there were factors which might have led Veolia to consider a written process of questioning preferable and while respecting the entitlement of Veolia to make that decision it seems to me that it nonetheless follows that Veolia must accept the consequences for the time scale within which information emerged which flow from their decision not to attend a meeting for a period in excess of three months after the initial communication of the result of the tender process.

8.17 I should also note that during the period which I have described it would appear that negotiations leading to the establishment of formal contractual relations between Fingal and the successful tenderer were proceeding but had not concluded. There is an implicit allegation in some of the evidence tendered on behalf of Veolia that Fingal had, in substance, strung Veolia along pending the conclusion of formal contractual negotiations with the successful tenderer. Insofar as such an allegation is made I do not accept that Fingal was guilty of any deliberate delay or obfuscation. I have come to that view notwithstanding the finding that in at least a number of respects Fingal failed to give clear answers to clear questions.

8.18 I should also touch on a further issue which arose in the course of the evidence. It was put to Mr. Dujardin that Veolia had failed to take adequate steps in advance of the meeting of 19th December to put itself in a position to commence proceedings in early course should it conclude that it wished to embark upon a legal process. In substance the contention was that the necessary preliminary work such as obtaining authority for the issuing of proceedings, the collection of documentation which might be necessary for inclusion in exhibits and drafts of the necessary legal documentation have not been attended to. It would appear that it is factually the case that no significant such preparatory work was engaged in. The issue arises as to whether that fact is relevant.

8.19 I agree with the submission of counsel for Veolia that there is no obligation on a party, per se, to engage in preliminary work. However where a party is, to its knowledge, subject to a strict time limit and where, at least to some extent, on any view, a portion of that time limit has already expired, it seems to me that a party cannot escape being blamed, at least in part, for delay in issuing proceedings if it is has failed to take appropriate preliminary steps. Put another way a party who could have shortened the period between a decision to proceed and the commencement of proceedings by having engaged in preliminary work may not be able to rely, in full, on the time which it might otherwise reasonably take to prepare the necessary documentation thereafter.

At least to the extent that Veolia were aware of grounds of challenge prior to the meeting of 19th December it seems to me that I have to have regard to the fact that some preparatory work for the issuing of proceedings could have been engaged in prior to that meeting which would have had the effect of shortening the time between a decision to issue proceedings and commencement of those proceedings. In those circumstances, and to that extent, it seems to me that Veolia must bear some of the responsibility for the delay between 19th December and issuing of proceedings. However those comments clearly only apply to those grounds in respect of which I am satisfied Veolia had reasonable knowledge prior to the 19th December.

8.20 Finally it is necessary to address the meeting of 19th December itself. The central point made by Veolia in relation to the 19th December is that it was at that meeting that Veolia first became aware that it was the €50 million tender which had been successful. I have already indicated my acceptance of the evidence tendered on behalf of Veolia that the disclosure of that fact at the meeting of 19th December came as a significant surprise to them. It is also, however, necessary to consider whether Veolia ought to have known, or at least suspected, that the €50 million tender was the successful tender or otherwise ought to have inferred that a tender which had not priced provisional items had been successful.

It does not seem to me to be reasonable, on all the evidence, to reach such a conclusion. While there are analyses which could, on one view, possibly lead to a conclusion (based on the information available prior to the meeting of 19th December) that the €50 million tender was the successful tender, it does not seem to me, having regard to all of the evidence, that it would be reasonable to blame Veolia for not having come to that conclusion. For the reasons which I have indicated above the confusion was, to a very significant extent, created both by the failure of Fingal to give a straight answer to a straight question and, indeed, by the obscure way in which Fingal described the manner in which provisional items were dealt with. In all the circumstances it does not seem to me to be reasonable to place blame on the part of Veolia for not having worked out that a tender which did not include a price for significant provisional items had been successful at any time prior to the 19th December.

9. Arguability of Third Ground

9.1 Before going on to reach conclusions as to an extension of time it is also necessary, as I have indicated above, to address the question as to whether Veolia has established grounds for challenge in relation to the third issue. It is clear that it would not be appropriate for the court to extend time for a challenge unless there was some realistic basis for that challenge.

