Neutral Citation: [2016] IEHC 546

THE HIGH COURT

COMMERCIAL

[2015 No. 176 JR]

[2015 No. 35 COM]

IN THE MATTER OF COUNCIL DIRECTIVE 2004/18/EC (AS AMENDED)

AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES, CONTRACTS (REGULATIONS) 2006 (S.I. 329 OF 2006)

AND IN THE MATTER OF COUNCIL AND DIRECTIVE 89/665/EEC (AS AMENDED)

AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (S.I. 130 OF 2010)

BETWEEN

BAM PPP PGGM INFRASTRUCTURE COOPERATIE U.a.

APPLICANT

AND

NATIONAL TREASURY MANAGEMENT AGENCY AND MINISTER FOR EDUCATION AND SKILLS

RESPONDENTS

JUDGMENT of Mr. Justice Robert Haughton delivered on the 6th day of October, 2016

Introduction

1. These proceedings relate to the public procurement process in respect of the design, finance, construction and maintenance of a Central Quad and East Quad for the Dublin Institute of Technology ("DIT") at the former St. Brendan's Hospital site at Grangegorman, Dublin 7 ("the Project").

2. The applicant ("BAM") is a company which was incorporated on 17th of May, 2011, in the Netherlands.

3. The second named respondent ("the Minister") is the authority for the project for the purposes of Directive 2004/18/CC of 31st March, 2004, 'on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts' ("the Procurement Directive"). The first named respondent ("NTMA" or "the Authority") is procuring the project in its capacity as agent for and on behalf of the Minister in accordance with the National Development Finance Agency Amendment Act 2007, and as successor to the National Development Finance Agency ("NDFA"), for which the NTMA was substituted by Schedule 4 of the National Treasury Management Agency (Amendment) Act 2014.

4. BAM was one of three qualifying tenderers for the project, the other two being Eriugena and Kajima. On 27th February, 2015, the NTMA notified BA M that it had identified Eriugena as the tenderer with the most economically advantageous tender and that it would now proceed accordingly. The letter also included the following paragraph :-

> "The Authority wishes to note that at the time of submission of the Tender documents to Asite, the uploading of a small number of the Eriugena documents was not completed until shortly after the 5pm deadline on 28th November, 2014. Having investigated the matter, the Authority was fully satisfied that no unfair advantage was gained by Eriugena in the circumstances and the Authority exercised its discretion to accept the Eriugena Tender prior to the evaluation exercise commencing."

5. Following further correspondence BAM instituted these proceedings on 27th March, 2015, seeking a number of reliefs including orders setting aside the decision of NTMA to accept the late tender submitted by Eriugena, and the decision to accept Eriugena as preferred tenderer. The central assertion in the case is that the NTMA was not entitled under the Invitation to Negotiate ("ITN") provisions and the relevant legal rules to accept a tender that was received in whole or in part after the expiration of the time fixed as the deadline for receipt of tenders.

The Relevant Facts

6. The Project was announced on 17th July, 2012, as part of a wider government-supported urban regeneration development known as "the Grangegorman Development". The European Investment Bank is a co-funder. The Project provides for the relocation and accommodation of approximately 10,000 students from 15 existing DIT schools, and will provide approximately 50,000m2 of teaching space through two principal buildings namely the Central Quad and East Quad.

7. By contract notice published in the Official Journal of the European Union on 31st October, 2013, the NDFA published notice of the contract for the Project. The expected capital value of the Project stated in the contract notice was €180 - €200 million, which "will be procured under a single PPP contract using the negotiated procedure".

8. Based on pre-qualification submissions received by the NDFA three tenderers were pre-qualified and invited to tender for the process: BAM, Eriugena (a consortium comprising MacQuarie Capital Group Ltd., FCC Construction S.A. and John Sisk and Sons (Holdings) Ltd.) and a Kajima consortium (comprising Kajima Partnerships Ltd., Infrared Capital Partners Ltd., Brookfield Multiplex Construction Europe Ltd. and Bilfinger FN (HSG Zander)).

9. The ITN was then issued to the three pre-qualified tenderers on 28th April, 2014. It is a lengthy document running to 164 pages. It sets out details of the tender process and the timeframes and rules applicable, and it will be referred to in greater detail later in this judgment as its terms fall to be construed by the Court. As it provides for a negotiated procedure, it facilitates interaction between tenderers and the Authority, discussion of tender requirements, and the proposal of solutions. It provides for the submission of the

final tender and thereafter, evaluation by the NDFA in accordance with the award criteria disclosed in the ITN. Based on that evaluation the Authority selects a preferred tenderer with whom it would engage with a view to awarding the contract for the Project to that preferred tenderer, although such an award is not inevitable.

10. The consultation process allowed for five face-to-face meetings between the NTMA and each tenderer. It provided for a query procedure where the tenderers were entitled to raise queries for the purpose of gaining a better understanding of the requirements for the Project. Clause 2.3 set out on "Indicative Timetable", and the most relevant entries are as follows:-

Week	Date	ITN Task
1	28 Apr. 2014	Issue ITN Documents
21	19 Sep. 2014	Tenderers submit Draft Tenders ("Draft Tender Submission Date")
23	3 Oct. 2014	Authority issues Draft Tender responses
29	14 Nov. 2014	Query Closing Date
31	28 Nov. 2014	Tenderers submit Tenders ("Tender Submission Date")
43	17 Feb. 2015	Notification of Preferred Tenderer
78	30 Sept. 2015	Award of Project Agreement to PPP Co. ("Commencement Date")

11. As can be seen from this table the tenderers were to submit draft tenders by 19th September, 2014, and thereafter they would receive responses. The ITN made provision for some further consultation before the "Query Closing Date", and the Final Tenders were to be submitted on 28th November, 2014. Thus it was a structured consultation process over a thirty-one week period. Five formal meetings were held with each tenderer to discuss financial, technical and legal aspects of the Project and to assist tenderers in developing their proposals. Structured feedback was provided to each tenderer. Two of the consultation meetings were held with each tenderer between submission of the Draft Tenders and the Final Tenders submission. All consultation meetings took place between June 2014 and October 2014, and over seven hundred written queries from the three tenderers were received and responded to over that period. In addition, there were opportunities for site visits and meetings with other interested parties such as Dublin City Council.

12. Clause 6 "TENDERS" contains the following clause 6.1:-

> "6.1 **Tender Deadline**.
>
> Tenders will be received in soft copy by the Authority by 17:00 on the Tender Submission Date for Tenders as indicated in section 2.3 (Indicative Timetable)."

13. Tenderers were required to send submissions and tenders to NTMA electronically via "Asite", a tendering portal used by the NTMA to conduct the tender process. This is described thus in the affidavit of Mr. Dennis McCarthy sworn on behalf of the NTMA on 27th April, 2015:-

> "4.12 It is essentially a software system with a front end website interface which manages the exchange of documents between Tenderers and the Authority. It is owned by a third party, Asite. This is the first time that tenders of this scale have been submitted to the Authority solely by electronic means, via the Asite portal, and therefore not exclusively within the control of tenderers (as the speed and functioning of the internet may play a large part in submission delivery). Prior to this, the Authority required tender documentation to be submitted in both electronic and hardcopy by the tender deadline.
>
> 4.13 Asite licenses were provided by the Authority to five people within each Tenderer consortium to use the system for the purposes of the competition, although under the arrangements imposed by the Authority in the ITN, only two log-in accounts were provided to upload tender documents to the site."

14. The requirement of delivery by 17:00hrs is also mentioned in clause 4.9(b) of the ITN which reads:-

> "Tenderers must send Submissions to the Asite address specified in Appendix 10 (Electronic Document Management System (ASITE) Guidelines). Tenderers must obtain an Asite system receipt, acknowledging delivery of Tenders by 17:00hrs Dublin time on the Submission Date specified in the timetable in Section 2.32.3 … (Indicative Timetable)."

15. In Appendix 10 the guidelines at paragraph 1 state that Asite will be used on the project for the Data Room, submission of queries, the issue of the Authorities' circulars, proposals for consultations, "Tenderers' Submissions for Draft Tender and Tender" and the issue of Authority clarifications on the Tenderers' submissions, and adds that the use of Asite "…will be in accordance with…" a protocol document available in the Data Room.

Paragraph 4(d)(i) states:-

> "In accordance with Section 4.4 (Submission Requirements) and Section 2.2 (Consultation Process)(c) of the ITN, Tenderers' proposals for Consultation Meetings and Submissions for Draft Tender and Tender must be uploaded onto Asite."

16. The ITN in clause 5 contains provisions in relation to "draft tenders". Clause 6 deals with "tenders" and sets out detailed "tender requirements" relating to Design Proposals Construction Proposals, Financial Information and Legal Information.

17. Clause 7 headed "Tender Evaluation" sets out the marking system that will be applied in evaluating tenders, and clause 8 sets out "evaluation criteria". Thus in respect of the technical aspects, the percentage weighting was 60%, broken down as to 40% on design quality, 10% on construction proposals, and 10% on services, life cycle and handback proposals. 40% of the weighting was then allocated to value.

18. One of the requirements in clause 6 is that tenderers provide "building information models" ("BIM(s)"). Mr. McCarthy in his said affidavit at paragraph 4.39 explains the BIM as follows:-

> "4.39 Section 6.3(b) [of the ITN] required that tenderers develop and submit Building Information Models … as part of their Tenders. BIM is a relatively new feature of building design and public tendering. The requirements included the "*native*" BIMs which are the files where each design discipline (e.g. architecture, structural engineering, etc.) prepares design (geometry and data) information. In essence, these are the models used to design the buildings. These models are computer based and provide complex 3 dimensional perspectives to the internal layout of building designs.
>
> 4.40 In addition, a number of BIM viewing tools were required. This is where the individual, design disciplines – such as Architecture and Structural Engineering – "*native*" models are brought together or "*federated*" into one single computer based-model that displays all of the design information on a "read-only" basis.
>
> 4.41 Native BIM files and BIM viewing tools were to be included in the Draft Tenders and Final Tenders. The BIM viewing tools contain the same information as the native BIM files, albeit in an aggregated form. Such files are complex and large electronic documents."

The averment that the BIM "viewing tools" contain the same information as the native BIM files was disputed by the applicant on the basis that it was a requirement of the tender under section 6.3(b) of the ITN in the following terms:-

> "(1) A fully federated, interactive 4-D Project Information Model ("PIM") in Navisworks, Syncro or similar format should be submitted. The 4-D model will be organised into appropriate task based selection sets where appropriate and all model elements linked to corresponding tasks within the imported programme. The native programme file (Asta, MS Project or similar) file and models should also be issued.."

19. In the course of the procurement process the NTMA issued various circulars addressing queries, and Circular 363 is relevant to the role of BIMs:-

> "… can you please advise what you are expecting to see from the 4-D model. Are you looking for a high level overview of the build or a detailed focus in on the construction plan or are there any areas of the build that you wish to see focused in on?
>
> Response:
>
> Tenderers should produce a 4-D simulation to demonstrate consideration of the implications of both construction sequence and site utilisation and control. The intention is that the Authority will be able to use the 4-D simulation to ascertain that the works will be carried out in a logical, achievable, optimum sequence, with safe working practices considered from the outset rather than a specific focus on any one activity. Tenderers should consider the wider context of the site and its operation when creating the simulation."

BAM relied on Circular 363, and the inclusion of BIM in the "check list for tender submission" to emphasise the importance of this requirement as part of the Tender.

Draft tender stage – difficulties uploading

20. At the draft tender stage BAM experienced difficulty in trying to upload all of its BIM files onto Asite. Its first document uploaded at 17:39 on 18th September, 2014, and it completed the uploading of its draft tender files at 18:16 on 19th September, 2014. Some 58 documents were uploaded **after** the 17:00 deadline. Mr. Mark Moore in the principal grounding affidavit sworn by him on behalf of BAM on 27th March, 2015, at paragraph 38 explained the difficulty thus:-

> "38. As a result of trying to upload all of the BIM files in batches of multiple files onto Asite on the afternoon of 19th September, 2014 for the Draft Tender submission, *the Asite system continually crashed resulting in the BIM files failing to upload*. This resulted in the BIM files then being uploaded individually which caused some of them to be uploaded beyond the 17:00 deadline and the last Draft Tender document uploaded being completed around 18:17." [Emphasis added]

Fifty-one of the fifty-eight documents which were late were BIM files. Two of these were similar to two of the five BIM files that, as it will be seen, Eriugena subsequently submitted late at the Final Tender Stage.

21. At draft Tender stage Eriugena's first file uploaded at 16:53 on 17th September, 2014, and it completed the upload of all its draft tender files at 16:24 on 19th September, 2014 – in other words all its documents were uploaded *before* the 17:00 deadline. Kajima commenced its upload of the Draft Tender stage at 09:44 on 19th September, 2014 and completed its upload at 17:56 on 19th September, 2014.

22. Mr. Moore avers at paragraph 39 of his said Affidavit –

> "I say and believe that one of the consequences of submitting a Draft Tender on Asite, is that tenderers will have become aware of how long was needed to ensure that all of the tender documents were uploaded to Asite by a fixed deadline. It was as a result of BAM's experience with the Draft Tender Stage that BAM learned how long would be required to ensure that all of the tender documents where uploaded to Asite by a fixed deadline."

He also notes at paragraph 41 that "the Authority raised no issue in relation to the time of delivery of our Draft Tender and did not refer to it in the Executive Summary provided to us."

23. Mr. McCarthy in his replying affidavit on behalf of the Authority at paragraph 5.11 avers that:-

> "5.11 At the stage of the submission of the Draft Tenders no Tenderer raised with NDFA any issue of delay or any other difficulties when uploading documents, although some Draft Tender submission documents were received later than the 17:00 deadline. Moreover, neither the Applicant, nor Kajima raised the issue of the lateness of submissions or any procedural issues in subsequent discussions, including during the final two consultation meetings that the Authority held with Tenderers when they set the agenda and had the opportunity to raise any issue they wished."

24. Mr. McCarthy goes on to aver that the Authority could have excluded the applicant from the tender process due to the late submission of documents but chose to accept the late submission, and did not raise any issue of lateness. Also BAM's Draft Tender omitted a key document, namely "a … master code book file, without which the remaining three code book files could not be viewed". A request was issued to BAM on 25th September, 2014, and the missing file was provided on 26th September, 2014, and the

Authority accepted late submission of this document.

25. A suggestion of some significance is made by Mr. McCarthy at paragraph 4.17 of his affidavit dated 27th April, 2015, where he states:-

> "4.17 Given that this was the first time that BIM models … were used by the NDFA as a tender deliverable as part of a tender submission on a project of this scale in PPP procurement in Ireland, the Authority was not aware of how large the BIM files would be or the impact that this could have on the upload duration or on the tender. Moreover, if the Authority had been made aware by the applicant of the difficulties it experienced at Draft Tender stage, as set out in the Grounding Affidavit at paragraph 38, in batching of BIM files (the Authority only learned of these particular difficulties for the first time in the Grounding Affidavit) and of the Asite system continually crashing resulting in BIM files failing to upload on time, the Authority would have taken a different course of action in its pre-tender circulars. The Authority would have investigated this matter with Asite and sought to improve the capability of Asite and would have notified tenderers of any limitations regarding interfacing with external systems, upload speeds etc. The applicants' failure to inform the Authority of its difficulties at the Draft Tender stage meant that none of these steps were taken."

26. Mr. Moore in his second affidavit sworn on the 14th July, 2015 took issue with this. At paragraph 88 he avers that;

"…several phone calls were made by Lorraine Brady [of BAM] to Dwayne McAleer of the NTMA during the draft tender upload which did confirm the difficulties that BAM was experiencing. I refer also to two emails from Fiachra O'Muineachain to Dwayne McAleer of the NTMA dated 19th September, 2014 in which these difficulties are raised…I also refer to paragraph 5.5 of the affidavit of Mr. McCarthy where he confirms himself that "*during the submission of documentation in advance of the second technical consultation meeting… the Applicant confirmed that it had difficulties submitting its BIM files.*" I say and believe it is not therefore accurate to suggest that the NTMA was unaware of the difficulties encountered by BAM at the Draft Tender stage."

27. The emails from Mr. O'Muineachain both simply state:-

> "Dwayne,
>
> Further to your telecon with Lorraine Brady, I wish to confirm that we have completed our upload following our IT issues.
>
> Thanks for your patience and cooperation on this matter.
>
> Kind regards."

There was no clear evidence before the Court as to what exchanges took place in the "telecon", or the extent of which BAM's difficulties were described or explained. There was therefore no clear evidence to show specifically that NTMA were made aware that BAM experienced that "…the Asite system continually crashed resulting in BIM files failing to upload."

28. From paragraph 186 onwards in his second affidavit sworn on 6th October, 2015, Mr. McCarthy makes a number of points. Firstly he avers (at paragraph 187) that "the authority was not aware of the cause of the difficulties encountered by the Applicant when uploading his Draft Tender" and he goes on to state (at paragraph 188):-

> "… It was only for the first time in Mr. Moore's Grounding Affidavit that the Applicant disclosed that the reasons for its late submission at Draft Tender was because of the Asite system continually crashing and because there were multiple failed attempts to upload BIM files …"

He avers that this information would have been important to the Authority in managing the tender competition, and that it was "not aware of any problems with interacting with Asite which may have been as a result of the large BIM files, and may have been as a result of insufficient internal IT system specifications which are needed to interact efficiently with Asite, being used by the tenderers." (paragraph 190). He then avers:-

> "191. The Applicant did not provide this information to the Authority. If the Authority had this information before tender submission, it would have investigated the problems with submitting large BIM files through the internet to Asite, including understanding what specification, e.g. bandwidth, of internal IT system was required to interact efficiently with Asite and made this known to all tenderers."

29. Mr. McCarthy emphasises that while the NTMA was aware that the applicant had experienced difficulties, it was not aware of the cause of the difficulties, and indeed the cause is not evident from the emails exhibited by Mr. Moore. It is also notable that Mr. O'Muineachain contemporaneously refers to "our IT issues" in respect of the Draft Tender upload, yet Mr. Moore at paragraph 38 states "the Asite system continually crashed". Mr. Moore seeks to explain this at paragraph 91 of his third affidavit sworn on 17th December, 2015, where he says "the email does not say that these issues were caused by "difficulties created by [BAM's] own IT system"." This however would tend to suggest that the problem that was encountered originated with Asite, and the crashing of its site, rather than difficulties experienced by BAM with its own IT system.

30. On 17th December, 2015, an affidavit was sworn by Ms. Lorraine Brady, employee of BAM, who avers as follows:-

> "8. At 12:30pm on 19th September, 2014, BAM commenced the upload of its completed files and models to Asite. BAM's BIM coordinators, Mr. Paddy Ryan and Mr. Robert Moore, were charged with the upload of the BIM files to Asite.
>
> 9. Our BIM coordinators informed me that they were having difficulties with the upload of the BIM files and I subsequently telephoned Mr. McAleer from Mr. Robert Moore's desk between approximately 2:30pm and 3pm on 19th September, 2014 to enquire if there were any issues with Asite. Mr. McAleer informed me that he was not aware of any issues with Asite. I passed the telephone to Mr. Robert Moore and I asked him to explain in detail the upload actions he was undertaking at that time. Following the exchange between Mr. Robert Moore and Mr. McAleer, I spoke again to Mr. McAleer and informed him that we were making every effort to upload our files before the deadline and I said that we would continue to try to complete our upload. Mr. McAleer stated that we should continue our efforts but requested that we send him an email advising him when our draft tender upload was complete.
>
> 10. Given that I was overseeing a number of other bid related tasks on 19th September, 2014, I requested that BAM's Design Manager, Mr. Fiachra O'Muineachain, email Mr. McAleer as previously requested by him. Mr. O'Muineachain emailed

Mr. McAleer at 6:17pm informing him that BAM's draft tender upload had completed and apologising for the IT issues addressed by me above (a copy of this email appears at Exhibit MM4 to the Second Affidavit of Mr. Moore).

11. In these circumstances, I reject the claim made by Mr. McCarthy that during the draft tender stage BAM was aware of problems with NTMA's systems "*but chose not to tell the Authority*". This is simply untrue."

31. Finally in an affidavit sworn on 15th January, 2016, Mr. Dwayne McAleer, a Senior Project Manager with the NTMA avers as follows:-

"4. I say that on the afternoon of 19 September, 2014, Ms. Brady phoned me to enquire if the Asite system was functioning, to which I replied that it was. I was not aware that there were any problems with Asite as I had been using it for much of the day without any difficulty, had received no other such enquiries and had been generally monitoring the upload activity of the three tenderers throughout the day.

5. As is stated in Ms. Brady's Affidavit, Ms. Brady stated that the Applicant had been experiencing difficulties when attempting to upload BIM files in batches. No further details were offered by Ms. Brady to explain the cause of the difficulties and I note that Ms. Brady does not suggest in her Affidavit that she explained the cause of those difficulties.

6. The conversation was very brief.

7. I do not recall the participation of Mr. Robert Moore of the Applicant in the call, contrary to the suggestion made by Ms. Brady at paragraph 9 of her affidavit. I say that, to my recollection, I only spoke with Ms. Brady.

8. Also contrary to the suggestion of Ms. Brady at paragraph 9, I say that I did not require or request an e-mail following up on our conversation.

9. I was aware that the Applicant did not know what the cause of the difficulties was when I spoke with Ms. Brady, as the purpose of the phone call was a query on the part of Ms. Brady as to whether or not an issue might have arisen with Asite.

10. I was also aware that the batching and attempting to upload of files does not take place within the Asite system itself, but within the IT system/server of the person attempting to upload."

Mr. McAleer goes on to point out that Ms. Brady was not the appointed representative of BIM to communicate with the authority, and he was aware that the appropriate medium for communications was the written Query Procedures set out in the ITN. He then states:-

"12. I say that I did not engage, and would not have engaged, in any detailed discussion with any Tenderer about problems with Asite as this was contrary to the Tender Rules. Instead, had such an issue arisen, I would have requested that formal written Query be submitted, and had the Applicant attempted to engage in a detailed discussion about Asite, I would have required such a written Query form be submitted."

With regard to the e-mail from Mr. O'Muineachain he stated:-

"14. I also understood from the e-mail received at 18:17, to which Ms. Brady refers, that the Applicant had concluded that the difficulties encountered had been on Applicant's side and not related to Asite itself. I accept the cause of the difficulties is not fully explained in the email but to me, the natural reading of the language used was that the difficulties had been with the Applicant's system or usage of same.

190. It was also clear to me from the Asite records that the Applicant had uploaded files in batches including BIM files and large files after the call."

A further matter of relevance is that all tenderers had the benefit of training in the use of the Asite system, including an Asite Training Manual and online help. Circular CIR304 created on 16th September, 2014 (just 3 days in advance of the draft Tender deadline) advised tenderers that the default "simple upload" option had an upload limit of 1 GB, and recommended that for "multiple files or a single file more than 1GB"the "Advanced upload" option be used. It should be noted that the largest of Eriugena's BIM files which were uploaded late at the tender stage was 4.1MB (i.e. less than one half a GB), and the other BIM files approximately 1.5MB.

Findings

32. It is appropriate at this point to make certain findings from a review of this evidence because it has relevance to later events:-

(1) While Mr. Moore averred that "the Asite system continually crashed resulting in the BIM files failing to upload", it is *more likely* that the difficulty encountered was on BAM's side, and not related to Asite itself. I am persuaded of this from the reference by Mr. O'Muineachain in his email to "our IT issues", and more particularly by Mr. McAleer's averment that the batching and attempting to upload of files does not take place within the Asite system itself, but within the IT system/server of the person attempting to upload. However the evidence does not exclude the *possibility* that there was a problem with the Asite system.

(2) BAM's experience with delays in uploading at the draft tender stage served as a warning to it of the potential for problems and delays in uploading to Asite, and meant that it was probably better prepared than Eriugena in November 2014 to plan, commence, and complete its upload of the final Tender documents and in particular the BIM files.

(3) BAM did not have any contractual or other legal duty to bring to the attention of NTMA the difficulties it had experienced on 19th September in uploading the files, or to raise any formal Query.

(4) At the time BAM did, at least to some extent, bring to the attention of NTMA's Mr. McAleer the difficulties that they were experiencing. A significant number of files were in fact uploaded late. The precise reason for their difficulty was never ascertained. Kajima files were also uploaded late.

(5) I accept the evidence that prior to the submission of the final Tenders the NTMA was not, as a matter of fact, fully aware of the impact that uploading large BIM files, or batches of files, could have on upload duration. Had it been fully

aware of this issue it is probable that the Authority would have investigated the matter more fully with Asite. Had it done so, NTMA could not have excluded the possibility that the cause of the difficulties was with the Asite system.

(6) However NTMA ought to have known, as of 19th September, 2014, that the uploading of files, and in particular BIM files, to Asite would be time consuming and had the potential to give rise to IT issues for the tenderers.

(7) There is no evidence that the NTMA specifically addressed this issue with the three Tenderers thereafter, and prior to the deadline for the final Tender e.g. by way of a Circular or at consultation.

(8) It is also reasonable to conclude that had NTMA specifically addressed this issue, it would have advised the Tenderers of the potential for delays or problems with uploading of the bigger files, including those under 1Gb, e.g. BIM files, and advised on the use of appropriate servers, software/systems or upload methods to best plan and carry out their uploads in order to avoid or overcome problems.

(9) Eriugena did not experience any notable difficulty with the uploading of BIM files with its draft Tender, and would have been unaware of the difficulties experienced by BAM and Kajima.

Tender Submissions

33. By way of Circular 454 dated 21 November, 2014, Tenderers were advised as follows:-

> "In advance of Tender Submission, Tenderers should take note of the following:
>
> • Tenderers are reminded that the Tenders submission deadline is 17:00 on 28 November 2014.
>
> • Asite folders will be ready for populating with files in the morning of 24th November, to allow for ample time to complete the upload process.
>
> • It is imperative to follow the submission requirements set out in the ITN, Sections 4 (submission requirements) and 6 (Tenders), reiterated in further communication, e.g. most recent – CIR 432 "Tender submission format".
>
> • Submission checklist is as per Section 6.8 (Tender – summary checklist) of the ITN.
>
> • Further to ITN Section 6.3(c) (BIM Output – drawings), drawing information must be extracted from the BIM (please refer to CIR 255 and other communication related to this issue).
>
> • Please refer to "Draft Tender General Comments to all tenderers.docx" for further guidance where relevant to the Tender Submission in relation to the submission format.
>
> • Please feel free to contact the authority (via the usual query process) in case of any issues with the upload.
>
> • Tenderers are kindly requested to issue a query via Asite to notify the Authority that the upload is complete"

It should be noted in passing that this document refers to "Section 4 (submission requirements)" of the ITN in the context of the final Tender. It is therefore contemporaneous evidence that NTMA's interpretation of the ITN was that the provisions of Section 4 applied at the Tender stage.

34. BAM's technical team gave a direction to its Design Team of architects and engineers to cease all work on, and to issue to BAM on Friday 21st November, all drawing sheets, room data sheets, and individual BIM models (not federated) and narratives. The process of combining the BIM model information and project programme information to produce the 4D models took more than 100 hours and two bid teams to complete.

