Neutral Citation Number: [2026] EWHC 2154 (TCC)

Case No: HT-2024-000177

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 12 August 2026

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

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Between :

ECOLOG INTERNATIONAL FZE **Claimant**

- and -

THE SECRETARY OF STATE FOR DEFENCE OF THE UNITED KINGDOM OF GREAT BRITAIN & NORTHERN IRELAND **Defendant**

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Sarah Hannaford KC and **Tom Walker**
(instructed by **Bird & Bird LLP**) for the **Claimant**
Rhodri Williams KC and **Simon Taylor**
(instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 6-7 May 2026

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Approved Judgment

This judgment was handed down remotely at 3pm on 12 August 2026 by circulation to the parties by email and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. By this claim, Ecolog International FZE challenges the award by the Ministry of Defence ("the MOD") of a contract for soft facilities management services at British bases in Cyprus. The contract was awarded to Sodexo Limited following a public procurement conducted by the MOD between May 2020 and February 2024 pursuant to the now-repealed *Defence and Security Public Contracts Regulations 2011* ("the Regulations"). Ecolog argues that Sodexo's bid was abnormally low, that the MOD failed to neutralise Sodexo's incumbency advantage, that the bids were unfairly and erroneously scored, and that the MOD acted unequally in its further negotiations with Sodexo after the submission of the rival bids. The claim is denied but there is first an issue as to whether any obligations were owed by the MOD to Ecolog in respect of this procurement and, if so, the extent of such obligations.

2. The Regulations, like other procurement legislation, provided protection to economic operators:

   2.1 Regulation 5(2) provided that the contracting authority should treat economic operators equally and in a non-discriminatory way.

   2.2 Regulation 51(2) provided that the contracting authority's duty to comply with key provisions in the Regulations was owed to economic operators.

   2.3 Regulation 52(1) provided that a breach of such duty was actionable by any economic operator which, in consequence, suffered or risked suffering loss or damage.

3. It is common ground that, as a company established in the United Arab Emirates, Ecolog was not an economic operator within the meaning of the Regulations and accordingly it cannot bring a direct claim for their breach.

4. Ecolog pleads, however, at para. 20 of its Amended Particulars of Claim:

   > "An implied tender contract ('the Tender Contract') was created in consequence of the advertisement of the Procurement and/or the issue of the tender documents and the Claimant's participation in the Procurement:
   >
   > (1) The Tender Contract obliged the Defendant to consider the bids in good faith which included, inter alia, carrying out the Procurement fairly, equally, transparently and/or in accordance with the terms of [the Invitation to Negotiate ('the ITN')] and/or regulations 5(2), 18 and 31.

> (2) Further or in the alternative, the Tender Contract obliged the Defendant to consider the bids in good faith and/or in accordance with the terms of the ITN.
>
> (3) Further, or in the alternative, the Tender Contract obliged the Defendant to apply the provisions of regulation 31 to the bids."

5. The MOD denies that any tender contract should be implied and contends, at para. 13 of its Re-Amended Defence, that Ecolog seeks to rely on such a contract "to circumvent the fact that it is not owed duties under the Regulations". If, alternatively, a tender contract can be implied, it pleads that its terms are limited to a duty to open and consider tender responses in good faith.

6. Ecolog reasserts its position at paras 6A-6D of its Reply. In particular, Ecolog pleads at para. 6C(3):

> "Further or alternatively, the Defendant was obliged to comply with the Regulations in respect of both the Claimant and Sodexo when carrying out the Procurement pursuant to its obligation of good faith:
>
> (a) The Defendant's obligation of good faith required it, inter alia, to act honestly, with fidelity to the parties' bargain, and not to conduct the Procurement in a way that would be regarded as commercially unacceptable by reasonable and honest people.
>
> (b) Whilst it is admitted that the Claimant was not an economic operator for the purposes of the Regulations, it is averred that the Defendant was a contracting authority and Sodexo was an economic operator. The Claimant does not understand it to be in dispute that the Defendant therefore was obliged to comply with the Regulations and owed duties under the Regulations to Sodexo when carrying out the Procurement.
>
> (c) Accordingly, the Defendant was obliged to comply with the Regulations in respect of both the Claimant and Sodexo when carrying out the Procurement. To do otherwise would be regarded as commercially unacceptable by reasonable and honest people."