9.2 This question (i.e. the question of whether arguable grounds have been established) was attended with some confusion in the course of the hearing. The central argument made on behalf of Fingal was that the Veolia contention (which is to the effect that the technology contained in the successful tender was not capable of being upgraded) amounted to nothing more than an assertion made by Mr. Dujardin based on an inference to be drawn from the fact that the successful tender that for €50 million. Because of the confusion which arose I have to confess that I am not clear as to the precise basis upon which it is contended on behalf of Veolia that grounds have been established under this heading. Having regard to the large number of other issues which were canvassed at the hearing this is understandable. In fairness to both sides it seems to me, therefore, that I should afford Veolia a further opportunity to explain the evidential and legal basis for their contention under this ground before reaching a final conclusion. I will, however, deal, as part of dealing with extension of time generally, with the question of whether it would be appropriate to extend

time under this ground in the event that I become satisfied that there are arguable grounds for Veolia's contention under this heading.

10. Conclusions on Extension of Time

10.1 For the reasons which I have analysed above it seems to me that the allocation of responsibility for any lack of knowledge on the part of Veolia differs significantly dependent upon the issue concerned.

10.2 So far as the question of knowledge that provisional items were not taken into account in relation to the ranking of tenders is concerned it seems to me that this was a matter which had been inferred by Veolia from quite an early stage and was confirmed in the letter of 18th October albeit in terms which were somewhat unclear. It was reiterated in the reply of 10th November.

10.3 Having regard to the share of responsibility which Veolia must bear for the absence of a meeting to discuss matters further, to the fact that Veolia had significant knowledge as to the existence of the relevant grounds more than three months prior to the commencement of proceedings, the absence of putting in place measures to ensure the speedy initiation of proceedings notwithstanding that knowledge and all the other factors of the case I am not persuaded that it is appropriate to extend time in relation to those grounds which are concerned with the failure to evaluate provisional items as part of the ranking process.

10.4 However, in my view, different considerations apply in respect of those grounds which are concerned with consideration being given to a tender which did not contain a price for upgrade to fully fixed as a provisional item at all.

10.5 While there might have being a basis upon which Veolia could possibly have worked out that the "€50 million tender" was the successful tender, I have already indicated that I am satisfied that Veolia had come to a different view. It asked, on at least two occasions, a straight question as to which tender was the successful tender and did not, unfortunately, get a straight answer. I am therefore satisfied that by far the preponderance of the blame for the fact that Veolia was not aware of which tender was the successful tender up to the 19th December, 2005, must rest on Fingal. I am also satisfied that knowledge of the existence of grounds for challenge based on the fact that the successful tender did not have a price for a provisional item providing for an upgrade to fully fixed was a matter which only really became apparent to Veolia (and reasonably so) when it became clear as to which tender was the successful one.

10.6 In all those circumstances I am satisfied that the preponderant reason why Veolia was not in possession of knowledge of the grounds under this heading until 19th December was due to the failure of Fingal to answer in a transparent fashion clear questions asked as to the identity of the successful tender.

10.7 For the reasons indicated above, I am of the view that a party is obliged to act with additional expedition where it obtains late knowledge of the existence of grounds such that it becomes likely that the three month time limit will be exceeded. However having regard to my finding that it was only on 19th December that Veolia were, to any real extent, aware of their grounds of challenge under this heading (and having regard to the intervening Christmas vacation) I cannot conclude that there was any breach of that obligation to act expeditiously in the period which elapsed between the 19th December and the institution of proceedings on 23rd January, 2006. In all those circumstances I am persuaded that it is appropriate to extend time in respect of those grounds which concern the contention that Fingal inappropriately included the successful tender in the evaluation and ranking process in circumstances where that tender did not contain a price for an upgrade to fully fixed.

10.8 Finally the knowledge of Veolia in respect of the third ground contended for (that is to say the contention that the successful tender was not, in fact, upgradeable) stems from the same set of circumstances as applied in relation to the ground last considered. Knowledge of the identity of the successful tender was critical in both cases. Subject to the question of arguable grounds it would, it seems to me, be appropriate to extend time under this heading for the same reasons.

10.9 However for the reasons which I have identified above I am not, as yet, persuaded that Veolia has established reasonable grounds under this heading. When counsel have had the opportunity to consider this judgment I will hear the parties further on this issue. For the moment it is sufficient that I indicate that if I am persuaded that Veolia have established arguable grounds for a challenge under this heading I would be prepared to extend time in respect of that ground as well.