35. Although the Asite portal opened in the morning of 24th November, 2014, BAM commenced its upload of its final Tender on 25th November, 2014, the upload of the first document being completed at 12:54. Work continued over the next two days during which most of its BIM files were uploaded. BAM's bid manager, Ms. Brady, provided a direction to their BIM team to "down pens" before 3pm on Wednesday 26th November, 2014, to support the completion of the IFC's and BIM -related files. Mr. Moore averred that "this was to facilitate the upload of BAM's large federated BIM models before the Final Tender deadline." BAM completed its upload at 16:37 on 28th November, 2014, some twenty-three minutes before the 17:00 deadline. Two BIM files were uploaded simultaneously at 13:35 on 28th November – one of these was 313Mb, and the other 179Mb.

36. Whereas the overall size of the tender documents submitted by BAM at the draft tender stage was 6.93Gb, at the Final Tender stage the overall size of the documents uploaded by BAM was 10.29Gb. As will be seen this was significantly greater than the total size of documents uploaded by Eriugena at both stages.

Eriugena's Tender Upload

37. Mr. Brian Saunders, an associate director and one of the parties involved in the Eriugena consortium, oversaw and supervised the uploading of the Eriugena Final Tender documentation. As with the other tenderers, Eriugena had two log in accounts for uploading files onto Asite. In his affidavit sworn on 27th April, 2015, he averred that as Eriugena had no difficulties with the submission of files at the Draft Tender stage, he and his colleagues "did not anticipate that we would have any difficulty uploading our files at the Final Tender Stage".

38. The upload commenced on Wednesday 26th November, 2014, and the upload of the first document was completed at 18:01hrs. The vast majority of documents, including BIM files, were uploaded between then and 02:39hrs on 27th November, 2014, at which point Ms. Kate Millington, who was doing most of the uploading, took a break. She recommenced uploading at 10:37 on 27th November, and continued until 17:30. She reassumed uploading at 22:46, taking a break at 01:33 on 28th November, 2014. She recommenced uploading at about 11:06 on 28th November, 2014, and save for an interruption, uploaded continuously until about 17:09. Mr. Saunders avers at paragraph 11 of his affidavit:-

> "Until around 15:07 on Friday 28th November, 2014, everything was proceeding very well and we were confident that we were on schedule, particularly given our experience of uploading during the previous two days. From approximately 14:00

on 28th November, 2014, Kate started to focus on the BIM files via the Sam Southall Log-in and Blaire Farrell started uploading the smaller non-BIM files using the second log-in (i.e. the Brian Saunders Log-in). Everything was still going smoothly at this point. I was present at all times during this period and until all files were finally uploaded later in the day."

Between 14:03 and 15:07 nine BIM files were uploaded successfully, one of these being a 180Mb BIM file, the uploading of which was completed at 15:02. Mr. Saunders then continues at paragraph 13 of his affidavit:-

> "We were on schedule to complete uploading in accordance with the Tender Submission deadline, when, unexpectedly, at about 15:07 on 28th November, 2014, we encountered difficulty. The Sam Southall Log-in which Kate was using suddenly encountered issues which persisted for at least 85 minutes. Kate was trying to upload a number of large BIM files and was not able to upload any of these files using the Log-in account during that period, as the uploads continually failed. The upload window on Asite closed a number of times as if the document was complete but the file did not subsequently appear on Asite. I do not know why this happened and having spoken to my colleagues I am not aware of any problems with our system that would have caused the files not to upload at this particular time. Large files had not previously presented a problem, including at 15:02 when a BIM file of 180Mb uploaded successfully.
>
> 14. Kate tried repeatedly to use the Sam Southall Log-in to upload five BIM files during this 85-minute period, but without success. The files she attempted to upload during this 85-minute period included a number of the BIM files that were subsequently submitted after 17:00. Most of these files were no larger than the 180Mb BIM file uploaded at 15:02. These files were as follows: [*Mr. Saunders then lists five files, the first four of which where around 150Mb BIM files and the last of which was a BIM file of 401Mb*].
>
> 15. Blaire Farrell, was able to use the Brian Saunders Log-in to upload files continuously while the Sam Southall Log-in that Kate Millington was using was out of action. Blaire was focusing on the reminder of the non-BIM files.
>
> 16. Kate stopped trying to upload these large BIM files and started working on smaller files. We were conscious that the information contained in the BIM files replicated information submitted by us in earlier documents and we felt it was important to concentrate on the non-BIM files (which generally contained information not previously submitted) at this point. The next successful upload by Kate on the Sam Southall Log-in was at 16:32 when a construction programme file (non-BIM file) was uploaded successfully, however the system continued to be slow to complete uploads after that time.
>
> 17. As a result of these difficulties, during this 85-minute period, we were only able to upload documents using one login - the Brian Saunders Log-in. This, combined with the slow uploads that we experienced after 16:32, significantly impeded our ability to upload documents at a pace such as to meet the 17:00 deadline. I am very confident that if the 5 large BIM files had uploaded as we expected them to, and with the same speed and in the same manner as BIM files had previously uploaded, the 17:00 deadline would have been met.
>
> 18. This loss of 85-minutes and the multiple failures of uploads of the BIM files (requiring repeated efforts by Kate to upload these documents) ultimately caused us to submit 8 files after 17:00. This was the reason why the three non-BIM files submitted shortly after 17:00 [*reference no.s given*] were submitted after the deadline – we did not have difficulty uploading these, but the volume of files was simply too much given the loss of the 85-minutes focusing on the large BIM files.
>
> 19. I should note that it is possible that the first document to complete its upload after 17:00 (i.e. at 17:03) was submitted before 17:00, but I have not been able to verify this.
>
> 20. At 17:14 on 28th November, 2014, my colleague, Blaire Farrell notified the Authority that while we had uploaded the vast majority of the submission documents, but we had experienced difficulty of a technical nature with some documents uploading. However, we continued to try to upload the outstanding files (which at that point was only the 5 BIM files) and eventually we were able to upload all of the 5 BIM files that we had tried continuously but unsuccessfully to upload between 15:07 and 16:32.
>
> 21. Finally, when we had uploaded all our files, my colleague, Blaire Farrell, notified the Authority at 18:24 on 28th November, 2014 (11 minutes after the last document uploaded) that we had continued to try to upload the 5 files and that all of our documents had finally been uploaded.
>
> 22. In total, 8 documents were uploaded after 17:00. I say that all 8 documents had been created and last modified before 17:00 on 28th November, 2014. They were last modified at 13:00, 12:55, 12:38, 16:00, 15:54, 16:08 and 12:15 on 28th November and 09:16 on 26th November."

The total size of documents submitted with Eriugena's final Tender was 6.19Gb.

39. It must immediately be noted that not all of the detail in the evidence presented in Mr. Saunder's affidavit was before the NTMA when it made the decision to accept Eriugena's late tender. The only document from Eriugena that was relied upon or referred to by the NTMA in making that decision, is the reply to a Clarification Request dated 9th December, 2014, and attached documents, which will be referred to later.

40. It should however be noted that the times given above are those provided by Asite as the times at which the uploads were *complete*. No evidence has been adduced as to the time at which the "Submit" instruction was pressed by the Eriugena staff uploading or attempting to upload the files. The evidence adduced by NTMA is that no such electronic record is or was accessible. Although that has been doubted by BAM, no evidence was presented to this court from which it could be concluded, as a matter of probability, that such an electronic record exists or could be accessed.

41. At the point when Eriugena commenced uploading its final Tender at 18:01 on 26th November, 2014, both Eriugena and BAM had very similar volumes of files remaining to be uploaded. At 08:00 on 28th November, 2014, both BAM and Eriugena again had very similar volumes of files to upload, and both of them left five large BIM files to be uploaded on that day. While Eriugena's Tender comprised of 280 documents (compared to 218 documents for BAM), their combined size was 6.192Gb compared to 10.286Gb for BAM.

Kajima Upload

42. Kajima's final Tender of 178 documents was a total of 4.378 GB. It commenced uploading on 28th November, 2014, at 02:59, and

completed its upload at 18:58 on 28th November, 2014. The upload of 57 of its documents was completed after the 17:00 deadline. It notified the Authority at 19:04 on 28th November, 2014, that it had completed the uploading of its files. There was no prior communication before this from Kajima to the NTMA.

Investigation by NTMA Post Submission of Final Tender Documents

43. Under section 7 of the ITN the Authority is obliged to carry out a Compliance Check in respect of Tenders. On 1st December, 2014, Mr. McCarthy, the Authority's Senior Project Manager, raised the issue of the late documents with senior management, and steps were taken to establish the facts by review of internal records derived from interrogation of the Asite system. This established the upload times and details of the documents. Contact was also made by email with Asite, who appear to have had their base in London. Having highlighted the documents that were submitted late by Eriugena, Asite were asked on 1st December, 2014, whether it was possible to establish when the highlighted documents were first attempted to be uploaded. In a response from Ritsah Lorrain of Asite on 2nd December, 2014, it was stated:-

> "Did they give details on what error they were facing in upload? If it is some client site restriction, I would not be able to do much. If they have any screenshot of the actual problem they were facing, I can certainly find out about it even if it was in the past."

In response to this on 3rd December, 2014, Mr. Donal Moylan of the NTMA emailed Ritsah Lorrain enclosing a spreadsheet with the list of Tender documents received after the deadline and asking:-

> "I need to be able to confirm that there were no issues related to Asite in relation to the late receipt of these documents.
>
> Is it possible to check the logs for these documents to see if there were any attempts to upload them earlier than the actual published time?
>
> Also is it possible to run a detailed activity report for certain users to see the activity during the tender period.
>
> I need to be able to verify 100% that the late receipt of these documents was not related to Asite.
>
> As you can imagine this is a highly important and sensitive issue so any help you and your team can provide is greatly appreciated."

This was copied to Sangeeta Pradhan of Asite, who responded:

> "Attached is the report for DIT Grangegorman Tender Workspace. Please check if this is the kind of data you required? If yes, then I will generate this for the other two Tenders.
>
> I will check the logs in the meanwhile."

These enquiries through Asite did not assist NTMA in identifying when the tender documents were first submitted, or when Eriugena first attempted to submit them. As will be seen, further enquiries direct to Eriugena and Kajima also did not yield this information.

44. On 5th December, 2014, Mr. McCarthy also sent an email to Healy Kelly Turner & Townsend ("HKTT"), the Technical Advisors to the Project. He asked them to comment on their experience of using Asite. Mr. Adolfo Rey of HKTT replied the same day stating that:-

> "We have collated below some views on issues experienced when using Asite. In relation to issues that might have impacted Tenderers' ability to complete submissions (re meet deadlines for submissions, etc.) we cannot bring much actual experience as our main activity when using ASite will be download more than upload of documents, nevertheless you might find this insight somehow useful. It should be noted that this is not our area of expertise and the content of this email shall not be considered professional advice but more so a simple collection of issues experienced by us and our team as users of the NDFA, Document Management System that have impacted our activities as TA and we consider might have impacted other users experience (i.e. Tenderers)."

HKTT then commented:-

> "Regardless of this note, from a procurement perspective, we would not consider that any of these issues should be taken into account to justify delays on issues of, or incomplete/mistaken Tender Submissions especially taking into account that Tenderers have been using the system for over six months prior to tender submissions, and specifically at Draft Tender stage they uploaded an amount of documents comparable by and large to the Final Tender documentation. Additionally, we understand that Tenderers had access to the Tender upload location for around 10 days prior to Tender Closing date which they should have used to plan (based on the months experience in use) their upload time requirements to meet the Tender Closing deadline. We don't consider that the use of ASite should be considered a disadvantage by comparison to a Tender process based on requirement for Hard Copies but more so that certain matters should be somehow improved upon.
>
> Having said so, there are a number of issues that we consider complicate matters for those uploading as well as those downloading documents from the System. Some are noted below.
>
> Generally over the consultation period for the project, "batch" actions have proven to be unreliable or completely unavailable, causing the system to freeze or crash without warning due to lack of live or active progress icons (i.e., progress bars can be frozen for a while before the user decides to cancel a process and start again);
>
> The above, coupled with standard auto log-off time (180 minutes, limited to a maximum 360 minutes when settings are changed) means that most large downloads/uploads will fail as the system will shut down automatically half way through the download/upload process resulting in a number of failed attempts before an action can be completed;
>
> Unfortunately, users, (mainly on downloads) have no ability to check or get a sense of the amount of information being sent to download even when the download has started. Any activity on Asite thereafter (even to try to re-set the auto log-off time) will stop the download;

> Download speed appears to be inconsistent. When it is good, each download will run approx. 1.3MB/s to 10.4MB/s. These sometimes fall dramatically (even when users connection speed remains unaltered). For example we had examples of downloads speeds (on ASite) dipping to 50KB/s on Sunday 30 November, 2014 at around 7pm;
>
> Downloads fail in many instances resulting in hours wasted and a considerable amount of aborted work/time; we would assume this is also the case for uploads. …"
>
> Further matters were referred to, related primarily to zip files, which are not particularly relevant, and the possible adverse impact of "Data traffic for a specific Workspace [which] appears to have a dramatic impact on the download (and we assume the upload) speeds and the amount of failed data transfers…"
>
> It is notable that in commenting "from a procurement perspective" the author of this email was under a significant misapprehension in his reference to a 10 day period of access for uploading the Tender – it was in fact 4 days. The reference to the upload at Draft Tender stage being comparable to the documents uploaded at Final Tender stage was also inaccurate because, as pointed out earlier, the size of upload was significantly greater (for both BAM and Eriugena) than it had been at draft Tender stage. These misunderstandings, coupled with the reservations as to expertise expressed in the first paragraph, on any reasonable reading seriously undermined the validity of the author's comments"… from a procurement perspective…" However in other respects, the information provided by HKTT on issues that may arise on uploading/downloading to or from Asite clearly pointed up the potential for problems and delays.
>
> Of particular importance is the statement of fact that during the tender consultation period "batch" action proved –
>
> > "…to be unreliable or completely unavailable, causing the system to freeze or crash without warning due to lack of live or active icons (i.e. progress bars can be frozen for a while before the user decides to cancel a process and start again)".

This appears to have reflected the actual experiences of the Eriugena uploaders as described in Mr. Saunder's Affidavit.

45. An internal NTMA email of 5th December, 2014, from Donal Moylan to Mr. McCarthy also states:-

> "We have looked more deeply at the late BIM files in relation to the Eriugena submissions. In theory these files may take between 60-90mins to upload due to their size. The last Eriugena upload was at 18:13 WET so that would support this timeline."

Having undertaken these enquiries NTMA then sent "Clarification" requests to Eriugena and Kajima on 9th December, 2014. The Clarification Request CPFB003 sent to Eriugena attached a spread-sheet identifying the documents delivered late, and the NTMA then stated:-

> "The Authority is considering this matter and requests that the Tenderer provides evidence, including from its own IT system, of the timing of its attempted upload of the documents listed together with confirmation of the date and time that the individual documents were last modified and saved before uploading was attempted. This clarification and its response are without prejudice to any course of action the Authority may take in response to this issue."

Eriugena responded on 11th December, 2014, stating:-

> "… we attach the following documents as evidence:
>
> 1. Evidence of final document modification time per those documents listed in the table issued by the Authority in CPFB003 (see Attached Appendices 1 to 8).
>
> 2. ISP usage graph of Macquarie Dublin office during the tender upload period ("Eriugena ISP Usage")
>
> 3. Summary Table ("Eriugena Completeness Check).
>
> The ISP usage graph shows that the documents were in the process of being uploaded prior to 5pm and that the upload speeds were capped out a number of times during this period (see light blue key). Furthermore the Asite upload window throughout the day of 28th November closed a number of times as if the document upload was complete, but the file would not appear on Asite.
>
> The attached evidence of when the document was finalised (following renaming and numbering in line with ITN requirements) is evidenced in the "modified" time shown in the snapshot of each Appendix 1 to 8. These times show that the documents were created prior to the Tender Deadline.
>
> If any further assistance can be provided in this matter by Eriugena, please do not hesitate to send us a further query."

It is apparent from this response that Eriugena did not supply evidence of precisely when the "submit" key was pressed on the first attempt to upload each of the eight late documents.

46. Mr. McCarthy avers (paragraph 7.9 of his first affidavit) that the Authority checked each of the late documents submitted by Eriugena and confirmed that they were all last modified prior to 17:00 and on the date/time shown in the screenshots – this is done by checking the file properties of the PDF documents on Asite which specified when they were last modified.

47. Mr. McCarthy further avers (paragraph 7.10) that:-

> "The "*native*" design information included in the 5 BIM related files ("Documents 4-8") was also submitted with the tender prior to the 17:00 deadline in the form of native BIM files. During the conformity check, the Authority's Technical Advisor (HKTT) examined the late BIM files and confirmed that the native files submitted prior to 17:00 had been exported and federated into the viewing tool files received after 17:00 … therefore all of the design information included in the files received after 17:00 was submitted and available to the Authority in the files received prior to 17:00 and the late files were not modified after 17:00."

48. Mr. McCarthy's investigations further established that the first document submitted late by Eriugena, at 17:03, was the only one of the eight late documents for which a version had not been submitted prior to 17:00. The second and third documents, submitted at 17:06 and 17:08 were very slightly modified versions of two documents which had been uploaded prior to 17:00. Documents 2 and 3 were last modified at 15:54 and 16:00 on 28th November, i.e. before 17:00.

49. The modification of Document 2 involved the deletion of one paragraph of text as follows:-

> "Feedback from Technical Consultation Meetings (TCM')
>
> Throughout the PPP tender process, there have been four very influential engagement meetings. The feedback from the Authority at these meetings has had a strong influence on the evolution of the design. We have positively welcomed this feedback and hope to continue the good dialogue."

It is readily apparent that the deletion of this paragraph was a deletion of comment that was not material, and therefore did not materially undermine the validity of the version uploaded before 17.00.

50. With regard to the third document submitted on 17:08, which had been modified at 16:00, the earlier version read:-

> "We have therefore provided an increase in area of 60% for the distributed learning comments, providing a total of 815m2 compared with 436m2."

The later version read:-

> "We have therefore provided an increase in area of 87% for the distributed learning comments, providing a total of 815m2 compared with 436m2."

The only change was a correction of the calculation – from 60% to 87% - where their correct base numbers were included in both versions. This therefore did not undermine the validity of the document uploaded previously in that it merely corrected an error that was internally obvious.

I also accept the averments that the modifications made to these two documents were made prior to 17:00, and would have made no difference to the marks awarded in the valuation.

51. With regard to the BIM files submitted late and their relationship to the "*native*" files submitted in time, Mr. McCarthy averred in his first affidavit (para. 7.19):-

> "3 out of the 5 BIM files (Documents 4-8 submitted at 17:09, 17:43, 17:55, 18:09 and 18:13) are not identical to the corresponding "*native*" documents submitted before 17:00. The "*native*" files contain contained slightly more detail (above and beyond that level of detail requested in the tender) than the files received after 17:00. However all the information in the later files was contained within the earlier files. The earlier versions were fully compliant with the ITN and would have been evaluated if the viewing tool versions had never been submitted."

52. Mr. McCarthy's overall view after this investigation was that, even if the late Eriugena documents had been omitted from the Final Tender, they would not have rendered the Tender non-compliant with ITN, and that it would have been accepted and evaluated. With regard to Documents 4-8 his view was that these BIM files could have been requested by way of clarification, and that they contained re-formatted information that had already been submitted with the tenderers native files. The validity of this view was hotly contested by BAM in these proceedings. With regard to Documents 2 and 3, Mr. McCarthy took the view that the Authority already had these. With regard to Document 1 his view was that its omission would not have rendered the bid non-compliant. Accordingly, as Senior Project Manager he made a recommendation to NTMA that all documents published after the Tender deadline be accepted as admissible for evaluation.

The Decision-Makers

53. Mr. McCarthy's recommendation is contained in a Memorandum dated 22nd January, 2015, with 8 attachments, addressed to Brian Murphy, Chief Executive, and copied to Gerard Cahillan, Deputy Head of Operations & Finance, and Steven Burgess, Head of Project Management – the relevant decision-makers. These three individuals signed their approval of this recommendation on the front page – Mr. Murphy's signature is undated, but the other two bear the date 23rd January, 2015. This document contains the record of the decision impugned in these proceedings to accept the late documents submitted by Eriugena and Kajima.

54. At this point it is necessary to make some further reference to these three decision makers because BAM raised an issue that one of them, Mr. Burgess, had some knowledge of the technical and financial submissions made by the tenderers prior to the taking of decision by NTMA to accept the late documents. This was raised in the context of a plea that in considering whether to accept the late documents, the Authority took into account irrelevant considerations in the decision making process, and there was a lack of transparency. It is indeed admitted at para.61(3) of the Statement of Opposition –

> "…the Authority was aware of and had reviewed the financial aspects of the tender before deciding whether to accept the Eriugena tender. It is denied that same was unlawful."

In the next subparagraphs the Authority pleads:

> "(4) In particular, the Authority will rely on the fact that there was strict separation between the functions and roles of those responsible for making the decision of whether to accept the late tender of Eriugena and those of its members involved in reviewing the financial aspects of tenders, such that those who made the decision on whether or not to accept the late tender had no prior involvement in the review of the tenders.
>
> (5) It is denied that those members of the Authority who made the decision to accept the late tender of Eriugena were aware of and/or had reviewed the financial aspects of the tender before deciding whether to accept the Eriugena tender."

55. Mr. McCarthy's evidence shows that the technical checking process in respect of the Tenders started on the evening of 28th November, 2014. Individual technical evaluators had access to and started to review technical documents from that time. He avers that the conformity check (a more through examination of all documents received as part of the Final Tenders) was fully completed

on 26th January, 2015, when the final technical clarification responses were received (paragraph 7.50 of his first affidavit). He goes on to state that the marking of technical submissions did not commence until after the Final Tenders were deemed to satisfy the assessment for completeness and compliance, and only *after* the decision was made to accept the documents delivered late. Thus the Technical Evaluation Team marking commenced on 28th/29th January, 2015.

56. At paragraph 7.44 of his first affidavit, Mr. McCarthy says of the three decision makers that "they were not members of any of the Evaluation Team. They had no access to or knowledge of the legal, technical or financial submissions of any tenderer before they made the decision to accept the late documents."

57. In his second affidavit Mr. Moore takes issue with this, noting that Mr. Burgess created and issued two technical post-bid clarifications, and six financial post-bid clarifications to BAM between 17th and 19th December, 2014, from which he deduces that Mr. Burgess would have had some knowledge of the technical and financial submissions prior to the decision to accept the late tenders of Eriugena and Kijima. He also noted (paragraph 73 of his affidavit) that Mr. McCarthy himself had issued twenty post-bid clarifications to BAM of a technical nature and financial nature starting from 23rd December, 2014, up to 4th February, 2015. He also queries how persons who were not on the team responsible for completeness and compliance checks, could have exercised the discretion relied on by NTMA to accept the late documents.

58. In his first affidavit, Mr. McCarthy explained that for the purposes of tender assessment and evaluation, three distinct teams were established by the Authority, and the Authority put in place a governance structure for the Project. At paragraph 4.5 of his affidavit he explained that –

> "4.5 …the evaluation of Final Tenders was to be conducted by a Technical Evaluation Team and a Financial Evaluation Team, with certain completeness and compliance checking to be carried out by a Legal Assessment Team (the "Evaluation Teams"), each of which acted independently and in isolation of the other.
>
> "4.6 There was a Legal Assessment Team to undertake an assessment of certain aspects of the Tenders. It did not score any tender submissions.
>
> 4.7 The Technical and Financial Evaluation Teams were (separately from each other and in confidence) to evaluate the Final Tenders in accordance with Section 7 of the ITN … and award marks to each Final Tender in accordance with Section 8 of the ITN (setting out the Evaluation Criteria). The Technical and Financial Evaluation Teams' marks were then to be considered by a Combined Evaluation Team and the award of marks, the ranking of tenders and the identification of the most economically advantageous tender was to be brought before a Project Team for consideration and recommendation, before being put to the Project Board for final approval and an instruction to proceed."

He explained that the Combined Evaluation Team's role was to consolidate the marks accumulated from the other two teams. There was then a Project Team comprising Authority, GDA and DIT personnel whose role was to ensure that any recommendation was ready to be presented to the Project Board. At para. 4.8 he stated:

"(f) The Project Board comprises Authority Senior Management and senior management representatives of the GDA and DIT, but not anyone who was on an Evaluation Team. The then Chief Executive of the NDFA was the Chair of the Project Board and was the Accounting Officer for the Project."

He added:

> "4.9. In addition, an independent Process Auditor (a former Secretary General of a Government Department), reporting to the Project's Accounting Officer, was involved in overseeing the evaluation process. The role of the Process Auditor was to review and be an independent adjudicator of the Tender Process. The Process Auditor was independent of the evaluation of tenders."

59. In response to Mr. Moore's specific allegations that Mr. McCarthy and Mr. Burgess were compromised in some way, at paragraph 16 of his second affidavit sworn on 6th October, 2015, Mr. McCarthy accepted that he and Mr. Burgess approved Clarification Requests but –

> "… the review of these clarifications did not point to the outcome of the financial or technical evaluation, and nor did the review of the clarifications provide information which would have allowed me or Mr. Burgess to engage in any comparison between the respective tenderers."

60. Mr. Burgess in his affidavit sworn on 22nd September, 2015, confirmed this and averred that it was part of NTMA protocols that all clarifications are reviewed and signed off either by the Senior Project Manager responsible for the tender assessment, or, in his absence, by another nominee prior to being issued to tenderers. He stated that:-

> "7. The clarifications were drafted by technical and financial teams and sent to me for approval in the absence of Mr. Denis McCarthy, who was on leave. I signed off on a number of financial and technical clarifications. However, my knowledge of the Tenders was limited to the wording of the clarifications and responses, but not any attachments. The seeking of my approval of the clarifications by the relevant teams did not involve the disclosure to me of any other information about technical or financial aspects of the submissions. As appears from the clarification requests approved by me and exhibited by Mr. Moore, there is no financial or technical information in any of the clarifications issued to the Applicant that would indicate the relative merits of the Tenders. Accordingly, the review of these clarifications did not point to the outcome of the financial or technical evaluation, and nor did the review of the clarifications provide information which would have allowed me to engage in any comparison between the respective tenderers.
>
> 8. I also did not have access to the financial or technical aspects of Tenders themselves prior to the making of the decision to accept the late documentation from tenderers and I had no knowledge of any information, whether from access to the Tenderers discussions with colleagues or otherwise that would have given me any sense of the merits of the Tenders prior to the making of the decision to accept the late documentation from tenderers."

61. I have considered the eight Clarification Requests signed off by Mr. Burgess. Two dated 17 December request technical details in relation to Foul Effluent. Of the other six, all dated 19 December: one requests figures omitted from two rows of an excel sheet related to insurance costs, and another requests 'figures against Construction Insurance with Project Indirect Costs section'; one refers to 'Component Life and Residual Life (years) have not been entered'; one asks about the absence of entries for 'Irrecoverable

VAT'; one requests a split of Professional Fees between disciplines; and one requests review of 'Number Formatting of cells D102 to D119' to avoid confusion.