7. Further, Ecolog pleads at para. 6C(4) that the MOD was obliged to apply the Regulations equally to it since otherwise it would fail to treat Sodexo equally as required by the Regulations.

8. On 16 January 2026, Eyre J ordered that these contractual issues should be resolved by the trial of four preliminary issues:

> "1. Was an implied tender contract created between the Claimant and the Defendant in consequence of the advertisement of the

Procurement, the issue of the tender documents and/or the Claimant's participation in the Procurement? (Amended Particulars of Claim, para, 20; Re-Amended Defence, paras 13-14; Re-Amended Reply, paras 6A-6D)

2. If such an implied contract existed, whether its terms were limited to the Defendant considering the Claimant's bid (alongside all other bids) in good faith. (Amended Particulars of Claim, para, 20; Re-Amended Defence, paras 13-14; Re-Amended Reply, paras 6A-6D)

3. If the answer to 2 is Yes, whether the implied tender contract required the Defendant to carry out the procurement:

   (1) fairly,

   (2) equally,

   (3) transparently, and/or

   (4) in accordance with the terms of [the ITN] and/or in accordance with regulations 5(2), 18, 31 and 33(13) of [the Regulations]. (Amended Particulars of Claim, para, 20; Re-Amended Defence, paras 13-14; Re-Amended Reply, paras 6A-6D)

4. If the answer to 2 is No (but an implied tender contract is found to have existed between the parties) whether the terms of such a contract included a duty for the Defendant to:

   (1) carry out the procurement exercise in accordance with the terms of the ITN, and/or

   (2) apply the provisions of regulations 31 and 33(13) of [the Regulations]. (Amended Particulars of Claim, para, 20; Re-Amended Defence, paras 13-14; Re-Amended Reply, paras 6A-6D)"

9. This is my judgment on the preliminary issues.

THE FORMULATION OF THE PRELIMINARY ISSUES

10. Sarah Hannaford KC, who appears with Tom Walker for Ecolog, proposes that the definition of the preliminary issues might be revisited and that the real issues are whether there was an implied contract at all and, if so, what were its terms. Specifically, she proposes combining issues 3 and 4 into a new composite issue which could read:

> "Whether any implied tender contract required the Defendant to carry out the Procurement:
>
> (1) fairly,
>
> (2) equally,
>
> (3) transparently, and/or

(4) in accordance with the terms of the ITN and/or in accordance with regulations 5(2), 18, 31 and 33(13) of [the Regulations]."

11. That reformulation is resisted by Rhodri Williams KC and Simon Taylor who appear for the MOD. Mr Taylor, who leads on this part of the case, maintains that the issues agreed by the parties and ordered by the court properly reflected Ecolog's case as pleaded at para. 20 of its Amended Particulars of Claim and, relying on my decision in *Martlet Homes Ltd v. Mulalley & Co. Ltd* [2021] EWHC 296 (TCC), that its case could not be amended by Ecolog's Reply. He argues that there is no pleaded claim that the MOD was required to carry out the procurement "as if" the Regulations applied to Ecolog, but that any such claim would import both the benefits and disadvantages of the Regulations so that the court would presumably also imply the requirement in regulation 53 of the Regulations that proceedings be commenced within 30 days of the date when Ecolog first knew or ought to have known that grounds for bringing proceedings had arisen. The MOD would, he submits, be prejudiced if Ecolog were now able to argue a new case without seeking to re-amend the Particulars of Claim and thereby avoiding any limitation objection to any amendment application.

12. Ms Hannaford responds that this is not a case like *Martlet* in which the claimant seeks to plead a new cause of action by its Reply, but rather a case in which the claimant has clarified a claim that the defendant does not appear to have understood.

13. The preliminary issues were formulated by agreement and approved by the court. There has been no formal application to amend the earlier consent order or to redefine the preliminary issues. In any event the formulation of issues 3 and 4 properly recognised the way in which Ecolog pleaded its case in the Amended Particulars of Claim. Ecolog's case as to fairness, equality, transparency and considering bids in accordance with regulations 5(2) and 18 is only pleaded as particulars of the implied contract to consider the bids in good faith at para. 20(1) of the Amended Particulars of Claim. There is no freestanding plea that there might have been such terms of any implied contract other than as an incident of good faith. While I acknowledge that the Re-Amended Reply was referred to after each issue, if it had been the intention of the parties or the court to have ordered a trial as to whether it was a term of any implied tender contract that the MOD would conduct the procurement "as if" Ecolog was entitled to the benefit of the Regulations regardless of any obligation of good faith, then the preliminary issues could easily have been so drafted.

14. I will therefore decide this case in accordance with the preliminary issues as ordered and not by reference to Ecolog's late and disputed reformulation of those issues. Accordingly, it is not necessary to grapple with the pleading issues or to consider further the application of the

Martlet principles to this case. Lest, however, I am wrong in that approach, I have in any event considered the implication of a freestanding "as if" term. For the reasons that I explain below, such reformulation would not have changed the outcome of this trial.

THE EVIDENCE

THE LACK OF FORMAL EVIDENCE

15. When preparing for this trial, I was concerned that no witness statements had either been ordered or filed and that there was no statement of agreed facts. Accordingly, and in advance of the hearing, I drew the parties' attention to rule 32.2(1) of the *Civil Procedure Rules 1998,* which provides the general rule that any fact that needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence. That position is, of course, different from the position at hearings other than the trial where the parties can rely on written evidence and indeed statements of case that are properly verified by statements of truth: rules 32.2 and 32.6. My concern was both to understand the evidential matrix against which the parties asked me to determine the preliminary issues and to ensure that I was not to be asked to determine some factual dispute without evidence being called.

16. Of course, I accept that there is a limit to what witnesses can actually say that is either admissible or useful on points of contractual construction although even in such cases there is scope for evidence as to the underlying factual matrix. Evidence might well be both admissible and of assistance on questions as to the implication of a contract or indeed the terms of any implied contract, but nevertheless neither party served any evidence or suggested that evidence was required.

17. Ms Hannaford makes clear that Ecolog does not seek to rely on any witness evidence and that its case rests on the tender documents (comprising the contract notice, the pre-qualification questionnaire ("the PQQ"), the ITN and a transcript of the recording of a negotiation meeting), and some internal documents from the MOD (comprising the MOD's reports at both the PQQ and final tender stages, and the MOD's negotiation strategy).

18. Not only are there no witness statements but no order for disclosure has been made in respect of the preliminary issues. Indeed, Ms Hannaford observes that - on reflection - it would have been helpful to have sought disclosure of the MOD's internal documents as to the issue of what they considered the position to be in respect of Ecolog. Put to her election and reminded that the trial is not a dress rehearsal, Ms Hannaford makes clear that she does not seek either an adjournment or further directions, and that she takes her stand on the documents that she had identified.

19. Mr Williams agrees that there is "little or no need for witness evidence" and that the case really requires an objective interpretation of the tender documents and the other documents referred to by Ms Hannaford.

20. For my part, I should have preferred the documents relied upon to have been put clearly in evidence by witness evidence which, it appears, would not have been cross examined. Nevertheless, at the parties' joint request, I proceed on the basis that it is common ground that the documents referred to by Ms Hannaford are properly in evidence before the court.

THE TENDER DOCUMENTS

21. The procurement was advertised in the Official Journal of the European Union by way of a contract notice dated 29 May 2020 and published on 3 June 2020. It was also advertised in Defence Contracts Online. The contract notice stated that the procurement would be carried out under the negotiated procedure at regulation 18 of the Regulations. The award criteria in the contract notice included the criterion of the most economically advantageous tender mirroring the provisions of regulation 31(1)(a).