62. Mr. Burgess avers that at the time he signed off on the clarifications the final prices of the bids had not been calculated and therefore could not have been known to him. He also averred that the financial evaluation did not commence until after the Tenders were deemed to satisfy the Compliance Check, and *after* the decision to accept the late documents (see paras. 9 and 10 of his affidavit).

63. I am satisfied that from this evidence that simply signing off on these Clarification Requests in these circumstances could not have given Mr. Burgess access to Technical or Financial information from BAM's Tender that would have compromised him as one of the decision-makers in relation to acceptance of the late documents.

64. Mr. Moore does not return to this subject in his final affidavit of 17th December, 2015, and there was no cross-examination on affidavit in this case. Accordingly the factual position as averred to by Mr. Burgess and Mr. McCarthy, both in relation to the process up to the date upon which the decision was taken to accept the late documents, and as to the extent of their knowledge and state of mind when that decision was taken, is not contested. I therefore conclude, as a matter of fact, that Mr. Burgess was not in possession of any price sensitive information that could have compromised his capacity to take part in the decision-making with regard to the late acceptance of Tender documents.

65. By comparison Mr. McCarthy was privy to more information. This is not surprising as he was the Senior Project Manager on this Project. The level of his involvement is apparent from the number (20) of Clarifications that issued to BAM under his name. Many of these relate to technical matters, but some concern financial aspects. The only lengthy request is dated 23 December, and concerns 'Financial Model Clarifications', the response to which led to a further Clarification Request on 16 January due to multiple referencing errors.

66. It is evident that Mr. McCarthy was an important figure throughout the procurement process up to the submission of the final Tenders. It is also evident that post 28 November, 2014, Mr. McCarthy held a key role in the day to day management of the Compliance Checks, which under Section 7.1(c)(i) of the ITN involve assessment of the completeness and conformity of each Tender with the ITN. It is in that role that he, or NTMA staff working with him, undertook the investigations and information gathering outlined earlier that informed the preparation of the Memorandum with his recommendations that in turn informed the impugned decision. I find that to be both a practicable and reasonable approach.

67. Had Mr. McCarthy taken the undoubtedly important decision to accept late documents himself it might conceivably have been vulnerable to challenge upon the basis that he was simply privy to too much information to be able to take an impartial decision, or upon the basis that he could be perceived to be impartial. Such a proposition might not stand up to scrutiny as the bids had not been calculated and the financial evaluation did not take place until after 23rd January, 2015, when the impugned decision was taken. Nonetheless I find that in the circumstances it was prudent of Mr. McCarthy, having collated the information and formed a view, to refer the matter up to higher authority within the NTMA for a decision.

68. The ITN does not contain any provisions guiding what Mr. McCarthy should have done in these circumstances. He might have referred the matter to the Process Auditor, but that was not mandated – indeed that particular role is not mentioned in the ITN and has no formal status in any contractual sense. He chose instead to refer it to a triumvirate consisting of the Chief Executive of the NTMA, the Deputy Director/Head of Operations & Finance, and the Head of Project Management. I can see no rational basis for criticising his adoption of this course of action. While he prepared the Memorandum that provided the decision makers with relevant information, I am satisfied that Mr. McCarthy was not himself one of the decision makers.

69. I therefore reject the plea that the impugned decision was unlawful because of the involvement of Mr. McCarthy in the investigation and preparation of the Memorandum and its attachments, and its recommendations, or because of the involvement of Mr. Burgess as one of the decision-makers. I am satisfied on the evidence before me that none of the decision-makers in respect of the impugned decision were privy to or had reviewed the financial aspects of any of the tenders before deciding to accept Eriugena's late documents.

The Impugned Decision

70. The Memorandum in its opening paragraph refers to a number of documents being published late to the Asite on 28th November, 2014, by Eriugena and Kajima, and then proceeds (relevant internal footnotes are also quoted):-

> "The Tender Evaluation Procedure (Section 2.2(a)[1]) requires that the Tenders received must be checked for compliance (completeness and conformity) prior to evaluation. As part of this check, it is necessary for the Evaluation Teams to determine the admissibility of documents received after the Tender Deadline.
>
> **Procurement Principles**
>
> Following detailed discussions with the Project legal advisors, Eversheds, it is clear that the key principles to consider in this matter are equality of treatment and proportionality. While the NDFA has obligations and some discretion as set out in the Invitation To Negotiate and under law, it is imperative that the NDFA ensures that no advantage is given to any Tenderer as a result of late submission of documents and that a proportionate, fair and transparent response is taken. The NDFA has a responsibility to fully explore the reasons for and nature of late document submission before any decision is made. In cognisance of this duty, the NDFA has taken the steps identified below.
>
> **Step 1 – Initial checks made by NDFA/Document Control**
>
> The tender documents were issued over a number of hours on a continuous basis and some parts of two of the Tenders (from Eriugena and Kajima) were received after the Tender Deadline, on 28th November, 2014. Following the opening of the Tenders, initial checks were made to verify the date and time that the documents were Published. It was noted that a number of documents were Published after the Tender Deadline. The dates and times of Publication available to the NDFA on Asite were recorded.

Step 2 – Checks made with Asite

The NDFA contacted Asite to seek confirmation of the dates and times that documents were Published. Asite re-confirmed the above dates and times, however, the dates and times that documents were first attempted to be sent to Asite could not be determined and therefore Asite could not verify if there were any technological delays in uploading to Asite.

Step 3 – Clarification Sought

Following the outcome of the above steps and consultation with Eversheds the NDFA has sought clarification from both Eriugena and Kajima in relation to evidence including from their own IT systems, of the timing of the attempted upload of the documents listed together with confirmation of the date and time that the individual documents were last Modified2 and saved before uploading was attempted (Asite Clarification Point Request references CPFB003 and CPFC003 refer).

Eriugena Clarification Response and NDFA Consideration

The response from Eriugena to clarification CPFB003 is enclosed as Attachment 3 (Appendices 1 to 8 excluded from this memo for ease of reading). The response indicates that none of the documents listed in Attachment 1 were Modified after the Tender Deadline. This is evidenced by screenshots of the "file properties" which displays the dates and times of the last Modification for each file. The appendices which contain the screenshots and the contents of the documents have been checked and verified against the NDFA's records on Asite and are in order. It is considered that no further action is required and that all of the Eriugena documents enclosed in Attachment 1 are deemed admissible for evaluation. The NDFA has further consulted with Asite and there is no evidence that any of the documents were delayed in electronic submission by the Asite electronic document management system.

2"Modified" means any change to the content of the electronic file or of its format, including any conversion of a file from a native file format to another format (e.g., Microsoft Word conversion to PDF)."

The Memorandum then includes similar material related to Kajima and its clarification response. The Memorandum then states, on page 3:-

"Tender Submission Process

Based on advice from Eversheds, the NDFA is satisfied for reasons of proportionality that the Publication of Tender documents to Asite up to 2 hours after the Tender Deadline following a 31 week Tender development process is not in itself a sufficient reason to either disregard the individual documents or reject an entire Tender. It is clear from the Asite records that all three Tenderers commenced uploading their Tenders significantly in advance of the Tender Deadline. The latest Tenderer to commence uploading was Kajima at c. 3am on 28 November 2014, some 14 hours prior to the Tender Deadline. All three Tenderers maintained reasonably consistent progress in uploading over the course of the working day of 28 November 2014. The latest document submitted on 28 November 2014 in the Tender upload activity was at 18:58 and the NDFA is satisfied that no further documents should be considered for admissibility beyond this date/time irrespective of their Modification date.3

[Footnote 3*It should be noted that no further documents were submitted on 28 November 2014, however in response to a number of post-tender clarifications raised by the Authority during the completeness checks, Tenderers have attempted to provide new information. However, this has not been accepted for evaluation.]*

The NDFA considers that this Project is the first NDFA project where master copy Tender documents including Building Information Modelling are being submitted electronically to Asite and therefore this is a relatively new process to both the NDFA and Tenderers. The NDFA is aware that the time taken to upload documents to Asite can be variable, which may at least in part be due to internal IT systems. The NDFA were not in a position to, and therefore could not, inform Tenderers of either how long it would take to upload Tenders or what specification of IT systems would be needed to interact in the most efficient way with Asite. Furthermore the NDFA is satisfied that using the tests of the latest Modification dates and times of the documents relative to the Tender Deadline and the precise nature of the Modifications are the clearest and most reliable method of ensuring that no Tenderer gained an advantage by Publishing documents later than the Tender Deadline."

Legal Opinion

[Redacted Text]

Recommendation

Further to the enclosed advice, it is recommended to accept all documents Published after the Tender Deadline as admissible for evaluation. Similarly, since we are in the middle of the tender evaluation process, to advise Tenderers as relevant that the administration matter has arisen, at the point of the appointment of the Preferred Tenderer.

Approval

If you are in agreement with the above, please sign this memorandum and the above actions will then be implemented.

Please contact me with any queries in relation to the above.

Kind Regards,

Denis McCarthy

Senior Project Manager

Attachment 1: Eriugena documents Published later than 17:00 on 28 November 2014

Attachment 2: Kajima documents Published later than 17:00 on 28 November 2014

Attachment 3: Response from Eriugena to clarification CPFB003

Attachment 4: Response from Kajima to clarification CPFC003

Attachment 5: Kajima Category 2 files

Attachment 6a: Response from Kajima to clarification CPFC025 (PDF)

Attachment 6b: Response from Kajima to clarification CPFC025 (excel)

Attachment 7: Eversheds advice note dated 21 January 2015

Attachment 8: Counsel Opinion from Nigel Giffen QC dated 18 January 2015."

71. With regard to the redaction it should be noted that neither the advice note from Eversheds dated 21st January, 2015, nor Counsel's Opinion were put before this Court upon the basis that they attracted legal profession privilege and/or litigation privilege. It is however apparent from the second paragraph of the Memorandum quoted above that Mr. McCarthy advised the NDFA that it had obligations "… and some discretion as set out in the Invitation To Negotiate and under law …". It is also apparent that the decision makers had the benefit of whatever legal advice had been obtained from Eversheds and learned counsel. It may reasonably be inferred from this paragraph that the legal advice obtained related to the NDFA obligations, its discretion (if any) under the ITN and the principles of equality of treatment and proportionality in the procurement process, and the requirement for "a proportionate, fair and transparent response" to the situation created by the late submission of documents.

72. By their signatures on the Memorandum the three decision makers approved Mr. McCarthy's recommendation which was two-fold:-

> "…to accept all documents Published after the Tender Deadline as admissible for a valuation. Similarly since we are in the middle of the Tender Evaluation process, to advise Tenderers as relevant that this administration matter has arisen, at the point of the appointment of the Preferred Tenderer."

Tender Decision and Subsequent Correspondence

73. Following evaluation of the three Tenders the Authority identified Eriugena as "the Tenderer with the most economically advantageous Tender".

74. By letter dated 27th February, 2015, the NTMA notified BAM of this decision, and then stated:-

> "… In accordance with the ITN, the Authority will now proceed to appoint Eriugena as the Preferred Tenderer and enter into the PT process with Eriugena in accordance with the ITN. This process may lead to a final decision to award Eriugena the Project Agreement. If, however, this process does not for any reason lead to the Project Agreement being awarded to Eriugena, the Authority reserves its rights in accordance with the terms of the ITN. This includes the rights set out in Section 9.1(c) of the ITN, including the right to invite Best and Final Offers and the right to invite BAM PPP, as the second-ranked Tenderer, to enter into discussions with a view to an award of the Project Agreement to it."

Later on in the letter, the author Mr. Brian Murphy CEO dealt with the decision of the Authority to accept the late documents in the following terms:-

> "The Authority wishes to note that at the time of submission of the Tender documents to Asite, the uploading of a small number of the Eriugena documents was not completed until shortly after the 5pm deadline on 28th November, 2014. Having investigated the matter, the Authority was fully satisfied that no unfair advantage was gained by Eriugena in the circumstances and the Authority exercised its discretion to accept the Eriugena Tender prior to the evaluation exercise commencing."

Enclosed with that letter was a commentary on the evaluation of BAM's Tender. Its ranking was good overall and was ranked first under three criteria and second under three other criteria.

75. BAM responded by letter dated 4th March, 2015, expressing alarm and dismay at the acceptance of Eriugena's late tender and asserting that there was "no discretion in relation to submitting a tender by the required deadline …". It was noted that the letter 27th February, 2015, provided "no detail whatsoever in relation to the circumstances arising in respect of the late submission of Eriugena's tender and certainly no information which would allow BAM PPP to make any informed decision as to whether this is a decision which requires review …". The letter proceeded:-

> Given the terms of the ITN, the Circulars, the time and resources committed by BAM PPP in preparation of its tender and because, as a matter of public procurement law, compliance with formalities (and in particular, tender deadline submissions formalities) must be applied strictly by awarding authorities in order to meet fundamental EU principles of transparency, equal treatment, proportionality and non-discrimination, there appears no basis which would entitle or entitled the Authority to accept Eriugena's late tender."

BAM did not accept that there was "no unfair advantage … gained by Eriugena". BAM, on the basis of the information provided up to that date, called on the Authority to confirm that it would now reject the Eriugena tender.

76. NTMA responded on 6th March, 2015, assuring BAM that:-

> "… acceptance of Eriugena's tender was made after a thorough investigation into the matter, taking into account the

> legal position and the specific facts that arose. We are very conscious of our obligations under procurement law and at all times we have taken careful and considered steps to ensure the integrity and fairness of the process."

Mr. Murphy then set out the factual position with regard to the number of documents submitted by Eriugena, the number that were not fully uploaded before the 17:00 deadline on 28th November, 2014, and details in relation to these inline with the information provided by Asite and to the decision makers. Mr. Murphy stated:-

> "… It is clear that Eriugena had some difficulties in uploading the large documents, which in the opinion of the Authority, was not wholly within their control.

He then stated:-

> "ITN
>
> Contrary to the assertions in your letter, the terms of the [ITN] do not impose an absolute requirement to disqualify a Tenderer in circumstances where the uploading of a small number of tender documents is not completed until after the deadline. The ITN is quite clear in affording the Authority discretion in this regard (see for example, Sections 4.1(c), 4.1(b)(D), 4.1(d) and the Important Notice).
>
> Following a thorough investigation, the Authority has exercised its discretion in this particular case and, having regard to the facts of the situation and all relevant considerations, it has decided to accept the Eriugena Tender. The Authority has determined in this case that no unfair advantage was gained by Eriugena in completing the upload of a small number of Tender documents after 17:00, and the decision to accept their tender is the reasonable and proportional course of action to take in the circumstances."

The accompanying Appendix gave full details of the eight Eriugena documents that were uploaded after the deadline.

77. Arthur Cox solicitors for BAM replied on 13th March, 2015, expressing grave concerns and effectively joining issue with the Authority in its response. At paragraph 4 the author stated:-

> "Purported exercise of discretion
>
> 4.1. Your letter refers to the exercise of Authority discretion. Even if one accepts that the Authority did have a discretion to accept Eriugena's late tender (which is not accepted), based on the information provided, the NDFA is in clear breach of public procurement law and was manifestly wrong in exercising such discretion.
>
> 4.2. From your letter it is clear that the blame for Eriugena's late tender lies entirely with Eriugena. The jurisprudence in relation to the acceptance or rejection of later tenders is quite clear. Save in special or exceptional circumstances, the acceptance of late tenders is a breach of the fundamental principles of procurement law, namely transparency, equality of treatment, proportionality and non-discrimination. No such special or exceptional circumstances arise in this case. This was simply a matter of Eriugena submitting a late tender which the Authority has wrongly accepted. Eriugena has been treated in a manner different to BAM PPP (and the other tenderer in this competition..)"

The letter went on to make a number of points. Acceptance of a late tender meant that tenderers were in a position to continue to work on their tenders just prior to submission – whereas BAM ceased working sufficiently in advance to ensure all information was properly uploaded. Had BAM been aware that it could have submitted elements of its tender late, then it could and would have submitted a different tender – and in this regard it was "treated unequally in this tender process". With regard to the Authorities' apparent view that the submission of information "in different file formats was not relevant", it was asserted that the Authority was in fact accepting a tender which did not comply with tender submission requirements within the tender submission deadline – a fundamental breach of the requirements of the ITN. With regard to the Authorities reliance on screenshots received from Eriugena to show that documents uploaded after the deadline were modified at an earlier point in time, the letter stated:-

> "Our understanding is that screenshots are inherently unreliable as they rely purely on the particular computers' own settings which can be altered. Furthermore it is not clear how or why those screenshots would have been contemporaneous and how the Authority is satisfied that the screenshots are genuine and valid."

Specific points were then raised in relation to the eight documents. Amongst these was that no reason or justification was given for accepting Document 1 which was uploaded at 17:03; Document 5 of 144Mb took 34 minutes to upload whereas document 4, another BIM file was uploaded in 1 minute. The letter requested responses to a number of questions such as when the "submit" button was pressed in respect of each late upload, the steps that the NDFA took to satisfy itself that no amendments were made to the document after the 17:00 deadline, whether Documents 2 and 3 submitted after the 17:00 deadline were exactly the same as the versions of these submitted before 17:00, and when Document 4 was uploaded. The possibility of proceedings was intimated in this letter.

78. The NTMA replied on 19th March, 2015, joining issue with Arthur Cox. Again asserting that the Authority had a discretion, Mr. Murphy stated:-

> "One of the factors taken into account in reaching that decision was the Eriugena report that the upload window on the Asite portal closed a number of times as if the document upload was complete, but without the relevant files subsequently appearing in Asite. This appears to have caused some issues for Eriugena. Having conducted a detailed analysis of the factual situation, the Authority is of the view that Eriugena may not have been solely to blame for the uploads completing after 17:00."

With regard to the BIM documents it was stated:-

> "Although certain documents were not published to Asite by Eriugena before 17:00 on 28th November, 2014 in the format requested, this was not considered by the Authority to constitute material non-compliance given all of the prevailing circumstances. We would point out that BAM PPP's own Tender contained certain discrepancies (including in relation to the financial model) which similarly were not considered by the Authority to constitute material non-compliance given all the prevailing circumstances. BAM PPP took the opportunity that the Authority gave it to address these discrepancies after the Tender Deadline. This clarification process was undertaken by the Authority using the same discretion as

referred to above (e.g., section 4 of the ITN)."

This latter consideration/comparison with BAM's own tender was not a matter that featured in the Memorandum which led to the impugned decision, and was raised here as a "point" for the first time.

79. Mr. Murphy then addressed the other points raised by Arthur Cox. With regard to screenshot information, it was stated that "we checked the "file properties" of each of these documents on Asite". With regard to the BIM files Mr. Murphy stated:-

> "Documents 4-8 are BIM viewing tools, related to the BIM models. As BAM PPP will know, the file formats of Documents 4-8 can only be created directly from the native BIM and programme files. These native BIM (Revit) files and programme (Asta) files were all uploaded to Asite prior to 17:00. The Authority's technical BIM advisor (HKTT) examined all of the BIM files and confirmed that the Eriugena BIM viewing tools are taken from those native files submitted before 17:00."

With regard Document 1 the Authority simply "considered that it was within the fair, reasonable and proper exercise of its discretion" to accept this document, and with regard to Documents 2 and 3 it was reiterated that these were "repeat uploads of the same documents". It was noted that Document 2 had a single immaterial added paragraph, and that Document 3 contained a percentage number which was incorrect, but based on other numbers stated in the same sentence which were correct and from which the error in the first number could be adduced. With regard to Document 4, the upload of which was completed at 17:09, Mr. Murphy noted that at 17:14 Eriugena reported that they had difficulties uploading this document (and other documents):-

> "And while this may be true, the fact of the matter is that the upload of Document 4 completed at 17:09 on 28th November, 2014. Document 4 was uploaded by a different person than the individual who uploaded the other relevant Eriugena documents … and this may account for the slight confusion on their part. The fact that this was published to Asite prior to the receipt by the Authority of the notification at 17:14 supports the view that difficulties were being encountered."

It was indicated that if proceedings were issued they would be defended vigorously.

80. Arthur Cox replied on 20th March, 2015, alleging that Documents 4-8 (the BIM files) "are entirely stand alone documents and are separate tender deliverables", and expressing surprise that the Authority had not received confirmation from Asite as to when the "submit" button was pressed in relation to each of the late documents. The NTMA replied to this on 24th March, 2015, reiterating that it was satisfied that the Documents 4-8 had been created before 17:00, and that they were not modified after 17:00, and that the technical content was "identical to the native BIM files". They reiterated that Asite could not confirm when the "submit" button was pressed. In an Appendix they gave the times, all prior to 17:00, when Documents 1 to 8 had been last modified. On 25th March, 2015, Arthur Cox requested further clarifications. On 27th March, 2015, Mr. Murphy on behalf of the NTMA reiterated previous responses in particular confirming that the Authority and Asite had no details of the time that the uploading of Documents 1-8 commenced, and that the Appendix in their previous letter referred to the date and time that the final form of each document was "last modified", and that, in respect of Document 5, the Authority was not aware of the reason for the delay between the date and time upon which it was last modified (09:16 on 26/11/2014) and the date/time of its upload. Mr. Murphy confirmed that:-

> "The Authority first became aware of the content of any sections of the tender documents after 17:00 on 28th November, 2014, at the start of the initial completeness and compliance check. The first Eriugena tender document to be accessed was at 18:06 on 28th November. The first Kajima tender document to be accessed was at 17:59 on 28th November. The first BAM PPP tender document to be accessed was at 18:36 (i.e. after all Eriugena's documents had been submitted) although BAM PPP's covering letter (Asite document reference S-000-PM-LT-001) only was opened at 17:16 on 28th November. The financial and legal sections of the tenders were not opened before 01 December 2014."

Following on from this correspondence, the originating Notice of Motion herein issued on 27th March, 2015.

The Review Proceedings

81. BAM instituted these proceedings pursuant to the Procurement Directive, Council Directive 89/665/EEC (as amended) ("the Remedies Directive"), the European Communities (Award of Public Authorities' Contract) Regulations 2006 (SI 329 of 2006) ("the Procurement Regulations"), the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. 130 of 2010) ("the Remedies Regulations"). The reliefs sought include the setting aside the decision "to accept the late tender submitted by Eriugena", setting aside the decision of the NTMA to select Eriugena as the preferred tenderer, requiring the rejection of the tenders submitted by Eriugena and Kajima, a declaration that the tenders submitted by BAM was the only compliant tender and an order requiring the NTMA to appoint BAM as the preferred tenderer and related declarations and ancillary reliefs.

82. The central and essential assertion in the case is that NTMA was not entitled under the ITN and the relevant domestic and European law rules and principles to accept the documents submitted late, to accept Eriugena or Kajima as tenderers, or to appoint either of them as preferred tenderer.

83. The statement of grounds may be summarised as follows:-

> (A) The Authority purported to exercise a discretion that does not exist under the ITN or Rules of Public Procurement. In particular Section 7 of the ITN which is concerned with compliance checks contains no provision for deeming tenders submitted late to be compliant, and the NTMA cannot rely on Section 7.1(d)(b) which provides that a tender will not be deemed to be non-compliant by reason only of the inclusion of "an error, which in the reasonable opinion of the Authority is clerical or administrative". The Authority acted the provisions of the ITN and public procurement law in purporting to exercise a discretion that does not exist under the ITN, and the Authority made a manifest error in law which was also a breach of the requirements of equal treatment and transparency contrary to the Procurement Regulations and Procurement Directive.
>
> (B) The Authority misdirected itself in law and made a manifest error as to the existence and basis of its alleged discretion to accept a late tender, and insofar as the Authority purported to rely on specific provisions in section 4 of the ITN and "the Important Notice" and section 7.1(d), the Authority misdirected itself and thereby made a manifest error of law.
>
> (C) The Authority failed to comply with the requirements of non-discrimination, equal treatment, transparency and proportionality. This ground proceeds on the alternative assumption, which is rejected by BAM that the Authority did have a discretion, but BAM submits that it could only be exercised in "exceptional circumstances" and in accordance with the General Principles. It is asserted that the NTMA was not entitled to take into account:

(1) The fact that the Eriugena documents were not modified after 17:00 hours on 28th November, 2014;

(2) That five of documents (the BIM files) contained technical information that was contained in other tender documents submitted prior to the deadline;

(3) The Authorities conclusion that "Eriugena may not have been solely to blame for the uploads completing after 17:00";

It is pleaded that the test for compliance with the deadline is an objective one and the time when a party ceased internally working on its documents is not relevant to its compliance with the fixed deadline requirement. It is pleaded that as BAM's design team was directed to cease work earlier to facilitate the upload of its final Tender there was a detriment to BAM. As to content of the documents uploaded late by Eriugena it is pleaded that one of these was entirely new. With regard to the BIM files it is pleaded that if the tender requirements could be met by the receipt of information in just one of the required formats, then this information needed to be imparted to all tenderers to respect the requirements of transparency and equal treatment. With regard to the assertion that "Eriugena may not have been solely to blame for the uploads completing after 17:00" it is pleaded that the NTMA did not ascertain when Eriugena attempted to upload the late documents and that to accept a late tender the basis of unconfirmed opinion that the lateness may not be wholly within the control of Eriugena was wholly disproportionate and discriminatory and lacking in transparency. It was pleaded that there was no exceptional circumstances upon which the Authority could rely. It was pleaded that the Authorities decision breached the requirements of transparency and equality in choosing to disapply clear criteria of the ITN. It was pleaded that the manner in which the Authority purported to exercise a discretion to accept late tenders and the justifications and reasons relied upon by the Authority into doing were lacking in transparency and proportionality and contrary to the requirements of equal treatment and non-discrimination.

(D) The Authority made a manifest error in the purported exercise of its alleged discretion under the ITN. It was pleaded that the time at which documents were modified is not relevant to the decision as to their lateness, and that the Authority was in manifest error in relying on the fact that certain information was contained in tender documents already submitted prior to the late submission of the BIM files. It was pleaded that the Authority should not have reached conclusions without information as to when Eriugena tried to commence uploading the late documents.

(E) The Authority took into account irrelevant considerations into deciding to accept the late tender submitted by Eriugena. These included:-

(1) That the content of some of the late documents were the same or similar to that of documents already submitted.

(2) That the Authority was aware of and had reviewed the financial aspects of tenders before deciding whether to accept the Eriugena tender.

(F) This is a general allegation that the Authority was in breach of the Procurement Directive and Procurement Regulations and acted contrary to the requirements of the General Principles, and made manifest errors of law and fact and took into account irrelevant considerations in purporting to exercise discretion to accept a tender submitted after the deadline."

The Statement of Opposition
This admits certain matters but in general traverses the claims made by BAM and denies that it is entitled to any reliefs. The Authority denies that it accepted "late tenders" and contends that it "accepted late documents". It denies that this had any direct impact on BAM or that it would have been the preferred tenderer had the tender of Eriugena not been accepted. It asserts that had the tenders of Eriugena and Kajima been rejected the Authority may have cancelled the tender competition.

The NTMA asserts that a discretion to accept the late documents did exist under the ITN under various provisions of Section 4 and under Section 7.1(d)(ii), or that it has "a discretion to accept documents of tenders that were submitted late" pursuant to the General Principles and other rules and laws. The provisions relied upon by NTMA will be referred to later in this judgment.