22. Interested parties were required to respond to the PQQ. It was used by the MOD to select suppliers to invite to tender and was accompanied by guidance. The guidance did not limit the procurement to nationals of the EU, Norway and Iceland, or otherwise. Paragraph 1 stated that the procurement would be conducted under the competitive negotiated procedure in accordance with the Regulations. Paragraphs 52 and 60 both stated:

> "The Authority is required by Regulation 5(2) to ensure that all Potential Providers are treated equally and in a non-discriminatory way during the procurement process. The Authority therefore needs to eliminate or mitigate conflicts of interest so as to ensure a fair and non-discriminatory process."

23. The PQQ Guidance also made other references to the Regulations, including to the discretionary grounds for the exclusion of providers under regulation 23; the criteria for selection of subcontractors to be applied by providers under regulations 23, 24 and 25; the right of the contracting authority to reject subcontractors in accordance with regulation 37(4); and the right of the contracting authority to require a successful consortium to form a single legal entity in accordance with regulation 28.

24. In the PQQ Guidance, the MOD sought to limit its contractual liability relating to the subject of the PQQ documents. The relevant paragraphs 41 and 42 stated:

> "41. Only the express terms of any written contract relating to the subject of the PQQ Documents as and when it is executed shall have any contractual effect in connection with the matters to which it relates. That contract will be governed by English or Scottish law, as specified in the contract.
>
> 42. Nothing in the PQQ Documents is, or should be, relied upon as a promise or a representation as to the Authority's ultimate decisions in relation to the Overseas Prime Contract. The publication of the PQQ Documents in no way commits the MOD to award any contract or pursue any tender process for the Overseas Prime Contract."

25. The ITN was issued on 20 May 2021. Ecolog, Sodexo, and Compass Contract Services (UK) Ltd were listed as having pre-qualified and were invited to tender. The ITN stated that the contract would be awarded to a single successful bidder for an initial term of 5 years (plus a mobilisation period of 6 months) with an option for an extension of up to 2 years.

26. The ITN stated that tenders would be evaluated using the most economically advantageous tender methodology in accordance with regulation 33(1)(a). It also explained that the tender stage of the procurement was to be carried out in three stages: initial tenders at stage 1, negotiations at stage 2, and final tenders at stage 3. At stages 1 and 3, thirteen technical questions would be scored between 0 (totally inadequate response) and 5 (excellent response) on the basis of a scoring methodology and weightings set out in the ITN. At stage 3, the successful tenderer would be selected on the basis of providing the most economically advantageous tender, using a weighted value for money methodology with weightings of 60% non-cost elements and 40% cost elements.

27. The ITN referred to the Regulations in setting out how the procurement would be conducted. Booklet 1, titled "Special Notices and Instructions to Tenderers", stated that the procurement was being conducted using the negotiated procedure under the Regulations. The booklet also provided that each tenderer would be informed by notice in writing of any decision to award the contract and that such notice would include the information prescribed in regulation 33(2); that the MOD was obliged to allow a period of at least ten calendar days after the day of despatch of its award decision notice to tenderers before entering into the contract in order to give unsuccessful tenderers an opportunity to challenge any alleged breach of the Regulations; and that a tenderer's debrief would be available on request as provided in regulation 33(7).

28. The ITN contained the following reservations relating to reimbursement, changes to the procurement process, and the conditions of tendering:

> "4. Tender Expenses
>
> 4.1 You will bear all costs associated with preparing and submitting your Tender. If the Tender process is terminated or amended by the Employer, the Employer will not reimburse you."

> "21. Changes to the Procurement Process
>
> 21.1 All dates in the above timetable are *provisional only* and the Employer may vary any date within the timetable or terminate or alter the procurement process in any way at its sole discretion, including the addition or removal of stages. The negotiation process, by its nature, involves discussion between the Employer and Tenderers during the negotiation and this, for example, may affect the outline timetable.
>
> 21.2 The Employer reserves the right to undertake an iterative tendering process following receipt of the Tender.
>
> 21.3 The Employer reserves the right to waive or change the requirements of this ITN in whole or in part without prior notice being given by the Employer.
>
> 21.4 The Employer reserves the right to make whatever changes it sees fit to the structure or content of the procurement process."

> "77. Conditions of Tendering
>
> 77.1 The issue of ITN Documentation or ITN Material is not a commitment by the Employer to place a contract as a result of this competition or at a later stage. Any expenditure, work or effort undertaken prior to any offer and subsequent acceptance of contract, is a matter solely for your commercial judgement. The Employer reserves the right to:
>
> 77.1.1 seek clarification or additional documents in respect of a Tenderer's submission;
>
> 77.1.2 disqualify any Tenderer that does not submit a compliant Tender in accordance with the instructions in this ITN;
>
> 77.1.3 disqualify any Tenderer that is guilty of misrepresentation in relation to its Tender, expression of interest, the dynamic Pre-

Qualification Questionnaire (PQQ) or the tender process;

77.1.4 re-assess your suitability to remain in the competition, for example where there is a material change of control from supplier selection;

77.1.5 withdraw this ITN at any time, or re-invite Tenders on the same or any alternative basis;

77.1.6 re-issue this ITN on a single source basis, in the event that this procurement does not result in a 'competitive process' as defined in the *Single Source Contract Regulations 2014*, making such adjustments as would be required by the application of the *Defence Reform Act 2014* and/or the *Single Source Contract Regulations 2014*;

77.1.7 choose not to award any contract as a result of the current procurement process;

77.1.8 award a contract for some of the Contractor Deliverables, unless you specifically oppose this in your Tender or state any minimum order quantities; and/or:

77.1.9 ask for an explanation of the costs or price proposed in the tender where the tender appears to be abnormally low."

29. Ecolog submitted an initial tender on 31 March 2022. Negotiation meetings took place in August 2022 and a transcript of the meeting on 2 August 2022 between Ecolog and the MOD was produced. In that meeting, Andrew Jameson (the MOD's Commercial Lead for the Project) asserted that the procurement was subject to the Regulations.

30. In advance of inviting tenderers to submit their final tenders, the MOD amended and reissued the ITN on 7 October 2022 and issued a final version on 21 November 2022. Only Ecolog and Sodexo submitted final bids in the procurement.

31. By letter dated 23 February 2024, the MOD informed Ecolog that its tender had been unsuccessful and that it had decided to award the contract to Sodexo. Ecolog then sought explanation of the reasons for the scores given to it and Sodexo and, on 7 March 2024, Ecolog wrote to the MOD complaining that Sodexo's final price was unsustainable and there were apparent errors in the scoring.

ARGUMENT

32. Ms Hannaford argues that it is well established that a tender contract can be implied: *Blackpool & Fylde Aero Club Ltd v. Blackpool Borough Council* [1990] 1 W.L.R. 1195 and *JBW Group v. Ministry of Justice* [2012] EWCA Civ 8, [2012] 2 CMLR 10. She accepts that in some cases the tender contract to be implied is relatively limited in scope and simply requires the authority to consider the tender alongside other tenders in good faith. She argues that the contract to be implied in any individual case will depend on the facts: *Blackpool,* at p.1202; *JBW,* at [60]; *Adferiad Recovery Ltd v. Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC), at [139]; and *Excession Technologies Ltd v. Police Digital Service* [2022] EWHC 413 (TCC), [2022] PTSR 859, at [158].

33. Ms Hannaford observes that the cases in which the courts have only been willing to imply relatively limited contracts have been where no relevant procurement regulations applied to the procurement at all. She concedes that such cases are difficult for claimants because they require proof of a common intention that terms akin to those found in the applicable regulations should be implied despite the fact that, as in *JBW,* the authority may have been acting on the express assumption that the regulations did not apply. This case, Ms Hannaford argues, raises the novel question of whether an implied tender contract exists where relevant regulations apply to the procurement but not to one of the tenderers, and where the authority expressly asserts that it will comply with such regulations. In this case, she argues that the MOD applied the Regulations to all bidders when evaluating their PQQ responses and their tenders, and when conducting negotiations.