84. The NTMA also pleads that it exercised its discretion in accordance with the General Principles, and that it had an obligation to accept the late tenders of Eriugena and Kajima particularly having regard to Section 7 of the ITN. While denying that the Authorities discretion could only be exercised in "exceptional circumstances", it pleads in the alternative that such circumstances arose here, and are set out in the NTMA letters of 6th March, 2015, 19th March, 2015, and 24th March, 2015.

85. The Authority admits that in exercising its discretion it took into account the fact that the late documents were not modified after 17:00, and denies that that fact is not relevant to the exercise of its discretion.

86. At paragraph 47(3) the NTMA accepts that the test for compliance with a deadline is an objective one, but pleads that this is not determinative of whether or not the Authority had discretion to accept a later tender and/or the exercise of that discretion.

87. The NTMA admits that it considered the content of the documents submitted late, and that it decided to accept the late tender on the basis that the contents of some of the late documents was the same as the content of other documents that were required as part of the tender. It admits that this did not apply to the acceptance of Document 1, but it denies that the acceptance of that document was unlawful. It is pleaded that the fact that the same or similar information may appear elsewhere as part of the requirements of the tender process is relevant to the exercise of the Authority's clarification powers and to the application of and compliance with the General Principles.

88. It is further admitted that the NTMA took account of its view that the lateness of Eriugena's submission may not have been "wholly within the control of Eriugena", and that Eriugena may not have been solely to blame for the uploads completing after 17:00. While admitting that the Authority had not ascertained the exact time at which Eriugena attempted to upload the late documents, it

was denied that that was unlawful or that accepting a late tender on the basis of an unconfirmed opinion that the lateness may not be wholly within the control of Eriugena was wholly disproportionate or discriminatory or lacking in transparency. The Authority denied that it did not have any information as to when Eriugena tried to commence uploading, or that it did not have any evidence substantiating any suggestion that technical issues had caused the delay, or that the NTMA was required to have information as to when Eriugena tried to commence uploading.

89. The Authority also denies that it breached the principle of transparency, or that it was a breach of such principle "to choose to disapply clear criteria of the ITN" in circumstances in which the ITN permit the Authority to disapply the said criteria.

90. As to alleged manifest error, the Authority plead its entitlement to rely on the provisions of the ITN for its true meaning and effect.

91. The NTMA admitted, as confirmed in its letters of 19th March, 2015, and 24th March, 2015, that it sought information from Eriugena about the late documents on 9th December, 2014, which it provided on 11th December, 2014; that it sought clarifications from BAM in relation to its tenderers as early as 8th December, 2014, and in particular on financial aspects; and that it was aware of and had reviewed the financial aspects of the tender before deciding whether to accept the Eriugena tender. It denied that this was unlawful, relying on the fact that there was strict separation between the functions and roles of those responsible for making the decision on whether to accept the late tender of Eriugena and those of its members involved in reviewing the financial aspects of tenderers "such that those who made the decision on whether or not to accept the late tender had no prior involvement in the review of the tenders". At paragraph 61(5) it pleaded "it is denied that those members of the Authority who made the decision to accept the late tender of Eriugena were aware of/or had reviewed the financial aspects of the tender before deciding whether to accept the Eriugena tender."

92. Accordingly, it is denied that the Authority was motivated by irrelevant considerations such as the content and substance of tenders in investigating and deciding to accept Eriugena's late tender or exercising its discretion. I have already found in favour of the NTMA on this aspect insofar as I have found that BAM has failed to demonstrate on the evidence before the court that Mr. McCarthy's involvement in the investigation and the preparation of the Memorandum and recommendations was not unlawful, and that neither Mr. Burgess nor the other two decision-makers were aware of or had reviewed the financial aspects of the bids before reaching a decision to accept the Eriugena late documents.

The further issues
93. The Court of Appeal in determining a dispute between the parties in relation to discovery in its judgment delivered on 6th November, 2015, identified the issues arising from these pleadings, and I gratefully adopt their formulation in paragraph 40 of their judgment:-

> 1. Did NTMA have a discretion under the ITN to accept (a) a later tender or (b) a tender notwithstanding that some of its documents where received after the deadline or (c) the tender of Eriugena?
>
> 2. Did NTMA misdirect itself in law or make a manifest error in considering that it had discretion either under the provisions cited in its letter of 6th March, 2015 or otherwise?
>
> 3. Did the circumstances that NTMA relied on in its letters dated 6th, 19th and 24th March, 2015 (a) constitute valid reasons for exercising its discretion or (b) infringe the principles of non-discrimination, equal treatment, transparency and proportionality?
>
> 4. Did the grounds relied on by NTMA constitute manifest error in the exercise of its functions under the ITN?
>
> 5. Did the NTMA take irrelevant considerations into account in deciding to receive the Eriugena tender?
>
> 6. Did NTMA's conduct amount to breach of the Procurement Directive or Procurement Regulation or the General Law?

As Issue 3(b) and Issue 6 are both concerned with European law and General Principles related to public procurement and their application to the facts of this case they will be addressed together.

Further issue – Transparency as to power/discretion to accept late tender
94. BAM sought to raise a further issue, namely that there was a manifest breach of the general principle of transparency in failing to set out in the impugned decision or correspondence the powers relied on by the Authority to exercise a discretion to accept a late tender or late documents. This was raised in para.s 95-114 of the written submissions and pursued in oral submissions. The essence of this argument was -

> •the Authority in the Memorandum/recommendation and in the subsequent communication of the impugned decision, and in later correspondence, the Authority gave differing and inconsistent explanations and sources for the power to accept a late tender/late tender documents and its assertion of "*some*" discretion in this regard;
>
> • that no mention of the legal basis for the decision or how a discretion arose was set out in the initial letter of 27th February, 2015;
>
> • that in its letter of 6th March 2015, to BAM's solicitors it referred to various provisions of section 4 of the ITN which BAM asserts can have no application; and
>
> • that it failed to then rely on section 4(9)(a) or section 7 in any preliminary correspondence.

95. From this factual base it was argued that the Authority took the decision without properly scrutinising or examining its power to do so, and then asking the right questions; and that the Authority failed to take as its starting point that late tenders should be rejected, and only then ask itself whether there were special or exceptional circumstances that might warrant a departure from that position. It was claimed that BAM was entitled to know basic information as to the claimed legal basis for the decision in order to test it lawfulness, and "to the extent that the Authority purported to exercise a discretion, then it was bound to do so based on a pre-determined and transparent basis clearly disclosed in the ITN" (para.114 of BAM's written submission).

96. The Authority objected to BAM raising this argument on the basis that it was a new complaint that was inadmissible because it was not raised in preliminary correspondence but was only raised for the first time in the second Affidavit of Mr. Moore sworn on 14th

July, 2015, and was not part of the pleadings, and was now being raised 'out of time'. In para. 21 of that Affidavit Mr. Moore commences:

> "21. First, it is striking that the NTMA has never stated which provision of the ITN it purported to rely on and which provisions it actually relied on when it made the decision to exercise an alleged discretion to accept late tenders."

In response in the second replying affidavit of Mr. Dennis McCarthy sworn on 6th October, 2015, he stated:

> "No case is made in the Statement of Grounds by the Applicant that the Authority erred by not relying on one specific provision of the ITN to ground its decision, even though there appears to be no reason why the Applicant could not have advanced that case…had it chosen to do so in the Statement of Grounds" (para.43)

Mr. McCarthy then took issue with this "entirely new complaint…which would appear to be time-barred in any event" being raised (para.44). Accordingly it was clear to BAM, at least from receipt of this affidavit, that the Authority would be objecting to this issue being raised.

97. Under the Remedies Regulations (S.I. 130 of 2010), regulation 7(2) stipulates that an application to the High Court, *inter alia*, for the review of a contracting authorities decision to award a contract to a particular tenderer must be made "within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application." Regulation 8(4) stipulates:-

> "(4) A person intending to make an application to the Court in accordance with this Regulation shall first notify the contracting authority in writing of –
>
> (a) the alleged infringement,
>
> (b) his or her intention to make an application to the Court, and
>
> (c) the matters that in his or her opinion constitute the infringement."

This provision reflects Article 1.4 of the Remedies Directive (Council Directive 89/665/EEC) which provides:-

> "(4) Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c."

98. The Rules of the Superior Courts 1986 (as amended) govern "Review of the Award of Public Contracts". Order 84A (as substituted by S.I. No. 420/210) under rule 3 requires that the application for review be made by way of originating notice of motion grounded on a statement that includes various particulars including:

- "(viii) the alleged infringement of the Regulations or the Directives, as the case may be";
- "(x) the date of the notification to the applicant of the alleged infringement";
- "(xi) the date of notification by the applicant to the contracting authority of the alleged infringement and of the applicant's intention to seek review"; and
- "(xiii) the grounds upon which each relief is sought".

99. Order 84A r. 4(1) states that the application must be brought within "the relevant period" under Regulation 7 which in the present case is 30 days.

Notwithstanding this, under sub-rule 4(2) the court may, on application to it, grant leave to bring a late application to review, where the court "considers that there is good reason to do so". No such application was made by BAM in the present case.

100. Secondly, under O. 84A r. 8:-

> "8.(1) The Court may on the hearing of the Originating Notice of Motion allow the applicant or any other party to amend his statement whether by specifying different or additional grounds of relief or opposition or otherwise on such terms, if any, as it thinks fit and may allow further affidavits to be filed if they deal with new matters referred to in an affidavit of any other party to the application.
>
> (2) Where the applicant or any other party intends to apply for leave to amend his statement or to use further affidavits he shall give notice of his intention and of the proposed amendment to every other party."

In this case there was no application by BAM to amend or extend the statement of grounds, either before or during the hearing.

101. The court must therefore firstly consider whether BAM complied with the requirement of notification to the Contracting Authority of this particular alleged infringement, and secondly, if there was notification, whether it was pleaded or adequately pleaded in the statement of grounds. It should be recalled in this context that the Authority notified BAM of its decision to accept the late tender/late tender documents by letter dated 27th February, 2015, and the proceedings were initiated by notice of motion dated 27th March, 2015.

102. I have carefully considered the exchange of correspondence between 27th February and 27th March, 2015. This consists of an initial letter from BAM dated 4th March, 2015, and thereafter letters on its behalf from Arthur Cox solicitors. The case consistently made by BAM and its solicitors in this correspondence is that the Authority had no discretion to accept a late tender. Notably in their response of 6th March, 2015, the NTMA asserted that it did have a discretion to accept tender documents after the deadline:-

> "The ITN is quite clear in affording the Authority discretion in this regard (see for example, sections 4.1(c), 4.1(b)(D), 4.1(d) and the Important Notice)."

In their reply dated 13th March, 2015, Arthur Cox reiterate their complaint that the NTMA had "no discretion to accept", and they go on to state:-

> "Even if one accepts that the Authority did have a discretion to accept Eriugena's late tender (which is not accepted), based on the information provided, the NDFA is in clear breach of public procurement law and was manifestly wrong in exercising such discretion … the *jurisprudence* in relation to the acceptance or rejection of late tenders is quite clear. Save in special or exceptional circumstances, the acceptance of late tenders is a breach of the fundamental principles of procurement law, namely transparency, equality of treatment, proportionality and non-discrimination."

103. It is notable that nowhere in their reply correspondence do Arthur Cox suggest any lack of transparency in relation to the various examples of clauses of the ITN which the NTMA in their letter of 6th March, 2015, asserted as the basis for the Authorities' discretion. While I appreciate that in their letter 26th March, 2015, Arthur Cox were still awaiting further response from the NTMA, and that at point in time, proceedings had to be commenced in order to comply with the 30 day time limit, even after further responses were made by the NTMA no application was ever made to amend or extend the grounds.

104. I have come to the conclusion that the particular complaint of lack of transparency the subject matter of this further issue was not the subject matter of a complaint in the correspondence/notifications by or on behalf of BAM prior to the commencement of the proceedings. Accordingly, BAM failed to comply with Regulation 8.4 of the Remedies Regulations.

105. That finding is sufficient to dispose of this further issue/complaint which I find to be inadmissible. However, I am also satisfied that this complaint was not directly or adequately raised in the statement of grounds. Allegations of lack of transparency do feature in the statement of grounds, but I am satisfied that none of them were intended to be, or directed at, an assertion that the Authority failed to set out adequately or at all the provisions of the ITN upon which it relied as affording it a discretion to accept a late tender or late tender documents, or that differing and inconsistent explanations were given. For example, in the statement of grounds at para. 8 under the heading "Infringements of the EU Procurement Directive and Regulations" at ground (a) it is alleged that "the Authority purported to exercise a discretion that it does not have … and therefore acted *ultra vires* the provisions of the ITN and of public procurement law and in particular the general principles of EU law of non-discrimination, transparency, equal treatment and proportionality ("the General Principles")."

106. Insofar as breach of the principle of transparency is included, it is clearly in the context of the purported exercise of a discretion which it is claimed the Authority did not have *at all*. The same in my view applies to the pleas at para. 8(b) and (c). The grounds set out in s. 13 of the statement of grounds also mention lack of proportionality on a number of occasions, but in a different context. So for example, 13.9 challenges the "purported exercise of discretion" as being contrary, *inter alia*, to the requirement of transparency. Notably at para. 13.17 BAM does address the provisions of the ITN upon which the Authority purported to rely as examples in its letter of 6th March, 2015, but lack of transparency is not alleged. At para. 13.26 BAM does allege lack of transparency in relation to the manner in which the Authority purported to exercise a discretion, and in para. 13.30 it is contended that the acceptance of a late tender on the basis of a "unconfirmed opinion that the lateness might not be wholly within the control of Eriugena is wholly disproportionate and discriminatory and lacking in transparency." There is also a more general plea at para. 13.33 that "the manner in which the Authority has purported to exercise a discretion to accept late tenders and the justifications and reasons relied upon by the Authority in so doing, are lacking in transparency and proportionality and are more over contrary to the requirements of equal treatment and non-discrimination". However, this is again directed at the manner in which the discretion was exercised, and not at the Authorities assertions as to the source of its power (if any) to exercise a discretion.

107. I am not therefore satisfied that this further issue was pleaded in the Statement of Grounds with sufficient specificity. Moreover reading the document as a whole does not indicate an intention to plead this particular point. The applicant therefore failed to comply with O84A r.3 R.S.C.

108. Further this issue was not raised until Mr. Moore swore his affidavit on 14th July, 2015, long after the 30 days allowed by the remedies regulations had expired. Even then BAM, being conscious that it wished to pursue such a complaint, might have applied for late leave (O84A r.4(2)) to review on this ground, or applied under O84A r.8(1) to amend the statement of grounds - but chose not to do so. Certainly after Mr. McCarthy's second affidavit sworn on 6th October, 2015 came to hand BAM must have been aware that the admissibility of this further issue was contested, yet thereafter no application was made, and no such application was made at the trial of the action.

109. A similar preliminary issue arose in a public procurement case of *Fresenius Medical Care (Ireland) Limited v. HSE* [2013] IEHC 414. At para. 21 of his judgment Peart J. referred to the judgment of Denham J. (as she then was) in *A.P. v. D.P.P.* [2011] 1 IR 729 –

> "…which makes clear that save where grounds have later been amended with leave of the court, an applicant seeking reliefs by way of judicial review is confined to the reliefs and to the grounds for those reliefs which the applicant has set forth in the Statement of Grounds, and for which leave has been granted. As stated in O. 84 RSC the applicant is further required to state precisely its grounds of complaint and not to do so in a vague and imprecise manner, and must further identify what matters and facts are relied upon in respect of the grounds asserted. It is important that these rules be observed as otherwise a respondent runs the risk of not knowing what case it has to meet until all affidavits and submissions are filed. The Statement of Grounds equates to a Statement of Claim in a plenary action. The Statement of Opposition equates to the Defence in such proceedings. Whatever form the proceedings take, the pleadings are important as they both define and confine the issues to be determined in the case. A party cannot be permitted to deviate or expand upon those issues by stealth…."

In that case Peart J. found that one particular point of objection was covered generally by a pleading but had been impermissibly expended upon in legal submissions which went "beyond the grounds for which leave was sought and granted". [2] I respectfully adopt the approach taken by Peart J. and find that this issue was not raised, or not raised with sufficient precision.

110. Accordingly, I find that this issue of transparency is impermissibly raised and pursued in the applicant's affidavit evidence and in submissions because of breach of Regulation 8.4, the absence of any adequate pleading, and the absence of any application for leave or amendment.

First Issue: Did NTMA have a discretion under the ITN to accept (a) a late tender or (b) a tender notwithstanding that some of its documents were received after the deadline or (c) the tender of Eriugena?

Interpreting the ITN

111. The principles applicable to interpretation of the ITN were not really in dispute. In *SIAC v. Mayo County Council (Case C-19/00)*

[2001] E.C.R. I-7725, the European Court confirmed that interpretation of tender documents is a matter for the national court. At para. 41 the court stated that the "principle of equal treatment implies an obligation of transparency in order to enable compliance to be verified …", and at para. 42 stated:-

> "More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way."

That this approach to interpretation applies to the terms of contract documentation other than the award criteria, including the procedural rules set out for submission of tenders, was not contested.

112. In *Gaswise Ltd. v. Dublin City Council* [2014] IEHC 56, Finlay-Geoghegan J. analysed the "reasonably well-informed and normally diligent tenderer" standard established in *SIAC*, and endorsed the reasoning of McCloskey J. in *Clinton (T/A Oriel Training Service) v. Department for Employment and Learning* [2012] NIQB 2 where he observed at para. 38:-

> "The *SIAC* test exhorts the court to attempt, so far as practicable, to occupy the shoes of the hypothetical tenderer. The test provides some insight into the characteristics and attributes of such a tenderer: well, but not necessarily fully, informed and usually careful and attentive, but not invariably a paragon of diligence. The incorporation of the adjectives "*reasonably*" and "*normally*" in the test, convey the notion of a tenderer who may be vulnerable to a certain (though not excessive) degree of error, inattention and other human weakness. In other words, the *SIAC* hypothetical tenderer is a terrestrial, rather than celestial, being, hailing from earth and not heaven. In its determination of this issue, I consider that the court should approach the matter not as an exercise in statutory construction or as one involving the interpretation of a deed or contract or other legal instrument. To adopt such an approach would not, in my view, be consonant with the *SIAC* test. Rather, the court's attention must focus very much on the "industry" concerned, in which the professionals and practitioners are not lawyers."

Finlay-Geoghegan J. added, at para. 23:

> "I would, respectfully agree with McCloskey J. that the court in answering the question should attempt to put itself in the shoes of a reasonably well informed and normally diligent tenderer who would be responding to this particular ITT, *i.e.* a person providing the relevant gas services, and should not do so as a lawyer."

113. In that case Finlay-Geoghegan J. found that while the tender document was capable of being construed in the manner contended for by the respondent, namely that a replacement part statement should have been submitted with the tender and not a replacement part list, she found that considered objectively and from the perspective of a reasonable well-informed and diligent tenderer ("REWIND tenderer") in the gas service industry this was not a clear or precise requirement.

The ITN

114. The ITN is a lengthy document running to some 164 pages. The first five pages contain an "Important Notice", and are then followed by a table of contents showing that the main part of ITN is broken into nine sections (pp.7-94), followed by twelve appendices. Definitions are contained in appendix 1 and run to some five pages. Counsel for BAM placed considerable emphasis on the layout and order of the ITN in support of its central contention that while the Authority was allowed certain discretion to accept late documents in respect of draft tenders, no such discretion extended to the acceptance of late documents or late tenders at the final tender stage. In order to analyse this and other arguments made by the parties, it is necessary to refer to certain parts of the ITN.

The "Important Notice"

115. The "Important Notice" covers a number of matters of some importance. Firstly it refers to "Defined Terms", and states that the terms used in the ITN "which are not defined in the Project Agreement or the body of the text of the ITN, are set out in Appendix 1 (Definitions)". The "Project Agreement" is defined in appendix 1 to mean "the principal agreement to be entered into by the Authority and PPP Co. for the design, build, finance and maintenance of the Project in the form provided with this ITN…" The Important Notice under the heading "Conflicts" states that "In case of a conflict between the ITN and the Project Agreement, the Project Agreement shall prevail."

116. The Project Agreement was not put in evidence, and no argument was advanced that any interpretation arising from the Project Agreement should prevail over the arguments on interpretation advanced before this Court.

117. The Important Notice includes the following statement, relied upon by the Authority in support of its actions:-

"Healthy Procurement Process

> The authority reserves the right, in its absolute discretion, to take such steps as it considers appropriate to ensure that a healthy competition is maintained throughout all stages of the Tender Process. For example, if a tenderer either withdraws or is expelled from the competition, the Authority is entitled to invite one or more of the parties who expressed an interest in the Project but were not shortlisted, to enter into the Tender Process. In such circumstances the Authority will notify Tenderers accordingly and reserves the right to amend the indicative timetable in Section 2.3 (Indicative Timetable)."

118. Other provisions of the Important Notice concern the exclusion of any liability on the part of the NDFA in relation to the content of the ITN; a prohibition on tenderers engaging directly with the Authority without the prior approval of the Authority; a provision excluding the contents of the ITN as forming any representation of fact or promise or constituting the basis of a contract in relation to the project, or establishing any legal relationship otherwise than under the Confidentiality Undertaking which tenderers were required to provide to the Authority; dealing with non liability on the part of the Authority for costs incurred by tenderers save in accordance with Section 2.6; stipulating that the ITN was governed and construed in accordance with the laws of Ireland; reserving to the Authority the right in its absolute discretion to amend or withdraw the tender process; governing publicity; dealing with conflict of interest; dealing with FOI requirements and empowering the Authority to require further details in the event of any abnormally high or low tender. Two further provisions provide:-

"Acceptance of ITN

> Each Tenderer's acceptance of delivery of this ITN constitutes its agreement to, and acceptance of, the terms of the ITN. This ITN is not being distributed to the public nor has it been filed, registered or approved in any jurisdiction. Tenderers will inform themselves of and will observe any applicable legal requirements.

Amendments and Clarifications of ITN documents

> The Authority may in its absolute discretion issue a clarification, provide additional information, or amend the ITN Documents at any time during the Tender Process. The Authority shall inform Tenderers in writing of any such clarifications, additional information or amendments but shall not be obliged to provide reasons for such clarifications, additional information or amendments."

119. Although little argument was addressed to it, it is appropriate to comment on the status of this Important Notice. It refers to and incorporates the defined terms in Appendix 1. It refers to other terms, largely protective of the Authority, of a sort that one would expect to see in a procurement document of this importance. It also contains important provisions relating to representations, the applicable law and jurisdiction, and the power of the Authority to make changes to the tender process.

120. In the view of the court, the provisions in the Important Notice are part and parcel of the ITN agreement and would have been read and considered by a REWIND tenderer. In accepting the terms of the ITN, each Tenderer was accepting, as part of that, the provisions of the Important Notice, and each of these are contractually binding between the Authority and each Tenderer. This follows in the absence of any provision of the ITN excluding those provisions from contractual effect. It necessarily follows that insofar as they are relevant or assist the court, the provisions of the Important Notice are matters to which the court can have regard when construing the meaning of later provisions of the document, and the document as a whole.

Section 1 – Introduction

121. Section 1.1 sets out the background to the Authority, and 1.1 (c) states:

> "The NDFA was established on 1st January, 2003 under the National Development Finance Agency Act, 2002. The role and functions of the NDFA includes a specialised procurement delivery function. The NDFA has established a Centre of Expertise for the specialist procurement of Public Private Partnership ("PPP") projects, including third level education projects."

122. Section 1.2 deals with the ITN documents. Section 1.3 deals with the background to the Project, and gives the overall project objectives and describes the Central Quad and East Quad facilities and the sites, the site surveys that have been undertaken and the planning requirements. While a pre-planning application compliance matrix had been pre-agreed with Dublin City Council, it was anticipated that the preferred Tenderer would obtain full planning permission for each project facility. Section 1.3 (g) sets out design and construction considerations.

123. Section 1.3(h) deals with the concept and requirements of computerised "Building Information Modelling". This sets ten "strategic BIM priorities" which include:-

> •"Create a virtual model to enable asset management and operational efficiency and reporting;
>
> • Provide a virtual asset that can translate directly into CAFM systems and procurement;
>
> • Understanding of method and safety;
>
> • To allow for continuous performance evaluation of the facility and energy usage".

The text then states:

> "It is a requirement that the Tenderers will develop and maintain a data rich Building Information Model ("BIM") in accordance with the agreed Building Information Model Execution Plan ("BEP") and Appendix 12 (Authority's BIM Model Production Delivery Table) to this ITN. Design information will be coordinated and communicated to the Authority using BIM at various stages of development during the tender process.
>
> During the Construction Period, PPP Co. will be required to continually and iteratively develop the BIM to facilitate collaborative working practices to support the PPP Co. project control and reporting. The PPP Co. will provide access to the BIM and any underlying data on an ongoing basis throughout the Construction Period".

This section also provides that the "data rich BIM" will also be used to maintain the facilities once constructed and must be updated during the services period.

It is thus apparent that the significance and utility of BIM files of the successful tenderer extends beyond the Tender Process, up to the end of the Services period.

124. Section 2 of the ITN is headed "Process" and para.2.1 is sub headed "General Overview of Process". Para. 2.1(a) provides that 'the first phase' of the Tender Process commencing with the issue of the ITN is the "Consultation Process" which is stated to involve "a series of technical, legal, insurance and financial meetings with each Tenderer during which the Tenderers will develop their proposed solutions. Further details are set out in Section 3.3 (Consultation Meetings) of this ITN."

125. At this point it is useful to mention a number of definitions in appendix 1:-

> **"Consultation Meetings"** means the meetings referred to in Section 3.3 (Consultation Meetings);
>
> **"Consultation Period"** means the period commencing on the date of issue of this ITN and ending on Submission Date for Tenders or (if applicable) abandonment of the Tender Process, whichever is earlier;
>
> **"Consultation Process"** means the process set out in Section 3 (Information Communications) of this ITN;
>
> **"Draft Tender"** means those Submissions submitted in accordance with the requirements of this ITN, which comply with Section 5 (Draft Tender);
>
> **"Draft Tender Submission Date"** means the Submission Date for Draft Tenders;

> **"Submissions"** means any of Base Draft Tender, Variant Draft Tender, Base Tender or Variant Tender (as appropriate) proposed by Tenderers during the Consultation Process in respect of the Project and **"Submission"** means any one of them;
>
> **"Submission Dates"** means the dates for the submission by Tenderers of the Draft Tender or Tender as part of the Consultation Process by the dates set out in Section 2.3 (Indicative Timetable) and **"Submission Date"** means any one of them;
>
> **"Tender"** means a Base Tender or a Variant Tender submitted by a Tenderer in respect of the Project in accordance with the requirements of this ITN.

126. Thus, while Section 2.1 (b) refers to the Consultation Process as the first phase, the definition of "Consultation Period" indicates that that period commences with the issue of the ITN and extends to the Submission Date for Tenders (or the abandonment of the Tender Process). In other words, it is not confined to the period up to submission of the *draft* tender (the "Draft Tender Submission Date"), but extends up to 17.00 on 28th November, 2014 or abandonment of the process.

127. Section 2.1 (c) requires that Tenderers submit a Draft Tender to the Authority in accordance with Section 5. Subclause 2.1(d) states that the Authority will not evaluate any Draft Tender but will review and discuss each draft Tender with such a Tenderer in order to assist it in developing its solutions.

128. Subclause 2.1(i) provides that "the Authority may, in its discretion, take such other steps in the Consultation Process as it deems appropriate, including arranging further Consultation Meetings. Tenderers will then be required to submit Tenders."

129. Subclause 2.1(j) states – "once Tenders have been submitted, the Authority will assess those Tenders in accordance with the evaluation criteria set out at Section 7 (Tender Evaluation) of this ITN, in order to identify the most economically advantageous Tender."

130. Subclause 2.1(k) provides that having identified the "Preferred Tender" the Authority then intends to proceed to Commencement Date in the shortest possible time frame after receipt of planning permission by the Preferred Tenderer.

131. Section 2.2 headed "Consultation Process" deals with this in more detail:-

> "(a) during the Consultation Process, Tenderers will be required to develop their proposals through a series of Consultation Meetings with the Authority. It is expected that there will be five Consultation Meetings (three technical and two legal/financial/insurance) with each of the Tenderers prior to the submission date for Draft Tenders. Two final Consultation Meetings (one technical and one legal/financial/insurance) may be held if necessary to discuss any clarifications arising in respect of the Draft Tender(s) and the issues identified in the Authority's review of the Draft Tender(s). Tenderers are referred to Figure 1: Indicative Consultation Process, Section 2.3 (Indicative Timetable) of this ITN for further details about the Consultation Process."

132. Earlier in this judgment, I set out the relevant entries from the Indicative Timetable in Section 2.3, from which it will be recalled that the Draft Tender Submission date was the 19th September, 2014. Another indicative date is 14th November, 2014, described as "Query Closing Date". Counsel for BAM submitted that this was the end of the Consultation Process, which, it was submitted, was only extendable if there were further queries made thereafter. However the Authority contended that the Consultation Process continued up to 17.00 on the 28th November, 2014, being the Tender Submission Date.

133. Section 3 of the ITN is headed "Information and Communications" and deals with the "Consultation Process", involving consultation meetings between Tenderers (and their architectural, building, technical, financial and legal experts) and the Authority, the raising of queries and the issue of responses and notifications via ASITE, access to the Data Room via Asite, site visits, and "Clarification Request" in relation to the tender process. Section 3.4(c) stipulated that "draft tenders and Tenders should be submitted to the Authority through its ASITE electronic document management system …"

134. Section 3.2 headed "Query Procedure" at subpara. (a) states that:

> "In addition to, and in parallel with the Consultation Process, Tenderers may submit queries or requests for further information ("Queries") in relation to the Project during the Consultation Period up to the Query Closing Date set out in Section 2.3 (indicative timetable). Queries received after the Query Closing Date will only be reviewed at the absolute discretion of the Authority …"

135. Clearly therefore that the "Consultation Process" could be extended beyond the Query Closing Date where the Authority in its absolute discretion received and decided to review queries raised after that date. In the present case there were no queries raised after the Query Closing Date, and Counsel for BAM therefore argued that the Consultation Process ended on 14th November, 2014. It is none the less clear from the express wording in the definitions that "Consultation Period" continued up to and ended on the submission date for Tenders i.e. 17.00 on the 28th November, 2014.

136. Section 4 headed "Submission Requirements" contains a number of provisions, particularly in clauses 4.1 and 4.9, that are central to the respondents' submission that the Authority had the power and discretion to accept a late tender notwithstanding that some of its documents were received after the deadline.

Section 4.1 provides:-

> "4.1 General
>
> This Section 4 sets out those requirements which shall apply to each Submission. Tenderers should note that Submissions are required to be submitted to ASITETM only (no hard copies shall be provided).
>
> (a) All Submissions must:
>
> (i) be prepared and submitted in accordance with the requirements contained in the ITN Documents;
>
> (ii) comply with any directions given to Tenderers by the Authority during the Tender Period; and

(iii) not contain any proposals that were the subject of objection by the Authority during the Tender Period.

(b) If a Submission fails to comply in any respect with the requirements (or the intent of such requirements), set out in Section 4.1(a) or is ambiguous, the Authority shall be entitled in its absolute discretion, to take such action as it considers appropriate, including:

(i) rejecting the relevant Submissions as non-compliant;

(ii) without prejudice to the Authority's right to reject the relevant Submission, the Authority may, in its absolute discretion:

(A) meet with, raise issues with and/or seek clarification from a Tenderer in respect of the relevant Submission;

(B) request a Tenderer to provide the Authority with information or items which have not been provided or have been provided in an incorrect, unclear or ambiguous form;

(C) negotiate an amendment and/or change to the relevant Submission with a Tenderer;

(D) waive a requirement which, in the opinion of the Authority, is minor or procedural; and/or

(E) amend the relevant requirement of the ITN Documents and invite Tenderers to adjust their Submissions on the basis of such revised requirement PROVIDED HOWEVER no amendment and/or change to the Authority's requirements shall be permitted if, in the opinion of the Authority, the amendment and/or change, if accepted, would constitute a material amendment and/or change to the Authority's requirements.

(c) If a Tenderer does not submit all information requested by the Authority pursuant to Section 4.1(b)(ii) above by the time specified, or if the information submitted is rejected by the Authority, the Tenderer's Submission may be rejected and not be considered further. If a Tenderer submits all information requested in accordance with the request, the Authority will send out a confirmation of receipt of a complete Submission to that Tenderer.

(d) The Authority reserves the right to evaluate and select any Submission from a Tenderer notwithstanding that such Tenderer's Base Submission and/or Variant Submission do not comply with the requirements set out in Section 4.1(a) above and/or involves an amendment or an omission, which in each case is not, in the reasonable opinion of the Authority, material."

137. Counsel for the respondents argue that clause 4.1(b), and its subclauses, give the broadest possible power, subject to the General Principles, to the Authority to accept a late tender or late tender documents. It was argued that under 4.1(b)(ii)(A) and/or (B) the Authority could have sought clarification or requested the outstanding BIM files or other information, but this was not necessary because they were submitted shortly after the deadline. Further it was argued that under 4.1(b)(ii)(D) the Authority was entitled to treat the late submission by Eriugena as minor or procedural, and to waive it. Reliance is also placed on 4.1(d) as empowering the Authority in the exercise of it's discretion to evaluate and select Eriugena's Tender notwithstanding that certain uploads were omitted at the deadline. In particular, it was urged that most of the information in the BIM files had already been submitted in other documents, and it was therefore within the power and discretion of the Authority to form a "reasonable opinion" that the omission/late submission of BIM files was not "material" in making these submissions . The Authority argued that Section 4 should be interpreted as applying not just to draft tenders, but to final tenders because the references to "Submissions" and "a Submission" should be read in conformity with the definition of "Submissions" which includes a "base tender".

138. Counsel for the Authority also relied on Section 4.9 which provides:-

"4.9 Delivery of Submissions

(a) Tenderers may submit the information referred to in Section 5 (Draft Tender) and 6 (Tenders) at any date prior to the relevant Submission Dates as set out in Section 2.3 (Indicative Timetable) with the Approval of the Authority. Tenderers may not seek to withdraw any such information prior to the relevant Submission Dates. Submissions received after the relevant Submission Date will only be considered by the Authority in its absolute discretion.

(b) Tenderers must send Submissions to the ASITETM address specified in Appendix 10 (Electronic Document Management System (ASITETM) Guidelines). Tenderers must obtain an ASITETM system receipt, acknowledging delivery of Tenders by 17:00 hours Dublin time on the Submission Date specified in the timetable in Section 2.32.3 (Indicative Timetable)."

139. It was argued that section 4.9(a) applies specifically to Tenders, as well as draft tenders, and gave the Authority an absolute discretion to consider "Submissions" received after the tender deadline. Similarly, it was argued that the wording in section 4.9(b) refers to "Delivery of Tenders", and would make no sense if it related only to draft tenders.

140. In making these submissions the respondents also relied on section 4.3:-

"4.3 Number of Submissions:

(a) Subject also to Section 4.6(b)(i), Tenderers shall not submit more than four (4) Draft Tenders or Tenders in total."

It was argued that this further reference to "Tenders" supports the interpretation that section 4 applies, not just to draft tenders, but also to final tenders. For the same argument, counsel also relied on section 4.4 headed "Submission Structure", the first part of which reads:-

"Submissions must contain the technical, legal, insurance and financial information set out in Section 5 (Draft Tender), or

Section 6 (Tenders), as the case may be …"

141. The main argument made in response to this by counsel for the applicant was that section 4 concerns the draft tender stage only, and that if it is to be interpreted as applying to final tenders, this would be inconsistent with later provisions of the ITN. It was argued that the definition of "Submissions" refers only to draft tenders or tenders "during the Consultation Process" which ended at the Query Closing Date i.e. 14th November, 2014. In particular it was argued that section 7 gives the Authority a very limited discretion, following receipt of Tenders, not to deem a tender non-compliant with the ITN where there is a clerical or administrative error, and therefore the discretions conferred by clause 4 cannot have been intended to apply to the final Tender. To better understand these submissions it is necessary to refer to sections 5, 6 and 7 of the ITN.

142. Section 5 of the ITN is headed "Draft Tender". Section 5.1 under the heading "General" provides that:-

> "Tenderers are required to provide their Draft Tenders no later than 17:00 on the Submission Date set out in Section 2.3 "Indicative Timetable".

The relevant date in the time table is 19th September, 2014. In comparing the date for submission of draft tenders with the date prescribed in Section 6.1 for the Submission of Tenders, counsel for the applicant drew attention to the fact that the draft tender submission date is nowhere described as a deadline, whereas the tender submission date appears in section 6.1 under the heading "Tender Deadline".

143. Section 5.2 sets out the information that must be contained in Draft Tenders and stipulates that "(c) each Draft Tender must comply with the requirements set out in Section 4 "Submission Requirements". In addition, each Draft Tender must include the technical, financial, insurance and legal information set out below." Subsections 5.3 – 5.6 then set out in detail the information that must be included.

144. Section 5.7 headed "Conclusion of Consultation Process" at (a) provides that within 20 business days following the draft tender submission date the authority would issue a draft tender response to each tenderer, and could, if it considered it appropriate to do so, issue "a further amended Project Agreement". Subsection (b) provides that if a further amended Project Agreement was issued "… Tenderers may, through the Queries Process, submit proposed Amendments to the further amended Project Agreement by the Query Closing Date …" i.e. 14th November, 2014. Subsection (d) then provides for two final consultation meetings with each tenderer to discuss "any final issue in respect of their proposed Tenders". Subsection (e) provides that insurances will be discussed at the first of these two meetings, and subsection (f) provides:-

> "For clarity, the Authority intends issuing a final Tender Project Agreement not later than (5) Business Days prior to the Query Closing Date …"

145. The applicant relied on these provisions as emphasising that they defined the end of the Consultation Process, and in support of it's submission that section 4 applies only up to the Query Closing Date, and does not apply to the submission of tenders.

146. Section 6 is headed "Tenders" and 6.1 provides:-

> "6.1 Tender Deadline
>
> Tenders will be received in soft copy by the Authority by 17:00 on the Tender Submission Date for Tenders as indicated in Section 2.3 (Indicative Timetable)."

147. Counsel for the applicant submitted that this created a deadline, the meaning of which is plain, and reflected the language of the Directive and Regulations, and that there was only a limited discretion, which could only be extended in "exceptional circumstances", where the failure to meet the deadline lies outside the control of the tenderer – and that there could be no broader discretion because that would be inconsistent with the General Principles.

148. Section 6.2 headed "Tender Requirements" then sets out the requirements of each Tender, albeit the Base Tender or a Variant. Under section 6.2(c) it must, *inter alia*,

> (i) comply with "the requirements set out in section 4.5 (Base Submission Requirements) applicable to Tenders (save to the extent that any amendments to such requirements were proposed in accordance with the Query Procedure and were Approved)", and

include the technical information set out in Section 6.3 – 6.5 of the ITN, and the financial information set out in Section 6.6, and other listed and specified information. Counsel for BAM made the point that this provision would not be necessary if Section 4 applied to Tenders.

149. Section 6.2(e) provides:-

> "(e) All Tenders must be submitted in accordance with the general requirements of Sections 4.1, 4.2, 4.3, 4.4, 4.8 and 4.10 (Submission Requirements) applicable to tenders."

Counsel for BAM argued again that if the Authority was correct in its submission that Section 4 applied to Tender submissions, which it was not, this provision would not be necessary, and that it only related to "requirements" and did not extend to tenders any of the discretions conferred by Section 4 in respect of draft Tenders.

150. There is in fact no section 4.10 in the ITN, and there was some debate as to what meaning should be attributed to subsection 6.2(e) in that context. Counsel for the Authority argued that section 4.9 does not contain "requirements" but rather confers a discretionary power on the Authority, and that it's omission from 6.2(e) was consistent with this as it was not necessary or logical to refer to section 4.9. Counsel for the applicant on the other hand asserted that there was deliberately no reference to 4.9(a) because it was not intended that that the power described there should apply at the Tender stage.

151. Subsection 6.3 is a lengthy and detailed provision setting out what must go into the tender. Subsection 6.3(b) is relevant to BIM files and the first part of it reads:-

> "(b) Building Information Model ("BIM")

Tenderers shall provide BIMs in accordance with the Authority's BIM Model Production Delivery Table as set out in Section 1.3(h) & Appendix 12 to this ITN and the requirements of Schedule 3 (Works Requirements) and Schedule 14 (Reports & Records) to the Project Agreement as follows:

(i) A fully federated, interactive 4-D Project Information Model ("PIM") in Navisworks, Syncro or similar format should be submitted. The 4-D Model will be organised into an appropriate task based selection sets where appropriate and all model elements linked to corresponding tasks within the imported program. The native programme file (Asta, MS Project or similar) file and models should also be issued. The model shall produce a 4-D simulation to demonstrate construction sequencing, site utilisation and control."

In relying on this as a requirement of each valid Tender, counsel for the applicant emphasised that the BIM is not just a viewing tool, but a fully federated model which enables the viewer to look, not just at design, but also construction sequencing, site utilisation and control, which is also relevant to maintenance of the completed buildings. The applicant also relied on clause 6.8 headed "Tender - Summary Checklist" which restates, *inter alia*, that "All Tenders are required to contain the technical, financial and legal information set out below in Section 6 (Tenders) (summarised in the check list below)", and the checklist itself which includes reference to the "Building Information Model" under the section concerned with "Design Report".

152. Section 7 of the ITN is headed "Tender Evaluation", and it is appropriate to set out subsections 7.1 and 7.2 in full:-

"7. Tender Evaluation

7.1 Assessment of Tenders

(a) This Section provides guidance on the methodology the Authority will use to evaluate Tenders. Each Tender will be evaluated on an equal basis.

(b) The Project Agreement, if awarded, will be awarded to the Tenderer which submits the most economically advantageous Tender to the Authority.

(c) Each Tender will be evaluated using the following two-stage evaluation procedure:

(i) Compliance Check

Assessment of the completeness and conformity of each Tender in accordance with the ITN.

(ii) Evaluation

Evaluation of each Tender in accordance with the evaluation criteria set out in Section 8 (Evaluation Criteria).

(d) Authority Discretion following Receipt of Tenders.

A tender will not be deemed to be non-compliant, by reason only of the inclusion of any of the following:

(i) an amendment to the technical requirements or Schedule 3 (Works Requirements) of the Project Agreement which in the opinion of the Authority is not material; or

(ii) an error, which in the reasonable opinion of the Authority is clerical or administrative.

7.2 Compliance Check

(a) Contents Check

All Tenders must contain the information set out in Section 6 (Tenders).

(b) Conformity Check

Each Tender must comply with the following:

(i) In respect of Base Tenders only, the requirements set out in Section 6.2 (Tender Requirements) applicable to Base Tenders;

(ii) in respect of Variant Tenders only, the requirements set out in Section 6.2 (Tender Requirements) applicable to Variant Tenders; and

(iii) other general requirements of this ITN."

The respondent further relied upon section 7, and in particular section 7.1(d) as empowering the Authority to accept the late tender/late tender documents submitted by Eriugena. It was argued that there is nothing in the ITN, or in section 7, that expressly provides that a tender, all or part of which is submitted after the tender deadline, is invalid or cannot be considered or evaluated. It was submitted that as a tender consists of a large number of documents, the "errors" referred to in section 7.1(d)(ii) should be read to include any omission of the required documents, and that is clearly intended to be within the discretion of the Authority. It was asserted that this is a belt and braces provision that is additional to the powers conferred on the Authority in section 4. It was further argued that section 7.1(d) limits the discretion of the Authority in that, if it is of the reasonable opinion that an error is clerical or administrative, it cannot deem the Tender to be non-compliant.

153. The applicant submitted that section 7 only applies after a valid Tender has been received ("following Receipt of Tenders"). While accepting that 7.1(d)(ii) does confer discretion, it applies only to errors, and not omissions i.e. it can only apply to errors within the Tender, and not to documents or information omitted. It was further submitted that this provision was not in fact relied upon by

the Authority in the notification of its decision or ensuing correspondence, and this was consistent with the fact that it could not be relied upon.

154. The applicant further relied upon clause 7.3 headed "Tender Evaluation", subclause (a) of which states:-

> "(a) Tenders that have satisfied the assessment for completeness and compliance will then be evaluated against the criteria set out in Section 8 (Evaluation Criteria) and ranked based on the marks received."

155. Counsel argued that the reference to completeness is meaningless if the Authority has the power to request or subsequently receive and accept missing parts of a Tender. It was further argued that there would be no need for any reference to "completeness" if section 4 did in fact apply to Tenders, and in this regard it was asserted that section 7.1 and 7.3(a) are inconsistent with the respondent's suggestion that section 4 applies to Final Tenders.

156. Section 8 then deals with Evaluation Criteria, and has no particular relevance to the issues. Section 9 headed "The Next Stage" is stated in 9.1(a) to be "indicative only" and (b) provides:-

> "Following evaluation of the Tenders, the Authority intends to appoint a Preferred Tenderer and to proceed in accordance with the process outlined in Section 9.2 (PT Process)."

This heralds a new interactive process with the preferred tenderer, in this case Eriugena.

Discussion

157. A REWIND tenderer engaging with the ITN would be generally aware that a public procurement of this nature and magnitude would entail a number of phases: publication, pre-qualification, consideration of the ITN, development of tender design and other elements of the proposal during a consultation period, the submission of draft Tenders, and submission of final tenders before a deadline. Such a tenderer would appreciate that the terms of the ITN are of central importance, and that certain words and phrases must be interpreted in accordance with the definitions – in this instance the definitions in appendix 1 – and applied consistently throughout the document.

158. The "Consultation Process" is defined to mean the process in section 3, which in essence, is the process by which the tenderers with their designers and other experts and associates develop their proposals by their own endeavours and through interaction with the Authority. That interaction occurs through consultations – with the Authority or stakeholders, or agents of the Authority such as Asite – by way of queries and responses and notifications/circulars communicated through Asite, and by way of access to the Data Room via Asite. By this means the tenderer alters and refines the proposal. This phase expressly includes the submission of draft Tenders (whether 'Base' or 'Variant') (s.2.1(c)) – which are not evaluated but are reviewed "…to assist [a tenderer] in developing solutions" (s.2.1(d)). It also includes two consultations post-Draft Tender (s.2.2(a)), the last of which was to take place at the latest on 22 October, 2014 (*per* the Indicative Timetable).

159. Within this phase tenderers can raise queries, up to 14th November, 2014. It is notable that 14th November, 2014 was close to the deadline for submitting final Tenders, of 28th November, 2014. Queries raised after 14th November might have been reviewed and responded to at the absolute discretion of the Authority (s.3.2(a)), so in theory that date could be later. However it would not be reasonable to expect Queries – other perhaps than queries of a technical nature related to problems of uploading - to be raised or answered very close to the Tender deadline, in particular during the period that the Asite portal was open for uploading of the final Tender (from 24th November).

160. I accept the applicant's contention that the ITN is to be interpreted on the basis that the Consultation Process was at an end at the Query Closing Date – which was 14th November, 2014, subject only to extension of the process for late queries, something which did not occur in the present case. Notwithstanding that the "Consultation Period" under the definition of that term extended up to the Submission Date for Tenders, I am satisfied that the REWIND tenderer would have understood the ITN to mean that the process of consultation or interactive development of the proposal ended prior to 28th November. I reject the respondent's contention that the reference to "Tenders" in s.3.4(c) implies that final tendering is part of the "Consultation Process". S.3.4 is headed "Communications and Queries" and is concerned with the logistics of communicating via Asite, and extends this requirement to the submitting final Tenders –but that does not bring them back into "Consultative Process".

161. It should therefore follow that the REWIND tenderer would understand the definitions of "Submissions" and "Submission Dates" relate respectively only to submissions made "during the Consultation Process" or "as part of the Consultation Process" , and do not apply to the submission of the final Tender and any submissions or document accompanying the final Tender (or any Variant Tender).

162. Of course it is true that both these definitions do refer to "Tender" as well as "Draft Tender", and it was argued by the respondent that submissions should therefore include the final Tender and hence that the Authority enjoyed the discretionary powers set out in section 4. However when these definitions are considered in the context of sections 3, 4 ("Submissions Requirements") and 5 ("Draft Tender"), and the logical positioning of these sections within the ITN, and the sequenced phases of the process leading up to final Tender, I am satisfied that the REWIND tenderer would recognise that the references to "Tender" are qualified by the references to "Consultation Process". Moreover, the drafters have used the word "Tender(s)" in s.4 in certain places to give consistent meaning but without necessarily applying s.4.1 to final Tenders.

163. Certain elements of section 4 reinforce this view. The heading is "Submission Requirements", in contradistinction to section 6 where s.6.2 is headed "Tender Requirements". The provisions of s.4.1(b) relating to "Submissions" are flexible and afford the Authority an absolute discretion to seek clarification or more information, to negotiate an amendment, to waive a minor or procedural requirement, and to amend the ITN Documents. S.4.1(c) merely provides that the Submission "may" be rejected if all information is not submitted in time, and from this wording it may be inferred that the Authority can (and may well) accept a late Submission. S.4.1(d) empowers the Authority to evaluate a Submission notwithstanding failure to comply with requirements or where it involves a non-material amendment or omission.

164. This is not the sort of flexible regime that a REWIND tenderer would associate with the submission of a final Tender, particularly in respect of a major public project subject to EU procurement law and governed by the General Principles. On the other hand, such provisions with built-in flexibility are consistent with a process that requires Tenderers to bring their proposals in respect of a complex and extensive project to an advanced level at draft Tender stage, and to utilise, for the first time in a PPP in the State, the Asite system for submitting the draft Tenders including complex BIM files.

165. The respondent has relied on references to "Tenders" in s.4.3(a) and in s.4.4 to "Section 6 (Tenders)" as demonstrating that

clause 4 applies to final Tenders. However such reliance ignores the fact that under s.5, Draft Tenders must comply with the "Tender Requirements" of final Tenders under s.6.2, and must provide the "Technical Information on Design, Construction and Services required to be in final Tenders by s.6.3,6.4 and 6.5 (see s.5.3), and much (though not all) of the Financial Information (s.5.4), and much of the Insurance and Legal Information (s.5.5 and s.5.6) required in final Tenders, and this extensive overlap between the s.5 draft Tender and s.6 final Tender explains these references in s.4.

166. In my view the same reasoning applies to s.4.9(a), the second sentence of which provides that "Submissions received after the relevant Submission Date will only be considered by the Authority in its absolute discretion." This provision should be interpreted as referring only to "Submissions" made during the "Consultation Process", i.e. up to 14th November, 2014.

167. S.4.(9)(b) prescribes that Tenderers use Asite for Submissions, and that they obtain a system receipt i.e. an electronic receipt "…acknowledging delivery of Tenders by 17:00 on the Submission Date….". This use of the word "Tenders" is relied upon by the respondent in support of its argument that s.4 applies to Tenders, but in my view this is overborne by the ensuing reference to "Submission Date" which I am satisfied must be within the "Consultation Process" i.e. must arise before 14th November, 2014.

168. As to Section 6.2(e) this cannot be read as incorporating into Section 6 in relation to Tenders the "discretions" contained in Section 4 – it only applies certain "requirements" for draft Tenders in Section 4 to final Tenders. I also accept the submission that Section 6.2(e) would be surplusage if Section 4 in fact applied to Tenders. As to the reference to "4.10", this was clearly a mistake as there is no Section 4.10. A REWIND tenderer could not presume either that it meant to apply Section 4.9 to Tenders, or that it intended to exclude the application of 4.9 to Tenders; in the absence of clarification it would have to be regarded as meaningless.

Section 7

169. While s.7 is headed "Tender Evaluation" it is expressly concerned, as the first stage of such evaluation, with a 'Compliance Check', which is an "Assessment of the completeness and conformity of each Tender in accordance with the ITN" (s.7.1(c)(i)) and s.7.2). As one of the requirements of the ITN is that final Tenders should be received by 17:00 on 28th November, 2014 (S.6.1), consideration of whether a Tender is compliant with that deadline is a matter that the Authority must consider as part of the Compliance Check.

170. The Tender will obviously consist of a great many documents – more properly described as "files" because of the electronic submission - and the Compliance Check must be undertaken even if one or more required tender files are not submitted, or not submitted on time. This interpretation is reinforced by the reference to "completeness" in s.7.1(c)(ii).

171. I therefore cannot accept as correct the applicant's submission that s.7.1(d) does not come into play until every Tender document or file has been received.

172. Further the Compliance Check is dual purpose - the Authority must check completeness *and* conformity, *inter alia*, with the requirements of s.6.2 and, by extension, under that provision the requirements of 6.3 (which covers BIM files).

173. Section 7.1(d) expressly deals with the situation where a Tender, which would otherwise be "deemed to be *non-compliant*", may nonetheless be treated as compliant. It is not concerned with evaluation, which is covered by s.7.3. The heading "Authority Discretion following Receipt of Tenders" cannot be interpreted as limiting the discretion only to complete Tenders, as to do so would be to ignore the Authorities' obligation to consider *completeness*, and would mean that s.7.1(d) applies only to the *conformity* check – which is not what it states.

174. For these reasons a REWIND tenderer considering the word "error" in s.7.1(d) would interpret it as including a clerical or administrative error resulting *in omission or failure to submit all Tender documents/files* before the deadline, an obvious form of incompleteness. In this regard, I do not accept the applicant's contention that the wording "…inclusion of….(ii) an error…" justifies a restrictive interpretation of the word "error" as being limited to positive errors, as opposed to omissions. I can also see no logic to the suggestion that an administrative error must emanate from or be apparent in a particular document.

175. The court's view of the correct REWIND interpretation is consistent with treating the broader discretions in Section 4 as applying only to "Submissions" (other than final Tenders), while allowing a more limited discretion to the Authority in relation to final Tenders that for some clerical or administrative reason are incomplete or non-compliant.

176. In coming to this conclusion I am influenced by two further points that I consider would be of significance to the REWIND tenderer considering the scope and meaning of this section. Firstly, the Important Notice at the start of the ITN states:

"Healthy Procurement Process

> The Authority reserves the right, in its absolute discretion, to take such steps as it considers appropriate to ensure that a healthy competition is maintained throughout all stages of the Tender Process."