34. Ms Hannaford relies on *Dukes Bailiffs Ltd v. Breckland Council* [2023] EWHC 1569 (TCC) as an instance where the court considered that it was "plainly arguable" that there was an express or implied contract incorporating the *Public Contracts Regulations 2015* as if they applied to the procurement. Further, she relies on *Harmon CFEM Façades (UK) Ltd v. Corporate Officer of the House of Commons* (1999) 67 ConLR 1 and the Northern Irish case of *Scott v. Belfast Education & Library Board* [2007] NICh 4 as examples of cases in which the court has found a broader implied contract.

35. Ms Hannaford argues that, as a matter of principle, where the Regulations do apply to the procurement but not to all of the tenderers and the contracting authority has made it clear that the Regulations and the ITN will be complied with, a wider tender contract can and should be implied. Here, she argues that there can be no suggestion that the MOD was acting on the assumption, as in *JBW,* that the Regulations did not apply.

36. Ms Hannaford argues that reservations in the tender documents need to be read in the context of the document as a whole. Properly read, she submits that there is nothing in the tender documents to negative the suggestion that wider duties applied in this case.

37. Given that duties of equal treatment and compliance with the Regulations were owed to Sodexo, Ms Hannaford contends that the procurement would be unworkable if such duties were not owed by implication to all tenderers. How, she asks rhetorically, can one of two tenderers be treated equally and the other unequally? Wider terms are, she submits, necessary to give business efficacy to the tender document and are so obvious that they go without saying.

38. As to the mechanics, Ms Hannaford argues that wider duties can be implied either as part of a duty of good faith or as a freestanding obligation. In support of the first argument, she relies on *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526, at [144], and *Re Compound Photonics Group Ltd* [2022] EWCA Civ 1371, at [241]. Further, she submits that contrary to the warning at para. 19 of the MOD's own guidance, it has not made clear that the Regulations would not apply to Ecolog.

39. Mr Williams relies on *Blackpool, JBW, Adferiad* and *Excession*. He argues that implied contracts are not to be lightly implied and can only arise where the court can conclude that (1) the parties intended to create contractual relations, and (2) their agreement was to the effect contended for. He submits that any implied contract would generally be limited to an obligation to consider Ecolog's tender in good faith. Mr Williams argues that Ecolog is essentially seeking to use implied terms to expand the reach of the Regulations. Further, he relies on *Candey v. Bosheh* [2022] EWCA Civ 1103, at [29], for Coulson LJ's restatement of the principles as to when terms should be implied into a contract.

40. Mr Williams argues that suppliers from third countries which have not concluded a reciprocal international agreement guaranteeing access to public procurement opportunities are precluded from seeking redress under national legislation that implemented EU Directive 2009/81/EC. In support of that submission, he relies on recent case law of the Court of Justice of the European Union. Mr Williams submits that the references to the procurement being conducted in accordance with the Regulations did not indicate in any way that the Regulations would be applied to benefit any tenderers from third countries who were not entitled to their protection.

41. Mr Williams argues that Ecolog cannot benefit by a sidewind from the MOD's obligation to treat Sodexo equally. That obligation was owed to

Sodexo under regulation 5(2) as a UK-based supplier, but it is not breached by treating Sodexo more favourably.

42. Further, Mr Williams relies on paras 41-42 of the PQQ and submits that such provisions made clear that no implied contract could arise in connection with the matters to which the PQQ related. He also relies on clauses 21 and 77 of the ITN, and particularly the express reservation of the right to change the procurement process at clause 21.4 and the right to re-issue the ITN on a single-source basis in the event that the procurement does not result in a competitive process at clause 77.1.6. He submits, relying on *Excession,* that it is not material that the MOD did not in fact substantially change the process during the procurement; what matters is that it retained the right to do so at any time such that it was not possible to establish any common intention.

43. On the facts, Mr Williams argues that it is clearly inappropriate and unnecessary to imply any contract at all, let alone one that extends beyond an obligation to consider the tender alongside others in good faith. Mr Williams submits that while a *Blackpool* implied tender contract may arise, in those cases where the claimant has claimed more than that – such as *JBW, Adferiad* and *Excession* – the courts have ruled that there is no warrant for a broader contract and that there should be no implied contract at all. Further, he criticises the lack of clarity as to how and when it is said that the tender contract arose. He observes that it cannot have arisen upon Ecolog's participation at the PQQ stage given that the PQQ expressly precluded a tender contract and the pleaded formulation seeks to rely on terms at the ITN stage.