While this does not allow the Authority to alter the process or change the rules otherwise than in the manner permitted by the main provisions of the ITN, it is an overriding consideration that a REWIND tenderer would take into account in interpreting the ITN.

177. Secondly, and as submitted by the respondent, there is no express provision in the ITN, whether in s.6, s.7 or elsewhere, stating that it is a necessary or inevitable consequence of failure to submit the complete soft copy Tender by 17:00 on 28th November, 2014, that the Tender is invalid and/or cannot in any circumstances be evaluated.

178. Section7.1 (d) should therefore be interpreted as giving the Authority a discretionary power to accept and evaluate late documents/files where it is of the opinion that such omission or failure to submit is clerical or administrative.

179. The s.7.1 (d) power is expressed to be a discretion, so it is not open-ended. For example, a tenderer might through administrative error omit to submit a file, but the Authority cannot be compelled to accept it later – under the ITN it must consider the circumstances before exercising its discretion. Moreover, unlike in the case of submission of a draft Tender to which s.4.1(b) applies, the discretion is not absolute. Rather the Authority must consider the circumstances and form an opinion before it exercises the discretion in favour of a Tenderer, and the use of the word "reasonable" denotes that there must be reasons for the opinion.

180. Because each final Tender is not a single document, but rather consists of multiple files all of which must be communicated via the Asite website, I am not satisfied that there is any material distinction to be drawn between a discretionary acceptance of a "late Tender" or a discretion to accept "late Tender documents".

181. Accordingly the answer to the first issue raised is that under the ITN as it would be interpreted by a REWIND tenderer, the Authority has a discretion under clause 7(1)(d) to accept a late Tender or Tender documents/files received after the deadline, and therefore had a discretion to receive the Eriugena tender.

Second Issue – Did the NTMA misdirect itself in law or make a manifest error in considering that it had discretion either under the provisions cited in its letter of 6th March, 2015, or otherwise?

182. The reference to "manifest error" in this question refers to the standard of judicial review applicable to procurement cases established under European law and reflected in *SIAC Construction Limited v. Mayo County Council* [2002] 3 I.R. 148. At p. 174, Fennelly J. referred to the decision of the European Court in *AICS v. Parliament (Case T-139/99)* [2000] ECR 2II – 2849, where the European Court of First Instance stated:-

> "Like the other institutions, the Parliament has a wide discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error…"

183. Fennelly J. continued:-

> "Thus, it seems to be well established by a significant line of case law of the Court of First Instance that a community institution, when in a comparable situation to the awarding authority of a member state, enjoys 'a wide discretion' as to the criteria by which it will judge tenders and, moreover, its decisions will be annulled only if a 'manifest error' can be demonstrated.
>
> It is not conceivable that the courts of the member states are required to apply a different standard of judicial review to their own awarding authorities…"

184. Fennelly J. then quoted with approval the following passage from the decision of the court in *Upjohn v. Licensing Authority (Case C-120/97)* [1999] E.C.R. I-223:-

> "34. According to the Court's case-law, where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion."

185. At p. 175, Fennelly J. stated:-

> "There are obvious common threads which run through any system of review of administrative decisions, especially where the primary decision-making function is administrative or governmental. The function of the courts is to guarantee legality, though that notion itself has a number of elements, some procedural and some substantive. The passages which I have cited speak of 'manifest' error as the test for judicial review adopted by the community courts. This is the standard which applies to the appreciation of facts by the decision-maker. They do not say that this test must be adopted by the national courts. I would observe, however, that the word, 'manifest', should not be equated with any exaggerated description of obviousness. A study of the case law will show that the community courts are prepared to annul decisions, at least in certain contexts, when they think an error has clearly been made.
>
> The decisive additional consideration in the area of the public procurement is the explicit concession of a wide margin of discretion to awarding authorities."

186. It will be recalled that in its letter dated 27th February, 2015, notifying of the appointment of Eriugena as Preferred Tenderer NTMA informed the applicant that a small number of Eriugena documents had not been submitted until shortly after the 5pm deadline, and that the Authority "exercised its discretion to accept the Eriugena Tender prior to the evaluation exercise commencing". That letter did not cite any particular provision of the ITN as a source of such discretion. In its letter of 6th March, 2015, the NTMA, in response to the applicant's protest that there was no such discretion, stated:-

> "The ITN is quite clear in affording the Authority discretion in this regard (see for example, Sections 4.1(c), 4.1(b)(D), 4.1(d) and the Important Notice."

187. Under the discussion in relation to Issue 1 in this judgment, I have found that NTMA's reliance on s. 4, or any of its subsections, as the source of its discretion to accept late tender files was incorrect. It follows that insofar as the NTMA relied on s. 4 or any of its subsections in the correspondence, it misdirected itself in law. However, firstly the reference to these provisions is prefaced by the words "for example" and it is clear from this that the NTMA was at all times relying more generally upon the terms of the ITN as the source of its discretion, and does not appear to have relied exclusively upon s. 4 or any of its subsections. This qualification in the first notification of the decision is in itself sufficient to persuade that court that the NTMA did not fall into manifest error. Secondly the letter invokes the Important Notice and as I have already found this is a part of the ITN that is relevant to construction of the full document, and relevant to a REWIND tenderer interpreting Section 7.1.

188. It is also notable that in the record of the Decision –the Memorandum prepared on 22nd January, 2015, and approved on 23rd January, 2015, - the author Mr. Dennis McCarthy states:-

> "Following detailed discussions with the Project Legal Advisers Eversheds, it is clear that the key principles to consider in this matter are equality of treatment and proportionality. While the NDFA has obligations and *some discretion* as set out in the Invitation To Negotiate and under law, it is imperative that the NDFA ensures that no advantage is given to any Tenderer as a result of late submission of documents and that a proportionate, fair and transparent response is taken. The NDFA has a responsibility to fully explore the reasons for and nature of the late document submission before any decision is made. Incognisance of this duty, the NDFA has taken the steps identified below."[Emphasis added].

189. This brings the court to the question whether the Authority had a discretion to accept a late tender or late tender documents/files otherwise than under the ITN. For reasons elaborated later in this judgment I am satisfied that a contracting authority has a power in exceptional circumstances to accept and evaluate a late tender, or tender documents submitted late,

notwithstanding that there may be no express or implied discretion in the procurement rule/contract document. The existence of such a power was countenanced by Richards J in the EWHC in the case of *J.B. Leadbitter & Co. v. Devon County Council* [2010] Euler 61 where he held that –

> "68. There may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender where, as noted by Professor Arrowsmith, it results from fault on the part of the procuring authority. But in general, even if there is discretion to accept late submissions, there is no requirement to do so, particularly where, as here, it results from fault on the part of the tenderer."

That decision has been approved and followed in the Court of Appeal. Counsel for BAM did not attempt to argue that this court should not adopt the same approach, and accepted that in exceptional circumstances a contracting authority may have a discretion to extend time/accept a late tender even though there is no provision for this in the ITN.

190. Accordingly even if the court is wrong in its determination that the Authority enjoyed a discretion under Section 7.1, it had a discretion under the general law to extend time for acceptance of tender documents/files in exceptional circumstances.

191. Whether under Section 7.1 or under the general law the Authority was correct in stating that it had "exercised its discretion" (letter of notification of 27th February, 2015), that it "had a discretion to accept the Eriugena tender" (letter of 19th March, 2015) and that it had "some discretion as set out in the Invitation to Negotiate and under law" (the Memorandum). The Authority was also correct in asserting that it had a discretion to accept a late submission of documents in certain circumstances and after due consideration of the principles of equal treatment and proportionality.

192. The court therefore cannot accept that any error in ascribing this discretion "for example" to s. 4 of the ITN rather than s. 7 or the general law was an error of such consequences as to undermine the decision to accept the files submitted after the deadline. It is also of significance that in the letter of 6th March, 2015, the NTMA emphasised that its decision was made after a thorough investigation and ensuring "…the integrity and fairness of the process", and that it acted "…in accordance with the requirements of the ITN and all applicable legal obligations, including adherence to the principles of fairness, equality of treatment and proportionality".

193. It is also clear from the Memorandum, approved by the decision makers on 23rd January, 2015, that they took into account the key principles of equality of treatment and proportionality on the basis under the ITN they had "some discretion". It is notable that they did not act on the basis that they had an "absolute discretion", the wording used in section 4.1(b).

194. The applicant also complained of lack of transparency in suggesting, by way of example, that it had a discretion under s. 4 of the ITN and failing to rely on section 7.1 or any general power to accept the late Tender arising from "exceptional circumstances". I do not accept that the communication of the reasons for the decision in the correspondence was so flawed or lacking in transparency as to render the decision void. The Authority made it plain that it had a discretion, and more importantly set out at length the considerations that it took into account and the reasons that found favour with it in exercising that discretion. This was done with sufficient detail such that the applicant was enabled to seek and obtain legal advice on its position and to pursue these judicial review proceedings, and the applicant can make no real or substantial complaint of lack of transparency.

The court, therefore, finds that the NTMA did not misdirect itself in law or make any manifest error in considering that it had a discretion under the ITN or otherwise, albeit that, as the court has found, this did not arise under the particular provisions of Section 4 cited only by way of example in the letter of 6th March, 2015.

Third Issue: Did the circumstances that NTMA relied on in its letters dated 6th, 19th and 24th March, 2015, (a) constitute valid reasons for exercising its discretion or (b) infringe the principles of non-discrimination, equal treatment, transparency and proportionality?

195. With regard to (a) it is beyond dispute that fair procedures and justice require that in administrative/procurement decisions reasons should be given by the decision-maker, and that this requirement also applies to the decision to receive Eriugena's late Tender documents. Such reasons should be based on relevant considerations, should be based on evidence, and should be a logical result of that reasoning. Relevant considerations may be those mandated by or implicit from relevant legislation, or evident from policy underpinning the legislation, and/or should have a logical or rational connection to the subject matter of the decision[3]. .The reasons should not be based on irrelevant or illegitimate factors (see Finlay C.J. in *P & F Sharpe Ltd v Dublin City and County Manager* [1989] I.R. 701, 717-718). They should explain the decision sufficient for the person affected by the decision and considering challenging it to know that the decision-makers' directed their minds to the issue, and to understand the basis for the decision, assess the prospects of success or otherwise in such challenge, and to formulate proceedings (see *Mulholland v. An Bord Pleanála (No.2)* [2005] IEHC 306).

However, beyond this the reasons may be succinct, they need not be detailed, and may be based on report(s) obtained by the decision-makers. Moreover so long as there are good reasons, the existence of bad reasons will not necessarily invalidate the decision (see *International Fishing Vessels Ltd v Minister for the Marine* [1989] I.R. 149).

196. Furthermore, in assessing whether the decision-makers had valid reasons for exercising their discretion in favour of Eriugena to accept the files submitted after the deadline, the court should apply the test of "manifest error" and should accord the decision makers that measure of discretion that is referred to with approval by Fennelly J. in *SIAC*.

These observations are without prejudice to the effect of the General Principles of procurement law on the obligation to give reasons, the application of which will be considered when part (b) of this Issue 3 and Issue 6 are considered together.

197. The reasons relied upon by the Authority in the three letters, which set out the its explanation and justification for its decision, may be distilled as follows:-

a. That only 8 out of 280 documents were uploaded after the 17:00 deadline;

b. That the late documents were received in complete form by 18:13;

c. That Documents 2 and 3 were repeat uploads submitted prior to 17:00;

d. That Documents 4, 5, 6, 7 and 8 related to BIM files, and had a combined size of over 1GB (i.e. that in the context of electronic transfer they were substantial files);

e. That these BIM files, while "separate tender deliverables", contain identical technical content to the native BIM Revit files and Asta programme files submitted by Eriugena before 17:00, the difference being that the information included in Documents 4-8 was submitted in different file – type formats, based on the native document information;

f. That Document 1 was the only document that contained information which the Authority did not already have available before 17:00;

g. That Eriugena contacted the Authority at 17:14 to notify them that the Asite system had not accepted Documents 4-8, and that the upload window was closing as if it was complete but without the relevant file appearing in Asite, and that a further notification was received from Eriugena at 18:24 advising that it had continued to attempt to upload these documents and that they had eventually gone through;

h. That following consideration of a clarification from Eriugena, the Authority was satisfied that Documents 1-8 were all created before 17:00 on 28th November and were not modified after that time, and that this was evidenced, *inter alia*, by the screen shots provided by Eriugena of the document file properties in displaying the dates and times of last notification – and that this response had been checked and verified against information available on Asite;

i. That the Authority confirmed that the BIM related files received after 17:00 were derived from the native (Revit) files and programme (Asta) files uploaded before 17:00;

j. The finding that "it is clear that Eriugena had some difficulties in uploading the large documents which in the opinion of the Authority was not wholly within their control.";

k. That Eriugena uploaded the Tender documents over a two day period;

l. That "no unfair advantage was gained by Eriugena in completing the upload of a small number of Tender documents after 17:00".";

m. That the decision to accept Eriugena's Tender "is a reasonable and proportionate course of action to take in the circumstances".";

n. That although certain documents were not published to Asite by Eriugena before 17:00, "this is not considered by the Authority to constitute material non-compliance given all of the prevailing circumstances. We would point out that BAM PPP's own Tender contains certain discrepancies (including in relation to the financial model) which similarly were not considered by the Authority to constitute material non-compliance given all of the prevailing circumstances. BAM PPP took the opportunity that the Authority gave it to address these discrepancies after the Tender Deadline. This clarification process was undertaken by the Authority using the same discretion as referred to above (e.g., Section 4 of the ITN)".;

o. That the Authority was satisfied that Eriugena did not modify its Tender documents after 17:00;

p. That the screen shot information for documents 1, 2 and 3 was verified by the Authority;

q. That – "Documents 4 – 8 are BIM viewing tools related to BIM models. As BAM PPP will know, the file formats of Documents 4 – 8 can only be created directly from the native BIM and programme files. These native BIM (Revit) files and programme (ASTA) files were all uploaded to Asite prior to 17:00. The Authority's technical BIM advisor (HKKT) examined all of the BIM files and confirmed that the Eriugena BIM viewing tools are taken from those native files submitted before 17:00.";

r. That it was fair, reasonable and proper exercise of its discretion having regard to all the prevailing circumstances to accept Document 1, the uploading of which was completed at 17:03;

s. That the repeat upload of Document 2 had deleted from it "a single immaterial paragraph noting non-specified feedback from the Technical Consultation Meetings.";

t. With regard to the repeat upload of Document 3 – "Document 3 contains a percentage number which was stated to be the percentage increase of one number over another number. All three numbers are stated in the same sentence, i.e., number 1 is a small x% increase over number 2. In the first version of Document 3, the percentage number was stated incorrectly as the outcome of the comparison of the other two numbers and this was corrected in the second version.";

u. That all the above mentioned modifications were made before 17:00 and were not considered to be material in any way and that although Eriugena reported difficulties in uploading Document 4 at 17:14, and while it had been in fact uploaded it at 17:09, this may be accounted for by the fact that Document 4 was uploaded by a different person than the individual who uploaded the other seven documents. "The fact that this was published to the Asite prior to the receipt by the Authority of the notification at 17:14 supports the view that difficulties were being encountered.".";

v. The Authority was not able to technically establish when the individual document uploads commenced i.e. when the "submit" button was pressed; and

w. That the time taken to upload documents to Asite can vary and can be dependent on a range of factors not within the control of the party uploading to Asite.

198. In addition to giving these reasons in the correspondence, the Authority provided a detailed appendix to the letter of 6th March, 2015, providing details in relation to each late document giving, *inter alia*, its description and file size and type, along with a 'Comment' column setting out further details and in particular confirming non-modification after 17:00, and referring to the screen shots. Accompanying the letter of 24th March was a further annex setting out the "Date & Time last modified" in respect of the documents indicating that none of the eight documents were modified later than 16:00 on 28th November.

199. The central considerations and conclusions evident from this correspondence are firstly that the late documents were not created or modified after the Tender Deadline, and hence the tender was not "improved" post deadline; secondly that Eriugena encountered technical difficulties that were "not wholly within their control" in the uploading of the documents and particularly the large BIM files; thirdly that the late documents were uploaded within a short space of time after the deadline; fourthly that the

"native" BIM files, the information in which forms the basis for Documents 4 – 8 being the BIM viewing tools, were uploaded prior to the deadline"; and fifthly that the Authority did not simply take Eriugena's word for it but undertook appropriate investigations, looked at other available evidence, and took appropriate advice to verify the forgoing before reaching a decision.

200. With one possible exception, I am satisfied that *prima facie* the reasons relied upon by the NTMA in this correspondence were based on relevant considerations and on evidence that was before the decision-makers in the Memorandum of 22nd January, 2015, and its annexes. I am also satisfied that the reasons given demonstrate that the decision-makers, having taken legal advice, were expressly aware that they had "some discretion" and addressed their minds to the evidence in that context.

201. The one possible exception is that the correspondence refers to "certain discrepancies" in the BAM Tender which it was allowed to address by way of clarification process. The clarifications and responses have been summarised in paragraph 61 of this decision. While they demonstrate a degree of flexibility in the Authority's approach to BAM's final Tender content, none of the issues raised can truly be compared to the late submission of BIM files by Eriugena. It must therefore be doubted that this was a valid comparison. However this did not feature as a consideration or reason anywhere in the Memorandum, and was merely "pointed out" in the correspondence. I find that it was not in fact a reason for the impugned decision to accept Eriugena's late tender documents. Even if it did feature in the decision-makers thinking it seems to court that it was of little or no import and that the central considerations and reasons were those summarised *supra* in paragraph 200.

202. With regard to the rest of the reasons given in correspondence, there is a logical connection between the circumstances found to exist on the evidence presented and considered, and the decision taken. In this regard, it is appropriate to refer to two aspects which in the court's view were central to the decision – firstly the statement that the difficulties that resulted in the late submission of files were not wholly within Eriugena's control, and secondly the acceptance that the late BIM files were not modified after 16:00 on the 28th November.

203. The Memorandum shows that the Authority investigated the root cause of the late submission of final Tender files insofar as it could and reported –

> "The NDFA is aware that the time taken to upload documents to Asite can be variable, which may at least in part be due internal IT systems. The NDFA were not is a position to, and therefore could not, inform Tenderers of either how long it would take to upload Tenders or what specification of IT systems would be needed to interact in the most efficient way with Asite."

This in turn was based at least in part on the response by Eriugena to the Clarification Request dated 9th December, 2014, which demonstrated that prior to 17:00 "…the upload speeds were capped out a number of times.." and added:

> "Furthermore the Asite upload window throughout the day 28th November closed a number of times as if the document upload was complete, but the file would not appear on Asite."

It is also clear that these elements of the Memorandum were firmly based on factual and expert information and advice obtained by Mr. McCarthy from Mr. Rey of HKKT, the Technical Advisors to the project, in the email of 5th December, 2014, and in particular Mr. Rey's statement that –

> "Having said so, there are a number of issues that we consider complicate matters for those uploading as well as those downloading documents from the System. Some are noted below.
>
> Generally over the consultation period for the project, "batch" actions have proven to be unreliable or completely unavailable, causing the system to freeze or crash without warning due to lack of live or active progress icons (i.e., progress bars can be frozen for a while before the user decides to cancel a process and start again)."

There was therefore a clear evidential basis for the statement in NTMA's letter of 6th March, 2015, that "…it is clear that Eriugena had some difficulties in uploading the large documents, which in the opinion of the Authority, was not within their control."

204. With regard to the timing of last modification, the decision-makers had two pieces of evidence. Firstly, they were in a position to check that the BIM files submitted late were derived from the native Revit design files and Asta programme files submitted before the deadline. Secondly, they had the screenshots furnished by Eriugena in response to the Clarification Request of 9th December, 2014, which verified the times upon which each document was finalised. Accordingly, the decision-makers did not rely solely on the screenshots which, as the applicant pointed out, were generated by Eriugena and therefore of more limited evidential value. The Authority was therefore entitled to conclude, as stated in the letter of 6th March, 2015:

> "The response to this clarification from Eriugena satisfied the Authority that Documents 1-8 were all created before 17:00 on 28 November and were not modified after that time."

205. The court's finding is that *prima facie* the circumstances relied on by the Authority in the correspondence represent valid reasons for the decision to exercise the discretion to receive and evaluate as part of Eriugena's Tender the files submitted after the deadline.

Issue 3(b) and Issue 6

206. This finding is subject to the court's further consideration of Issue 3(b) - whether in relying on the circumstances as stated in the correspondence to exercise a discretion, the Authority infringed the general principles of non-discrimination, equal treatment, transparency and proportionality. It is opportune at this point to also consider in more detail the applicant's contentions that under the Procurement Directive or the Procurement Regulations, or under the general principles/general law relating to procurement, it was not possible for the Authority to waive the final Tender deadline, notwithstanding what is stated in the ITN, and that the NTMA's conduct breached these provisions/General Principles and the general law (Issue 6).

The Procurement Directive and Procurement Regulations.

207. Article 2 of the Procurement Directive states:-

> "Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."

208. Article 26 provides:-

> "Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations."

209. Although deadlines for the submission of tenders are mentioned later in the Procurement Directive, nothing in the Directive requires contracting authorities to lay down any special condition setting out the consequences of failure to comply strictly with a deadline. Equally, nothing in the Procurement Directive either expressly prohibits a national contracting authority from including in invitations to negotiate, terms conferring a discretion to accept late tenders, or excludes the existence of such a power under the general law.

210. The applicant did place some reliance on Article 33.5, the last sentence of which reads:-

> "Contracting Authorities may not proceed with tendering until they have completed evaluation of all the indicative tenders received by that deadline."

However, Article 33 relates to "Dynamic Purchasing Systems" the subject matter of tender, and is not therefore particularly relevant to a negotiated procedure.

211. Of possibly more relevance is Article 40, headed "Invitations to submit a tender, participate in the dialogue or negotiate". Article 40.1 provides:-

> "In restricted procedures, competitive dialogue procedures and negotiated procedures with publication of a contract notice within the meaning of Article 30, contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate or, in the case of a competitive dialogue, to take part in the dialogue."

Article 40.5 so far as relevant then states:-

> "In addition, the invitation to submit a tender, to participate in the dialogue or to negotiate must contain at least:
>
> (a) a reference to the contract notice published;
>
> (b) the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up;…"

212. Apart from the use of the word "deadline" – which is not defined or further elaborated within the Procurement Directive – the Directive does not lend any particular support to the suggestion that as a matter of European Law a discretion cannot be vested in the Authority to waive the Tender deadline and accept, in its discretion, documents/files received late. In fact one provision that was not referred to in argument demonstrates that in certain circumstances the contracting authority is duty bound to extend the time limit for receipt of tenders. Article 38.7 provides:

> "7. If, for whatever reason, the specifications and the supporting documents or additional information, although requested in good time, are not supplied within the time limits set in Articles 39 and 40, or where tenders can be made only after a visit to the site or after on- the-spot inspection of the documents supporting the contract documents, the time limits for the receipt of tenders shall be extended so that all economic operators concerned may be aware of all the information needed to produce the tenders."

While the particular circumstances envisaged by Article 38.7 did not arise in the present case, it is notable that the provision does not impose a requirement of fault on the part of the contracting authority, or lack of fault on the part of the tenderer, in mandating the extension of time limits.

213. With regard to the Procurement Regulations, Chapter 2 headed "Deadlines" and Regulations 6(3) have been quoted above and 3(a) does mandate that the Authority shall "fix a deadline for receipt of request to participate", and sub-Regulation 3(b) does mandate that it "fix a deadline for the receipt of tenders". This requirement of a tender deadline does underscore the difference between draft tenders or other submissions required to be submitted by a date in advance of the submission of final tenders on the one hand, and the deadline for final tenders on the other hand. Beyond this, the Procurement Regulations do not define further "deadline", or the consequences of a failure to comply with a deadline for receipt of a final tender, nor is there any regulation prohibiting the inclusion of provisions conferring, or purporting to confer, on the Authority, a discretion to accept receipt of late tender documents.

214. Although not referred to in argument, there is one express provision that mandates the contracting authority to extend the deadline, and which clearly seeks to implement Article 38.7 of the Procurement Directive. This is Regulation 46(9) which provides:-

> "If –
>
> (a) for any reason the specifications and the supporting documents or additional information, although requested in good time, are not supplied before the deadline for the receipt of tenders referred to in Regulation 47 or 48, or
>
> (b) tenders can be made only after a visit to a site where the contract is to be performed or after an on-the spot inspection of documents supporting the contract documents,
>
> the contracting authority shall extend the deadline so that all of the economic operators concerned may become aware of all the information needed to prepare tenders."

215. Regulation 47 relates to an economic operator who has requested to participate but is not offered unrestricted and full direct access by electronic means to the specifications and supporting documentation. The Authority must send such an operator the specifications and supplementary documents within six days of the request, and under Regulation 47(2) if the economic operator requests additional information, a reasonable time before the deadline for the receipt of tenders, "the contracting authority shall provide the requested information to the operator without delay, but in any case no later than 6 days before the deadline". Regulation 48 relates, *inter alia*, to negotiated procedures where relevant specifications are held by a person other than the contracting authority. Under Regulation 48(4) on receipt of a request for additional information within a reasonable time before the deadline for the receipt of tenders, the person concerned must provide that additional information to the economic operator not less than six days

before the deadline (Regulation 48(4)(a)).

216. The Procurement Regulations, therefore, provide for four specific circumstances in which the contracting authority is obliged to extend the deadline: (1) where Regulation 47(2) comes into play; (2) where Regulation 48(4)(a) comes into play; (3) where tenders can only be made after a visit to the site where the contract is to be formed; and (4) where tenders can only be made after an on-the spot inspection of documents supporting the contract documents. In each of these circumstances, the Authority must also consider that it is necessary to extend the deadline "so that all the economic operators concerned may become aware of all of the information needed to prepare tenders".

217. Three things should be noted about Regulation 46(9). Firstly, it contemplates extension of the deadline in certain circumstances, and provides that extension is mandatory. Any argument that final tender deadlines are in all circumstances immutable under the Procurement Directive or the Procurement Regulations is not therefore sustainable. Secondly, there is nothing in Regulation 46 or in sub-regulation 46(9) that prohibits the contracting authority from conferring a discretion to extend the deadline in other circumstances. Thirdly, as with Article 38.7, there is no requirement of fault on the part of the Authority, or lack of fault on the part of the tenderer, in order for the obligation to extend the deadline to arise.

218. "Directive 2014/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC" was also mentioned in argument. This Directive, which replaces the Procurement Directive, did not apply to this tender as it only entered into force at the end of April, 2016. Counsel for the Authority relied on Article 56.3 as undermining authorities, and in particular academic authorities, referred to later in this judgment:

> "3. Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency."

On the face of it this provision does seem to give Member States/contracting authorities greater flexibility and discretion than existed in legislation prior to April 2016, where a Tender is incomplete or "documents are missing", to request and accept supplemental documents provided there is compliance with the principles of equal treatment and transparency.

General principles of Procurement law

219. The applicant relied in argument in particular on alleged infringement of the overarching General Principles applicable to public procurement under EC law. As mentioned above, two of these are uncovered by Article 2 of the Procurement Directive, and this is transposed in the Procurement Regulations by Regulation 17 which states – "On awarding a public contract, a contract authority shall (a) treat all economic operators equally and without discrimination, and (b) act in a transparent way."

220. In addition, the applicant relied on the general principle of proportionality, which requires that the actions and decisions of the contracting authority be proportionate to the deal and necessary for the objectives which are sought to be obtained.

221. BAM contended –

> 1. The decision to accept the files submitted after the deadline, without notice to BAM and without any prior indication that documents files be accepted late and considered, breached all of the General Principles.
>
> 2. BAM was treated unequally vis à vis the other tenderers in that it sacrificed the opportunity to work on its tender right up to the tender deadline, whereas Eriugena worked on its BIM files up to 04:00, and this discriminated in favour of Eriugena and Kajima and against BAM.
>
> 3. The acceptance of the files delivered late was not "minor and/or procedural" as suggested by Mr. McCarthy in his first affidavit (para. 19.24); the consequences of the Authority waiving the deadline in respect of these files was serious in that, if they had not been accepted, BAM would have been the only tenderer to have submitted a valid tender and therefore would have been appointed as the Preferred Tenderer. The decision therefore infringed the principle of proportionality.

222. In making these submissions, in the absence of any clear Irish authority on the issue, BAM relied on certain U.K authorities, in particular: *J.B. Leadbitter & Co. v. Devon County Council* [2010] Euler 61, and *Azam & Co. Solicitors v. Legal Service Commission* [2010] EWCA Civ 1194, and certain EU case law.

223. *Leadbitter* concerned a tender competition for construction works to be carried out on behalf of the respondent Council. The tender documents required tenders to be submitted electronically through the council's portal and did not, in general, allow for an alternative means of delivery. It was required that the documents constituting the tender all be submitted at the one time. The Council rejected Leadbitter's tender as, although it was submitted before the deadline, it did not comply with the requirement to include a number of case studies. Before the deadline of 12 noon, the Council extended the deadline to 15:00 as a power failure had prevented another Tenderer from submitting its tender on time. Leadbitter submitted its tender without the case studies at 12:05. Upon discovering its error, Leadbitter unsuccessfully sought to submit the case studies before the deadline of 15:00 but the portal would not permit any further documents to be added to the tender already submitted. Leadbitter sent the case studies to the Council by email shortly after the deadline, but in a form which had been finalised long before the deadline.

224. Leadbitter challenged the Council's rejection of its tender arguing that the Council had infringed the principles of equal treatment and proportionality by refusing to waive compliance with the deadline and the requirement for a unitary tender submission. In this first instance, Leadbitter argued that by extending the deadline from 12:00 to 15:00, the Council had waived the deadline for one of the tenderers and that it would therefore be discriminatory to not afford a similar indulgence. The court rejected this argument noting in particular that the power failure was entirely beyond the control of that tenderer and that the extension of time was one which extended to all of the tenderers, not only the tenderer whose power had been cut.

225. Leadbitter then argued that in applying the tender deadline strictly the Council had acted disproportionately. The court first considered and accepted that the principle of proportionality applied to the actions of a contracting authority involved in a procurement process, and then concluded that the Council was not required to accept the non-conforming tender and that there was nothing disproportionate in the manner in which the Council had treated the deadline requirement. In so concluding, the court relied on para. 7.94 – 7.96 of *The Law Public and Utilities Procurement* (2nd edition 2005) by Professor Sue Arrowsmith, in which the author

opined that the general rule is that late tenders may not be accepted save where there are special and exceptional circumstances which justify acceptance. Richards. J. stated that -

> "66. Fundamentally, Devon CC relies on the simple proposition that a procurement process requires a deadline for the submission of tenders and that a deadline is a deadline. The ITT could not have been clearer on the requirement for a single upload and submission before the deadline, and the claimant's witnesses readily accepted that they knew that this was the requirement. In addition, there are clear statements of policy and practice in Devon CC's code of business conduct that late tenders are not considered. True it is that the deadline was extended for three hours to accommodate a particular tenderer, but the extension of the deadline was agreed before the expiry of the existing deadline, *it was caused by an event outside the control of the tender in question*, it applied to all tenderers and was communicated to them all, and complete submissions had to be made by the new deadline.
>
> 67. As well as the deadline, the other key elements of submitting tenders, such as the requirement for a single submission and the lack of provision for changes to submitted tenders, were clear and well understood by the claimants, as their witness's evidence made clear. Fairness to all tenderers, as well as equal treatment and transparency, required that these key features should be observed.
>
> 68. *There may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender*, most obviously where, as noted by Professor Arrowsmith, it results from fault on the part of the procuring authority. But in general, even if there is discretion to accept late submissions, there is no requirement to do so, particularly where, as here, it results from a fault on the part of the tenderer. In addition to the considerations already mentioned, the particular facts on which the claimant relies to characterise its case as exceptional would require investigation and determination by Devon CC and I do not see that it was required to undertake those tasks. In my judgment, the decision of Devon CC to reject the claimant's tender was well within the margin of discretion given to contracting authorities."
>
> [Emphasis added].

226. This court was also referred to the equivalent passage in the current (Third Edition) of Professor Sue Arrowsmith's book (*The Law of Public and Utilities Procurement – Regulation in the EU and UK,* Third Edition, 2014), which it was suggested is even more forthright than the Second Edition quoted with approval by Richards J, in expressing the author's view that deadlines for receipt of tenders may not be waived. At para. 7.157 the learned author states:-

> "Since most breaches of procedural requirements will not create any significant inequity between tenderers, or operate to deter tenders, and since the scope for material abuse of discretion is very limited in this context (even though as with any discretion there is a theoretical potential to use it more favourably in favour of domestic firms), it is submitted that the presumption should be that contracting authorities have a right to waive compliance (as well as to allow corrections) in the case of non-conformity with merely procedural requirements. However, the presumption should be capable of rebuttal when there is evidence of impact on the authority or a significant advantage to the tenderer, where the need to comply might have deterred other tenderers, or where significant risks of abuse exist. Thus failing to submit the correct number of copies of documentation, for example, should generally be considered capable of waiver. For cases that are appropriate for a power of waiver this should normally exist even if not expressly reserved – although no doubt authorities could expressly preclude such a power in the contract documents. On the other hand, the considerations referred to above suggest that waiver of certain formalities such as the deadline for tender (see paras. 7.162 – 7.163 below), may not be possible. Where a particular formality of this kind is required by legislation itself, as with the deadline for tenders as discussed below, a waiver should not be possible regardless of what is stated in the contract documents."

This opinion is somewhat qualified by the author in para. 7.163, and I will refer to this later in this judgment.

227. Before leaving *Leadbitter* two points of factual distinction from the present case should be noted. Firstly the ITP in that case required a unitary submission of the tender documents, whereas in the present case there was no prohibition on more than one upload (indeed it could be said that a number of uploads was integral to the process), and no automatic closure of the portal, and it was on this basis that Richards J found against the applicant. Secondly the court was there concerned with considering whether the *refusal* to accept late documents or waive a deadline was disproportionate and unlawful, whereas this case concerns the exercise of a discretion in favour of Eriugena to *accept* late documents/files.

228. *Azam* concerned a claim by a firm of solicitors seeking a declaration that their exclusion by the respondent from a tendering process for carrying out publicly funded work in relation to immigration was unlawful. At the time, the firm was an existing supplier of publicly funded immigration services, and indeed this was the bulk of its work. It claimed that its failure to submit a tender before the deadline was caused by a failure by the respondent to identify that deadline by any direct communication to the firm, and secondly, that the respondent's refusal of an extension of time was a breach of its enforceable Community obligation to comply with the principle of proportionality having regard to the serious damage that would be occasioned to the firm. A standard letter sent to the appellant had indicated the need to tender, but had not provided the deadline, although this would have been readily seen had the appellant visited the relevant website. Devon County Council relied heavily on the decision in *Leadbitter*, and on the opinion of Professor Arrowsmith expressed in the second edition of her text. The court was clearly unimpressed with the claim pointing to the affect that the appellant in its correspondence had not pointed to any "exceptional circumstances" that would have justified waiver of the deadline. Pill L.J. referred with approval to the reasoning of the trial judge, Briggs J., who at para. 70 of his judgment stated:-

> "But that analysis ignores the weighty reasons to be considered in the balance against the grant of a week's extension. First, the immigration tender process had been published expressly on the basis that deadlines were there to be complied with, and that no extensions would be given. Secondly, the grant of an extension to the firm, occasioned by a failure to submit a failure on time which was by no means beyond its control, would run the grave risk of constituting unequal treatment of other tenderers. In particular, it would be likely to be regarded as unfair by tenderers who would have wished for longer time in which to perfect their tenders, but who nonetheless completed them on time and, in reliance on the warning that extensions would not be granted, sought no further time for themselves. Thirdly, it seems to me that the principles of transparency in good administration weigh very heavily in the balance against an applicant for an extension of time who is unable to point to reasons beyond his control by way of justification."

229. Dealing with the question of proportionality, Pill L.J. stated:-

> "36. As to proportionality, the judge acknowledged "the harsh economic consequences of the inability to tender" as

expressed at para. 70. However, he gave "weighty reasons against the grant of an extension". I agree with those reasons. The decision not to permit an extension was not, in the circumstances, disproportionate. I have already read para. 70 of the judgment where the reasons are set out. These are put as an objective test, but it is clear, in my judgment, that the relevant considerations were kept in mind by the respondents. I also agree with the approach of David Richards J. in *Leadbitter* and I accept that it reflects the earlier authorities. A deadline is a necessary part of a tendering process. The deadline was plainly stated in readily accessible documents. There is no fault by the respondents; they needed to be conscious of their duty to treat tenderers and potential tenderers equally and to avoid suggestions of favouritism towards a particular party. The failure to tender arose from a single and very unfortunate failure, though against the background of a failure by Mr. Azam and his firm to monitor what was seen to be documents sensible to be monitored by a firm doing this type of work, it was a failure to take action on the receipt of the letter of 23 December. The need for an extension could not be attributed to *any fault on the part of the respondents or to any factor outside the control of the appellants*."

[Emphasis added].

230. Lord Justice Rimmer concurred stating at para. 53 of his statement:-

> "…in para. 68 David Richards J. recognised that there may be exceptional cases in which proportionality will require the acceptance of a late tender, most obviously where the lateness is because of the procuring authority's fault. In general, however, even if the tender conditions give a discretion to accept late submissions, his view was that there was no requirement to extend time, particularly where, as in the case before him, the lateness results from a fault on the part of the tenderer. I would respectfully agree with that approach as being a good working approach to the like issue in this case."

231. The applicant also relied on *J.R. Jones v. Legal Services Commission* [2010] EWHC 3671 (Ch.), a decision of His Honour Judge Purle Q.C., sitting as a High Court Judge. In that case, there was a tender process for immigration and asylum work with a deadline for submitting tenders of 12.00 noon on 28th January, 2010. It was stipulated that tenders submitted after the deadline would not be considered. Here the applicants, upon electronic submission of their tender, selected the wrong option in the drop down menu. The significance of this was that if the applicants had represented, at least, one client before the AIT since December 2008, which they had, they would have obtained an extra three points. The tender provided:-

> "We are under no obligation to contact Applicant Organisations to clarify their tenders or to obtain missing information or documents, and tenders which are incomplete may not be considered."

232. Purle Q.C. followed the approach of Pill J. and Rimmer LJ in *Azam* and cited with approval, the passage quoted above at para. 36 of the judgment of Pill J. in respect of proportionality. Purle Q.C. then commented:-

> "60. Much of that applies here, if not all of it. The reference to the significance of 'fault' was that David Richards J in the earlier decision of *Leadbitter*, to which I have referred, postulated that there might be circumstances where proportionality would exceptionally require acceptance of the late submission of a tender, most notably where there was some fault on the part of the procuring authority. He also went on to emphasise that there was a wide margin of discretion for contracting authorities in deciding whether to depart from the rules laid down in the tender documents. He considered this to be in line with the learned observations of Professor Arrowsmith at various points in her publication…. However, for that discretion to be exercised, the burden must be on the applicant to demonstrate manifest error on the part of the LSC."

233. Counsel for BAM took issue with the accuracy of this recounting of Richards J. statements in *Leadbitter*, and argued that para. 60 was "obiter", and was later qualified in the decision. It was pointed out that Purle QC. went on to state:-

> "66. There may be, just as there is in the case of late bids, a residual discretion in exceptional circumstances, especially where there is fault on the part of the contracting authority, justifying the LSC waiving the prohibition on amendments and allowing a mistake to be corrected. It is difficult to see how they could do that without allowing other mistakes to be corrected, and if, as was suggested in argument, one is to draw a distinction between mistakes relating to objectively verifiable facts and other mistakes, that itself gives rise to scope for legal challenge as to how any particular mistake is to be classified.
>
> 67. Moreover, although there is no element of potential abuse on the facts of this case, given the objectively verifiable nature of the mistake, if mistakes are allowed to be corrected after the deadline which are not evident on the face of the tender, that would give rise to the risk of tenderers having second thoughts, and portraying their original thoughts as erroneously recorded when there was in truth a change of position.
>
> 68. Rimmer LJ agreed with Pill LJ in the *Azam* case, pointing out that to extend time in that case would give to *Azam* an advantage denied to all other tenderers. There might be some who had rushed the presentation of their bid in order to meet the deadline who could have improved it had they had an additional week. Likewise here, there may be some people who could have improved their bid if they had had an additional week to amend it…."

234. Counsel suggested that these statements qualified para. 60 and relied on these statements for the proposition that it was, at least, necessary for a late tenderer to provide evidence from which it could be objectively verified that the fault rested with the authority, and not with the tenderer.

235. Counsel for the Authority responded that the concerns expressed by Purle Q.C. in para. 67 of his judgment could not apply in the present case because there could have been no change of position given that the native files in respect of the BIM files were submitted in time, and further that evidence was provided as to the timing of the last modification of the BIM files. It was further submitted with reference to the concern about improvements after the deadline expressed in para. 68 of the decision of Purle Q.C., and that this could have no application in the present case where the BIM files and other documents were developed over several months, and it could not be suggested that advantage could be gained by continuing the development of the documents after the deadline. The court also notes that in *Jones*, much as in *Azam*, the error was very clearly that of the tenderer.

236. Counsel for the applicant also relied on *An Application by David Watters* [2009] NIQB 71, a decision of Morgan LCJ. The applicant challenged the decision of the Sports Council for Northern Ireland not to accept Belfast City Council's submissions for funding. The covering letter to applicants advised that all associated documents "must be submitted to their House of Sport reception by 4pm

precisely on Friday, 28th November, 2008", and their Guidance Document stated:-

> "It should be noted that the applicant is fully responsible for the completion and submission of the Outline Business Case and Stage Two requirements before 4 p.m. …."

237. The applicant telephoned the contracting authority between 3:20pm and 3:25pm on 28th November, 2008, indicating that they were printing but had a computer server problem and requested an extension but were told that the deadline was 4pm and they should do what they could to get their submission in. A further call was made at 3:45pm, and they were again advised that they should do what they could before the deadline. They again rang to say that the application was on its way, and at 4:02pm, a taxi arrived with the papers and they were brought into reception, one minute later further papers were lodged. Morgan LCJ cited Richards J. in *Leadbitter* at para. 68 and then commented as follows:-

> "18. The underlying reason for that decision is in my view the recognition that there is also an obligation to bear in mind the principles of equality and transparency which have been imported into the public procurement exercise from Europe. In this case all applicants were advised at the seminar in July 2008 of the relevant European background. I consider, therefore, that in addition to the objectives for a deadline for which the applicants contend the decision-making authority is also entitled to take into account and give weight to the proposition that transparency and equality of treatment requires that deadlines should be honoured. Taking those factors into account I consider that no criticism can be made of the decision of the Sports Council to approach this issue by asking itself whether there was any special or exceptional reason why the application should be admitted despite the fact that it was submitted after the deadline.
>
> 19. The Sports Council recognised that it had a discretion to admit the application. In exercising that discretion it looked carefully at the reasons for the delay and the background to the submission. Where delay is materially contributed to by the actions or omissions of the determining authority considerable weight may have to be given to that as a countervailing factor. It is clear that the Sports Council carefully considered the position in relation to the provision of the volleyball information on 25 November 2008. I have earlier identified the nature of the additional information which was provided. Although the applicant asserts that this caused the application to be rewritten the applicant has not provided any altered drafts or schedules of time spent by partners or employees to quantify the impact of the late receipt of this information. The new material is very limited and in the absence of any explanation as to why it should have caused substantial delay there is in my view no proper basis for concluding that the provision of such limited information could have had a material effect on adherence to the deadline. On the facts of this case I do not consider that the applicant has demonstrated that the delay was caused or contributed to in any material way by the Sports Council."

238. Although rejecting the applicant's claim that the Sports Council had incorrectly or unreasonably applied its discretion, Morgan LCJ did decide that its decision was unlawful on other grounds, and remitted the matter for consideration of whether a reduced award should be made to the applicant.

239. BAM also relied in their submissions upon the fact that the UNCITRAL Model Law on Public Procurement provides at Article 40.3:-

> " A tender received by the procuring entity after the deadline for presenting tenders shall not be opened and shall be returned unopened to the supplier or contractor that presented it."

240. This however is not part of Irish law, and I accept as correct the respondent's submission that UNCITRAL adopts a position which has not been incorporated into Community legislation, and that the EU now takes a rather different approach in Article 56.3 of Directive 2014/24. UNCITRAL, therefore, does not assist the court in deciding on the competing submissions in this case.

241. As to EU case law, BAM relied in particular on *Scan Office Design SA v. Commission of the European Communities* (Case T–40/01). There the General Court was concerned with a claim for damages by an unsuccessful tenderer arising out of a tender for the purchase of furniture by the Commission in a negotiated procedure, where the successful tenderer was a company called Frezza. The Commission had erroneously sent the specifications for the project to the tenderer's Italian, rather than Belgian, Branch. The tender deadline was 18th August, 1997. Although Frezza's tender bore that date, it was not in fact submitted in time. By letter dated 21st August, 1997, Frezza sought an extension of the deadline. That letter was posted on 22nd August, 1997, and received by the Commission on 25th August, and following that request, the deadline was extended by the Commission to 28th August. Having found these bare facts the court stated that :-

> "32. It follows from the foregoing that both the submission of Frezza's tender as well as its request for an extension of the deadline and thus a *fortiori* the agreement of the Commission to an extension all occurred after expiry of the deadline set for the submission of tenders.
>
> 33. Accordingly, the Commission committed a fault in accepting Frezza's late tender."

242. It should be noted that the applicant's claim to damages failed because its own tender did not comply with mandatory conditions under the tender specifications.

243. Unfortunately, the judgment does not indicate what arguments were made in relation to the deadline issue, and the court does not set out its reasons for ruling that the extension was impermissible notwithstanding that the Commission was at fault in initially notifying the incorrect branch of Frezza. As Professor Arrowsmith states in her 3rd Edition of *The Law Public and Utilities Procurement* (2nd edition 2005) at para. 7 – R163 – "… the court did not specifically address the argument that this error justified the Commission's section and its conclusion may have been based on the fact, that given ongoing communications between *Scan & Commission* the error caused no prejudice."

244. It is also apparent, from a reading of the *Scan* decision, which includes detailed referencing to earlier proceedings between Scan and the Commission, that Court was highly critical of the Commission's denial of the existence of assessment sheets, and its failure to produce them. At para. 27 of its judgment the court stated –

> "27. It cannot but be concluded that the Commission, in repeatedly denying the existence of documents which in reality existed and by refusing to communicate documents on the ground that they were confidential, committed a serious fault."

245. Furthermore, the judgment does not make it clear whether the ruling that "the Commission committed a fault in accepting Frezza's late tender" was based on the Procurement Directives or on general principles, or on other rules applying to the Commission's procurement – a fact noted by Professor Arrowsmith at para. 7-0162 *op. cit*. . The judgment also predates the Procurement Directive,

relating as it does to a tender procedure in 1997. For all these reasons, I do not find this judgment helpful or supportive of any general rule applicable to the present case to the effect that the deadline for accepting late files could not, under any circumstances, be extended.

246. Both parties referred the court to *Tideland Signal v. the Commission* [2002] ECR II 03781. An invitation to tender was issued by the European Commission for the Procurement of Navigation equipment for Ports in the States relating from of the former Soviet Union under a Commission Aid programme. The applicant's tender was rejected on the basis that it did not include an undertaking to keep the tender open for acceptance for a period of ninety days after the tender deadline. The tender did state that it was valid for "a period of 90 days from the final date for submission of tenders, I.E. until 28/07/02.". The ninety day period did not in fact end on this specified date, which was ninety days from the *original* tender deadline before it was extended. The reference "28/07/02" was a remnant from the first tender which had been prepared to meet the first deadline and which had not been amended to reflect the extended deadline. The General Court annulled the Commission's decision to reject *Tideland's* tender holding that –

> "43. … on the Evaluation Committee's decision to reject the tender without seeking clarification of its intended period of validity was clearly disproportionate and thus vitiated by a manifest error of assessment."

247. While this case was primarily relied upon by counsel for NTMA, counsel for BAM submitted that it should be distinguished because it was concerned with contract documents which were ambiguous, and in that sense actually supported BAM's submissions. Thus, at para. 43 of its judgment the court stated –

> "In addition, as regards the principle of proportionality, the Court finds that in the present case the Evaluation Committee, faced with the applicant's ambiguous tender, had a choice between two courses of action, either of which would have produced the legal certainty referred to at paragraph 34 above, namely to reject the tender outright or to seek clarification from the applicant…"

248. Counsel for BAM emphasised that the present case does not involve any ambiguity – the deadline was 17:00 on 28th November 2014.

249. I do not consider that *Tideland* assists the applicant. It does establish that, even where a deadline is concerned, where a tenderer is ambiguous the Commission or other relevant authority has a duty in an appropriate case to seek clarification, and that to reject the tender outright would be a disproportionate and "manifest error of assessment". Having said this, it is clear that *Tideland* involved a failure to exercise an express power under the invitation to tender and not – as in the present case – an acceptance of late documents notwithstanding an express provision that the tender documents/files be uploaded by a stated deadline.

250. Counsel for BAM also relied on *Commission v. Denmark* Case C-243/89, 22nd June, 1993. There, the court stated:-

> "37. In this regard, it must be stated first of all that observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.
>
> 38. …
>
> 39. With regard to the Danish Government's argument that Danish legislation governing the award of public contracts allows reservations to be accepted, it should be observed that when that legislation is applied, the principle of equal treatment of tenderers, which lies at the heart of the directive and which requires that tenders accord with the tender conditions, must be fully respected."

251. It was submitted that the imposition of a deadline is a mandatory requirement with which all tenderers must accord because otherwise there would be a breach of the principle of equal treatment. That case, however, did not specifically address the question of a deadline, and in particular where the tender document allows, as I have found, some discretion.

252. Counsel for BAM also relied on *Artiera dell'Adda SpA v. CEM Ambiente SpA* (Case C-42/13- 10th Chamber), again for the proposition that the contracting authority must comply strictly with the criteria established in the ITN. At para. 42, the court stated:-

> "42. The Court has already held that the contracting authority must comply strictly with the criteria which it has itself established, so that it is required to exclude from the contract an economic operator who has failed to provide a document or information which he was required to produce under the terms laid down in the contract documentation, on pain of exclusion (see, to that effect, judgment in *Manova*, C‑336/12, EU:C:2013:647, paragraph 40).
>
> 43. That strict requirement on the part of contracting authorities has its origins in the principle of equal treatment and the obligation of transparency deriving from that principle, to which those authorities are subject in accordance with Article 2 of Directive 2004/18."

253. The court went on to hold that Article 45 of the Procurement Directive in conjunction with Article 2:-

> "does not preclude the exclusion of a tenderer on the ground that he has omitted to annex to his bid a sworn statement relating to the person identified in the bid as technical director. In particular, in so far as the contracting authority takes the view that that omission is not a purely formal irregularity, it cannot allow the tenderer subsequently to remedy the omission in any way after the expiry of the deadline for submitting bids."

254. It was submitted, in particular, that "BIM" files contain additional information, so that their omission was not merely a matter of form. These were documents and information which Eriugena was required to produce under the terms laid down in the ITN.

255. The next case relied upon by the applicant was *SAG ELV Slovensko a.s. v. Úrad Pre Verejné Obstarávanie* (Case C-599/10). In the course of the procedure under consideration, tender clarifications were sought from two candidates – in addition to questions specific to their tenders, they were asked to provide clarification of "the abnormally low prices which they had proposed". The court was not concerned with negotiated procedure. It stated:-

> "36. By its very nature, the restricted public procurement procedure means that, once the tenderers have been selected and once their respective tenders have been submitted, in principle those tenders can no longer be amended either at the request of the contracting authority or at the request of the tenderers. The principle of equal treatment of tenderers and

the obligation of transparency resulting therefrom preclude, in that procedure, any negotiation between the contracting authority and one or other of the tenderers.

37. To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment.

38. In any event, it does not follow from Article 2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned. Those tenderers cannot, moreover, complain that there is no such obligation on the contracting authority since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence in the drafting of their tender, to which they, like other tenderers, are subject.

39. Article 2 of Directive 2004/18 does not therefore preclude the absence, in national legislation, of a provision which would oblige the contracting authority to request tenderers, in a restricted public procurement procedure, to clarify their tenders in light of the technical requirements of the tender specifications before rejecting them because they are imprecise or do not meet those requirements.

40. Nonetheless, Article 2 of that directive does not preclude, in particular, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender. Nor does that article preclude a provision of national legislation such as Article 42(2) of law no 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tender without, however, requesting or accepting any amendment to the tender."

Discussion

256. Consideration of the Procurement Directive and Procurement Regulations is inconclusive, and all that can really be said is that they require the contracting authority to apply the principles of equal treatment, non-discrimination and transparency to relevant decisions. While the time limit for submitting tenders is referred to as a "deadline", this is not further defined and there is no provision excluding the possibility that a contracting authority might have and exercise a discretion to extend time in an appropriate case. That deadlines are immutable is clearly not borne out as the provisions identified earlier do mandate an extension of time limits in certain circumstances (which don't arise in the present case), where there is not necessarily any fault on the part of the tenderer.

257. There is no persuasive, let alone clear, authority of the European courts which states that a public procurement tender deadline is immutable or can never be extended. Rather the EU decisions show that the contracting authority must apply the General Principles when considering whether to accept late or omitted documents, or when raising queries after the tender date, or when availing of any discretion of this nature afforded to it under the applicable tender rules. This appears to be so even if the tender as submitted breaches requirements of the tender specification. Indeed, the principle of proportionality may impose a duty on the contracting authority to exercise a discretion to allow late filing or to seek clarification where there is ambiguity.

258. It appears that the European courts have been prepared, in limited circumstances, to sanction a contracting authority granting some leeway to tenderers where –

(1) discretion is afforded by the applicable tender rules, and/or

(2) the irregularity – be it error, ambiguity, omission or late filing - is the fault of the contracting authority, or is not the fault of or within the control of the tenderer, and

(3) the exercise of that discretion does not breach the principles of equality, proportionality and transparency (and in respect of these considerations there is no margin of appreciation), and

(4) there has been no manifest error in the exercise of the discretion by the contracting authority – and in this respect the courts concede a "margin of appreciation" to the awarding authority in relation to matters of judgment or assessment.

259. I am not persuaded by the suggestion in Professor Arrowsmith's 3rd Edition that "…waiver of certain formalities such as the deadline for tenders may not be possible" or "should not be possible regardless of what is stated in the contract documents." Even as posited this opinion is qualified, and insofar as it is based on the decision in *Scan Office Design*, I am not satisfied that that is an authority that can be relied upon for such a proposition – as Professor Arrowsmith herself acknowledges at para.7.163.

260. I find persuasive the judgment of Richards J in *Leadbitter* that the principle of proportionality applies, and that, at least before Directive 2014/24 became effective, (and during the period of this tender) – "There may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender…" The Authority relied on *All About Rights Law Practice, R (on the application of) v The Lord Chancellor* [2013] EWHC 3461, where Carr J appeared to go further in stating:

"49. It is clear that in appropriate circumstances proportionality may require the acceptance of late submissions of a tender…if there are obvious slips which can readily and easily be put right without improvement to the bid or a disadvantage to others."

While there may be little practical difference between use of the words "appropriate" as opposed to "exceptional", in my view the latter term better describes the abnormal circumstances in which a contracting authority may be duty bound to exercise a discretion to extend a tender deadline, and gives due emphasis to the rarity with which this might occur.

"Exceptional circumstances" would encompass failure to achieve deadlines as a result of power failure, or *force majeure*, but these are extremes, and the court should not attempt to define or thereby limit the scope of what might in a given set of circumstances be "exceptional". Furthermore what might not seem exceptional at first glance must be considered in the context of all relevant facts, and might then be seen to reach the threshold of "exceptional" when viewed objectively, particularly from a tenderer's perspective.

Thus the Authority was entitled to consider Eriugena's predicament in the context of a 31 week process, the expense involve, and the public interest in progressing the project rather than risking its abandonment.

261. BAM argued that to allow deadlines to be flexible at the discretion of the contracting authority brings an unacceptable uncertainty to a process that has its origins in EU directives and is intended to be certain and structured. The analysis earlier in this judgment of the 2004 Directive and the 2006 Regulations undermines this argument, and I consider that the import of EU and UK case law relied upon by BAM as reflecting the EU position is further weakened by the more flexible approach now taken in the 2014 Directive. It is also answered by *Leadbitter* – there may be a discretion to accept a late tender, notwithstanding the uncertainty argument, albeit that it is only in "exceptional circumstances" that the contracting authority may enjoy such a discretion.

262. Although the facts in *Azam* are distinguishable – there was an egregious delay, entirely the fault of the tendering firm – I find the formulation of Briggs J in the High Court as most helpful, where he stated:

> "41. First, the principle of proportionality is capable of applying to the implementation of the terms of a procurement process. Secondly, it may permit and in certain cases even require the waiver of some term of the process, such as a deadline. Thirdly the question whether to permit a waiver of a deadline, or, which is in this case the same thing, to grant an extension of time, is pre-eminently the exercise of a discretion, in which the public authority is to be afforded a proper scope for the exercise of reasonable judgment. Fourthly, the concurrent obligations of equal treatment, good administration and transparency will often weigh against the exercise of such a discretion by waiver or extension of time, in particular where the publication of the tender includes (as in the present case) a statement that extensions of time will not be granted. Fifthly, although generally it will be appropriate to compare the prejudice which may be caused to the applicant for an extension by a refusal with the prejudice which might be caused by a grant of an extension, a primary consideration will be the question whether the need for an extension has arisen as the result of the applicant's conduct (whether by act or omission) rather than by something which is either the fault of the public authority, or otherwise a matter entirely outside the applicant's control."

The reference to "proper scope for a reasonable judgment" emphasises that the decision as to whether the extension resulted from "exceptional circumstances" is one for the Authority, and in respect of which it enjoys a margin for appreciation.

263. *Azam* concerned a refusal to extend a deadline which Briggs J considered, on the facts before him, was the same thing as a waiver of a deadline. The present case concerns the exercise of a discretion to accept late documents forming part of a tender, and a decision which effectively waived the deadline in respect of those documents. I do not discern, at least in the present case, any difference between such decisions, and therefore the same principles should apply. However one point of difference to note which is very relevant is that in *Azam*, the tender documents expressly made it clear that extensions of time would not be granted. In the present case there is no such provision in the ITN, although tenderers were reminded of the deadline in Circular CIR454 of 21 November, 2014.

264. With regard to the question of fault, where a tenderer can demonstrate with appropriate evidence that it has acted responsibly and in accordance with the tender documents, and something occurs that is not within its control which has frustrated due compliance with a deadline, then there is *prima facie* a case made out for late acceptance/extension such that the contracting authority must *consider* exercising its discretion. I do not consider that the law requires that the problem that occurs must be entirely outside the control of the tenderer. Provided there is no clear or identifiable fault on the part of the tenderer, the contracting authority is entitled to exercise its discretion in favour of a tenderer if satisfied that there are decisive elements that were outside its control.

265. In this respect, the decision in *Watters* is consistent with this approach, but may be distinguished on its facts. There the applicant's excuse for not quite meeting the deadline was that due to a request for additional information two days before the deadline they had to rewrite the application and they then experienced difficulty printing because of a "computer server problem". However they failed to adduce evidence in the form of altered drafts or schedules of time spent on the rewrite, and the new material required was very limited. The court therefore held that the Sports Council was entitled to exercise its discretion not to accept the late tender. This is an example of a case where the applicant failed to discharge the onus of proving the case for an extension of the deadline – but it is not authority for the proposition that simply because the problem lay with the tenderer's computer server no extension could be granted.

266. The discretion to extend time in exceptional circumstances that is justified by this case law does not mean that the express discretion that the court has found exists under Section 7.1 also requires proof of exceptional circumstances. However it does establish that in exercising the contractual discretion under Section 7.1 of the ITN the Authority must not infringe the principles of equal treatment/non-discrimination, proportionality and transparency.

267. Applying these principles to the facts, was the Authority entitled to consider that there Section 7.1 applied, or that there were "exceptional circumstances" such that it should not reject the late documents? If so, did the circumstances that NTMA relied on in the letter dated 6th, 19th and 24th March, 2015, infringe the principles of non-discrimination, equal treatment, transparency and proportionality?

268. I am satisfied that on the evidence that was before it, the Authority was entitled to treat the late submission of documents as an administrative error and to accept the late documents and to proceed to evaluate them. Further, and in the alternative, I am satisfied that the authority was entitled to treat the circumstances giving rise to the late delivery of documents as "exceptional".

269. The upload by Eriugena was a process that commenced two days before the deadline and resulted in the vast majority of the files being submitted before the deadline – with the remaining 8 files being submitted by 18:13, i.e. within one hour and thirteen minutes of the deadline. Three further factors forming the background to this are averred to on page 3 of the Decision Memorandum. Firstly, this was the first project of its kind where BIM modelling was being submitted electronically, and therefore was "… a relatively new process to both the [Authority] and Tenderers." Secondly, the Authority was aware that the time taken to upload documents "can be variable, which may at least in part be due to internal IT systems". Thirdly, as noted in the Decision document:

> "The [Authority] were not in a position to, and therefore could not, inform Tenderers of either how long it would take to upload Tenders or what specification of IT systems would be needed to interact in the most efficient way with Asite."

270. These factors were quintessentially administrative in nature and particularly relevant given that two of the three tenderers encountered unanticipated difficulties in uploading, and BAM had previously experienced problems of uploading at the draft Tender stage.

271. As to fault, a factor that must be considered in the context of "exceptional circumstances", although not expressly acknowledged in the Memorandum, there is implicit in the statement that NTMA could not inform Tenderers of how long it would take to upload or what specifications of IT systems would be needed, and the later statement that Eriugena's upload problems "were not wholly within their control", that some of the blame/fault lay with the Authority. The decision-makers certainly had evidence that NTMA should have anticipated the potential for upload problems and it is worthwhile restating here some of my earlier findings in relation to the late submission of documents by BAM at the draft Tender stage:

> "(6) However NTMA ought to have known, as of 19th September, 2014, that the uploading of files, and in particular BIM files, to Asite would be time consuming and had the potential to give rise to IT issues for the tenderers.
>
> (7) There is no evidence that NTMA specifically addressed this issue with the three Tenderers thereafter, and prior to the deadline for the final Tender e.g. by way of a Circular or at consultation.
>
> (8) It is also reasonable to conclude that had the NTMA specifically addressed this issue, it would have advised the Tenderers of the potential for delays or problems with uploading of the bigger files, including those under 1Gb, e.g. BIM files, and advised on the use of appropriate servers, software/systems or upload methods to best plan and carry out their uploads in order to avoid or overcome problems."

272. BAM argued that the Authority erred in blaming the internet, and that all tenderers must be aware that its speed is variable, and it was up to each tenderer to make appropriate plans and to provide for contingencies. While there is some force to this argument it seems to me that it doesn't preclude the Authority on appropriate evidence attributing fault to a third party whose operations are not under the control of a tenderer. If Eriugena had demonstrably left it too late in commencing the upload, or otherwise acted irresponsibly, that would be another matter. BAM also relied upon the advice given in Circular 304 and the Asite Training Manual as to the use of "Advanced Upload" to suggest that the blame lay with Eriugena. However a consideration of that advice shows that the use of Advanced Upload was recommended by Asite for single or combined files with a size of 1Gb, and that advice did not change notwithstanding BAM's problems at the draft Tender stage. Accordingly this argument is not well-founded given that none of Eriugena's late documents had a file size exceeding 4.1Mb.

273. Two further important considerations were Eriugena's assertions, accepted by the Authority on the evidence presented, that (1) "upload speeds were capped out a number of times" during the crucial period leading up to 5pm, and (2) the non-modification of files after the deadline.

274. Again the first of these is clearly a matter arising in the course of administration, namely during Eriugena's attempt to transmit the Tender to the Authority. In the court's view, this combination of circumstance (1) and (2) was exceptional, and was comparable to the power outage that led Devon Co. Co. to extend the time for submission of all tenders in *Leadbitter*. There was clear evidence to support the view that the delayed upload was not wholly within Eriugena's control. It was such that the Authority was entitled to decide to accept all the late documents and proceed to evaluation on that basis, whether under Section 7.1 or because of exceptional circumstance.

Non-discrimination/equal treatment

275. Non-discrimination and equal treatment may be considered together. In *Fabricom SA v Belgium* [2005] ECR I-1559 at para. 27 the CJEU stated:

> "Furthermore it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."

276. BAM did not experience problems uploading the final Tender, whereas the Authority accepted that Eriugena and Kajima did, and in this respect their situations differed. The Authority treated Eriugena and Kajima equally in accepting and considering the files uploaded late. The questions are whether the evidence accepted by the Authority provided an objective basis for the reasons given for this different treatment, and whether its decision resulted in impermissible discrimination.

277. I am satisfied that there was ample evidence before the Authority to justify it considering and deciding to treat Eriugena differently to BAM by accepting late files. Of relevance was the fact that electronic submission of the BIM files was a relatively new process, and the advice to the Authority was that the time taken can be variable and uploading can be problematic. Critically, there was evidence to support Eriugena's contention that it experienced technical difficulties, that in effect none of the documents were modified after the deadline, and that the base information for the BIM files was derived from the native BIM files which were submitted in time. There was, therefore, an objective basis for different treatment.

278. BAM argued that it was disadvantaged in that it stopped working on developing its tender promptly in order to ensure compliance with the deadline; and concomitantly that the late acceptance of files afforded additional time to Eriugena (and Kajima) to review and work on their Tender(s) and that this discriminated against BAM. I do not accept these submissions. Firstly, the ITN and imposition of the deadline for submission of the Tender did not require, expressly or by implication, that the tenderers stop working on their tender documents when the Asite portal opened for final Tenders, or at any particular time, or at the same time. It was a matter for each tenderer to decide when to cease work on improving and finalising its tender files.

279. Secondly, the Authority took into account that Eriugena commenced its upload some two days before the deadline, and having conducted its investigation, the Authority based its decision on evidence of the completion of the material documents prior to the deadline. Thus, there was evidence that Eriugena started and pursued its upload in a timely manner, and that all its documents, including BIM files, were ready and last worked on prior to the deadline. Critical to this was the evidence of non-modification of documents post the deadline, and indeed Eriugena's large BIM files were last worked on prior to 13:00 on 28 November. There was no evidence to suggest that Eriugena was attempting to or did take advantage of additional time that notionally became available because of the problems experienced in uploading - whether before or after the deadline. There was evidence that the files uploaded late did not "improve" Eriugena's tender. On the facts of this case there was no question of "potential for abuse", or risk that the late documents might express "second thoughts" or "change of position" – the risks adverted to by Purle QC in *J.R. Jones* – arising from the acceptance of the late documents.

280. It was of course for the Authority to assess this evidence, as it did, and it is not for the court to intervene unless there is a manifest error. I find no error, and certainly no manifest error. The complaint that in the course of the investigation "no real efforts" were made to determine the times when the "submit" button was pressed for each upload is not borne out. In the court's view, reasonable investigations and inquiries were made and the results considered before a decision was taken. The criticism of the failure

to obtain "conclusive" evidence concerning what caused the late uploads is not well made: the Authority was entitled to take a decision after undertaking reasonable investigations and based on cogent evidence – it was not necessary for the evidence to be conclusive. I accept the respondent's argument that in the absence of contemporaneous screen-shots it is hard to envisage what further technical evidence could have been produced to verify when the "submit" button was pressed. On the evidence before it when it took the impugned decision, the Authority was entitled to find that Eriugena's difficulties were genuine and that it did not seek, take or receive any unfair advantage, and that there was in fact no discrimination in favour of Eriugena by virtue of the late uploading and acceptance of files. As I have already found there was an objective basis for the view expressed by NTMA in its letter of 6th March, 2015, that Eriugena's difficulty "…was not wholly within its control".

281. I also accept the submissions of NTMA that analysis of the late Eriugena documents further demonstrates that no unfair advantage was obtained. Document 1 submitted at 17:03 was not created or modified after the deadline. Documents 2 and 3 did not differ from the previous versions of the same documents in any material respect. Documents 4-8, the BIM files, were based on information already made available to the Authority in the native BIM Revit and Asta programme files. While it is undoubtedly true that the BIM files are requirements of the ITN, and amount to more than merely "viewing tools", the crucial fact remains that the information upon which they are based was completed and submitted in time, and the files themselves were created and not modified before the deadline.

Proportionality
282. BAM contended that the decision to accept the late documents from Eriugena and Kajima was lacking in proportionality. In *European Dynamics v European Central Bank* [2014] T-553/11 at para.301 the General Court stated:

> "301. It should also be noted that the principle of proportionality requires that the acts of institutions, bodies and agencies of the Union should not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued and that, where there is a choice between several appropriate measures, recourse must be had to the least onerous…"

283. BAM argued that because the impugned decision breached a deadline provision, it seriously undermines the concept of deadlines in public procurement in Ireland and more broadly within the EU, which provides for objective legal certainty. This judgment has already dealt with the Authority's discretion to accept late documents and found that the exercise of this does not *per se* breach EU directives or the general law.

284. BAM next contended that there was lack of proportionality as the acceptance of late documents resulted in the non-compliant tenders of Eriugena and Kajima being evaluated and Eriugena being appointed preferred tenderer - instead of BAM being appointed as the only compliant tenderer.

285. The court cannot accept that the impugned decision is disproportionate for a number of reasons. The project is a very large one and of significant public interest, relating as it does to the core development of an inner city university. As the ITN Important Notice indicated the Authority had as an objective that "…a healthy competition is maintained throughout all stages of the Tender Process". This objective could have been lost if the late documents had not been accepted, with the distinct possibility that the competition would be abandoned with only one tender to evaluate and consequent delay in delivery of the project. The tender process up to 28th November had run over thirty one weeks, and was detailed and complex, involving significant resources and time on the part of each tenderer as the tenders were developed. This was the first time BIM models were submitted electronically as part of a final Tender. By the 17:00 deadline the vast majority of Eriugena's tender files had been uploaded. For reasons already addressed in this judgment Eriugena's late documents, with only one exception, effectively reflected documents or information submitted before the deadline, and none were modified post-deadline. The difficulty encountered by Eriugena appeared to be, if not the fault of the Authority, also not the fault of Eriugena.

286. The court is therefore satisfied that the decision taken was "the least onerous" option, and in accordance with the principle of proportionality. Indeed any other decision would have been open to the objection by Eriugena that it breached the principle of proportionality.

Transparency
287. BAM plead generally that the manner in which the Authority purported to exercise a discretion to accept late tenders, "and the justifications and reasons relied upon by the Authority in so doing, are lacking in transparency" (para.13.33 in the statement of grounds), and in para.13.32:

> "…An entity in the position of the Authority is obliged to indicate to all candidates the requirements it will use and how these will be applied. This must be done in a manner which is clear and which facilitates a uniform interpretation and understanding of the tender requirements. Furthermore, it is not permissible and is in breach of the requirements of transparency and equality for an authority to choose to disapply clear criteria of the ITN."

288. More specifically BAM pleads –

> (1) in relation to the late acceptance of 5 BIM files that –
>
> "…if the tender requirements could be met by the receipt of the information in just one of the required formats, then this information needed to be imparted to all tenderers to respect the requirements of transparency and equal treatment. That was not done." (para.13.29); and that
>
> (2) "To accept a late tender on the basis of an unconfirmed opinion that the lateness may not be wholly within the control of Eriugena is wholly disproportionate and discriminatory and lacking in transparency."

289. As to (1) it is beyond dispute that the submission of BIM files was a requirement of section 6 of the ITN, and that there was no indication in the ITN (or Circulars) that anything short of this, such as the native Revit BIM files, would be acceptable. All parties knew where they stood. However this did not in my view preclude the Authority from looking at objectively relevant considerations, including the nature and content of the documents, when deciding whether the late BIM files could be accepted. It would be unreasonable for there to be a requirement that in respect of a discretionary or general law power of this nature an ITN would be obliged to anticipate and describe all possible considerations or possibilities amounting to clerical or administrative errors, or constituting "exceptional circumstances" that might justify acceptance of late documents. Moreover the effect of the Authority's decision was not to relax the requirement that BIM files be submitted with the final Tender, but only in relation to the timing of acceptance of such files. The Authority made its position clear on this in its letter of 6th March, 2015.

290. As to (2), this complaint relates more to the quality of evidence upon which the Authority reached its decision, than a lack of transparency. The court has already found that the Authority was not required to obtain "conclusive" evidence, and after making appropriate and reasonable inquiries, the Authority was entitled to act on the information provided by Eriugena, which they had no reason to doubt. Furthermore in the view of the court the Authority was transparent in explaining the reasons for its "unconfirmed opinion" in the letters of 6th and 19th March.

291. The court therefore concludes that the circumstances that the NTMA relied on in the letters of 6th, 19th and 24th March, 2015, constituted valid reasons for the exercise of its discretion and did not infringe the General Principles, or breach the Procurement Directive or Procurement Regulations, or breach the general law.

Fourth Issue: Did the grounds relied on by the NTMA constitute manifest error in the exercise of its functions under the ITN?
292. This has been answered and reasons given earlier in this judgment that do not need restating. The grounds relied on by the decision makers in NTMA as set out in the Memorandum and the correspondence in March 2015, do not demonstrate any error, and certainly not any manifest error, in the exercise of its functions under the ITN.

Fifth Issue: Did the NTMA take irrelevant considerations into account in deciding to receive the Eriugena tender?
293. In the statement of grounds the applicant pleads that the Authority erred in taking into account some three matters:

> (1) that Eriugena's documents were not modified after 17:00, asserting that:
>
> "The test for compliance with a deadline is an objective one and whatever time a party ceased internally working on its documents, is not relevant to its compliance with a fixed requirement that the tender be received by 17:00 on 28 November 2014". (para. 13.27).
>
> (2) that the content of some of the late documents was the same as the content of other documents submitted in time – although this was not the case in respect of one of the documents (para. 13.29).
>
> (3) that the late submission may not have been "wholly within the control" of Eriugena, and that "Eriugena may not have been solely to blame for the uploads completing after 17:00" (para.13.30).

294. In identifying what may be relevant or irrelevant considerations, the respondent in its written submission relied on passages from Biehler, *Judicial Review of Administrative Action: a Comparative Analysis* (3rd Ed., 2013 Round Hall Thomson Reuters). At pp.93-94 the author states:

> "The question of what is relevant must of course be answered in the first instance by reference to the specific enabling statute conferring the power. A statute may expressly or by implication provide that certain factors must or must not be taken into account but there is also a considerable margin of appreciation within which the decision-maker may exercise his own judgment. In addition, it should be borne in mind, as Hill J stated in *Haidar v Department of Social Security* (1998) 157 ALR 359, that in most cases where a discretion is conferred, resorting to the specific language of the statute will provide no explicit answer as to what is a relevant consideration. So, as Mason J observed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39, " if the relevant factors…are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act". In general terms it can be asked whether a factor is logically or rationally related to the objects of a discretion and whether it serves a policy which is within the range of those permitted by the legislation.
>
> …even where a statute does set out a list of relevant considerations, difficulties may arise in seeking to establish whether these factors are mandatory or merely discretionary and whether the list is intended to be exhaustive or inclusive. As Mason J made clear in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, it is only where a decision-maker fails to take into account a consideration which he is bound to give his attention to that this ground of review can be invoked and the court must determine whether a given factor is mandatory in nature by reference to the language used in the statute…
>
> "So, clearly where a factor may or may not be taken into account, failure to do so will not provide sufficient grounds for review. This point was made by Cooke J in *CREEDNZ Inc v Governor General* [1984] 1 NZLR 172, 183 as follows:
>
> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision. "

These statements were not contested by counsel for the applicant and I accept them as correctly setting out the approach that the court should take in identifying and assessing what are the relevant or irrelevant considerations.

295. No legislative provision expressly addresses or sets out the considerations that should be taken into account by a contracting authority when deciding to accept late tender documents. As we have seen Article 2, of the Procurement Directive provides generally that -

> "Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."

and this is reflected in Regulation 17 of the Procurement Regulations. The case law also establishes that the principle of proportionality applies.

296. It was therefore necessary for the NTMA to apply these General Principles in reaching its determination, and that it purported to do so is reflected on p.1 of the Memorandum and the reference there to the advice received from their solicitors. Implicit in this is consideration of whether any tenderer has altered in any material respect its tender or tender documents after the submission deadline. Such a material alteration, if permitted, would breach the requirements of equality and non-discrimination and potentially give unfair advantage to the late tenderer. This would seem to be central to proper consideration of whether to accept late documents. I am therefore of the view that consideration by the NTMA of when the late documents were last modified was both relevant and mandatory.

297. Alternatively I am satisfied that considering when the late documents were last modified was rationally related to the object of

the discretion in the ITN to accept late documents, namely to treat as compliant a tender with an error/omission of a clerical or administrative nature – but not necessarily one the correction of which would lead to acceptance of a substantively new tender after the deadline. On this basis it was a relevant matter which the NTMA was fully entitled to consider when coming to its decision.

298. With regard to the content of the late documents, it is hard to see how this could not be relevant to the overall consideration of whether one or more documents/files should be accepted late. If a document has in substance, but in different form, already been submitted prior to the deadline, then this is a relevant factor in taking a decision to accept the correct document or file after the deadline. This consideration was appropriately applied to Documents 2 and 3 (in substance already submitted), and to the BIM files (Documents 4-8) which were based on the facts in the Revit files and Asta programme files already submitted. The fact that this was not a consideration in respect of Document 1 was transparently adverted to by the NTMA in its letter of 19 March 2015, when it stated:

> "7.2 The Authority considered that it was within the fair, reasonable and proper exercise of its discretion, having regard to all of the prevailing circumstances, to accept Document 1 (the uploading of which completed at 17:03) from Eriugena."

The court therefore finds that the NTMA consideration of content was relevant.

299. The question of fault for late delivery of documents is one which has featured prominently in the case law on "exceptional circumstances" and is clearly one that the courts of England and Wales regard as relevant and important – see *Leadbitter* and *Azam* considered *supra*. As Briggs J put it –

> "…a primary consideration will be the question whether the need for an extension has arisen as the result of the applicant's conduct (whether by act or omission) rather than by something which is either the fault of the public authority, or otherwise a matter entirely outside the applicant's control."

It is particularly relevant to the wider question of proportionality that a contracting authority should consider fault. If the error or delay is caused entirely by the fault of the contracting authority, that is a factor that should weigh in favour of the late tenderer. If the fault is entirely that of the tenderer then it is a weighty consideration against accepting late documents. Between these two extremes it may be difficult to ascertain who is at fault, or the level of fault properly attributable to a particular party. That is a matter of judgment for the decision maker, but this does not mean that consideration of this aspect is any the less relevant. I therefore find that the NTMA acted properly in considering the question of fault before taking its decision.

300. The court therefore concludes that the NTMA did not take irrelevant considerations into account in deciding to receive the Eriugena tender.

Summary

301. Under Section 7.1 of the ITN as part of the Compliance Check the NTMA had a discretion to accept documents/files submitted after the Tender deadline, and to treat a tender as compliant, where the lateness was due to clerical or administrative error or omission. Further and in the alternative the NTMA had a discretion under the general law to accept late tender documents. The exercise of such discretion, whether under the ITN or the general law, was subject to the Authority not infringing the general principles of equal treatment, non-discrimination, proportionality and transparency.

302. While the NTMA did misdirect itself in law in considering that it had a discretion under Section 4 of the ITN, it did not misdirect itself in law, or at any rate did not make any manifest error, in considering that it had a discretion to accept Eriugena's late documents/files, whether under the ITN or the general law.

303. The circumstances relied on by the NTMA in the letters of 6th, 19th and 24th March, 2015, constituted valid reasons for exercising its discretion in favour of Eriugena, whether under the ITN or the general law, and did not infringe the General Principles of non-discrimination, equal treatment, transparency and proportionality.

304. The grounds relied on by the NTMA did not constitute error, or manifest error, in the exercise of its functions under the ITN.

305. The NTMA did not take irrelevant considerations into account in deciding to receive the Eriugena tender.

306. The conduct of the NTMA did not breach the Procurement Directive, the Procurement Regulations or the general law.

307. The impugned decision was not rendered unlawful because of the involvement of Mr. McCarthy in the investigation and preparation of the Memorandum/recommendations, or because of the involvement of Mr. Burgess as one of the decision-makers. On the evidence none of the decision-makers in respect of the impugned decision were privy to or had reviewed the financial aspects of any of the tenders before deciding to accept Eriugena's late documents.

308. As the court finds against the applicant on all grounds, the application will be dismissed.

[1] It is in fact not Section 2.2(a) but Section 7.2(a) and (b) and that requires the Compliance and Conformity checks respectively, but I find that nothing turns on this error.

[2] Notwithstanding this Peart J. proposed to deal with the issue "for the sake of completeness", but expressly stated that he didn't "want that to be taken as an indication that parties can go beyond the grounds permitted when leave is granted by enlarging the grounds being put forward by either oral or written submissions."

[3] See further in this judgment the treatment of Issue 5 concerning "Irrelevant Considerations" and the guidance on identifying relevant considerations in Biehler, *Judicial Review of Administrative Action: a Comparative Analysis* (3rd Ed., 2013 Round Hall Thomson Reuters) discussed in that section