44. Following on, Mr Taylor argues that "fairness" adds nothing to equal treatment and transparency. He observes that the duty owed under regulation 5(2) to economic operators is to treat them equally and in a non-discriminatory way, and to act transparently. He argues that equal treatment and transparency arise under the Regulations and that accordingly these terms are parasitic on a finding that there is an implied term to apply regulation 5(2). He argues that there is no basis implying EU principles of equal treatment and transparency at common law post Brexit, and that in any event EU law could have no possible application to suppliers from the United Arab Emirates with whom there was no reciprocal procurement treaty.

45. Further, Mr Taylor submits that there is no evidence of a contractual intention to be bound by the terms of the ITN.

DISCUSSION

IMPLIED TENDER CONTRACTS

46. In the seminal *Blackpool Case,* the Court of Appeal recognised that a contract governing the conduct of a tender exercise can be implied. The defendant local authority had sent out invitations to tender for a concession. The form of tender stated that the defendant did not bind itself to accept all or any part of the tender, and that any tender received after the deadline would not be admitted for consideration. The plaintiff club submitted a tender within the specified time but, by error, the defendant failed to consider it.

47. In resolving the contractual issue in favour of the club, the judge held that an express request for a tender might in appropriate circumstances give rise to an implied obligation to perform the service of considering that tender. In upholding the judge, Bingham LJ (as he then was) posed a number of counterfactuals:

> "[W]hat if… the council had opened and thereupon accepted the first tender received, even though the deadline had not expired and other invitees had not yet responded? Or if the council had considered and accepted a tender admittedly received well after the deadline?"

48. Bingham LJ could not accept the council's argument that it would not be in breach of any obligation in such circumstances, as distinct from breaching its own standing orders or merely being accused of discreditable conduct. For the law to take that approach would be to bring about an "unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties" (at p.1201G-H). Bingham LJ concluded, at p.1202B-D:

> "[W]here, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure – draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question, and an absolute deadline – the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are. Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been 'of course.' The law would, I think, be defective if it did not give effect to that."

49. Bingham LJ observed that while the invitation to tender did not explicitly state that the council would consider all timely and conforming tenders, there was also no statement to the opposite effect. He concluded, at p.1202E, that "a reasonable invitee would understand the invitation to be saying, quite clearly, that if he submitted a timely and conforming tender it would be considered, at least if any other such tender were considered".

50. Bingham LJ cautioned, however, at p.1202F:

> "I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for. It must also, in most cases, be able to answer the question posed by Mustill L.J. in *Hispanica de Petroleos S.A. v. Vencedora Oceanica Navegacion S.A. (No. 2) (Note)* [1987] 2 Lloyd's Rep. 321, 331: 'What was the mechanism for offer and acceptance?' In all the circumstances of this case, and I say nothing about any other, I have no doubt that the parties did intend to create contractual relations to the limited extent contended for. Since it has never been the law that a person is only entitled to enforce his contractual rights in a reasonable way (*White & Carter (Councils) Ltd. v. McGregor* [1962] A.C. 413, at p.430A, per Lord Reid), Mr Shorrock was in my view right to contend for no more than a contractual duty to consider. I think it plain that the council's invitation to tender was, to this limited extent, an offer, and the club's submission of a timely and conforming tender an acceptance."

51. *Blackpool* has been endorsed and followed in subsequent cases. In *Fairclough Building Ltd v. Port Talbot Borough Council* (1992) 33 ConLR 24, the plaintiff submitted its tender in response to the local authority's invitation. It was then removed from the tender list after the wife of one of its directors, who worked for the council, declared a potential conflict of interest. The plaintiff's claim based on breach of an implied tender contract was dismissed. Upholding that decision, Parker LJ reviewed the reasoning in *Blackpool* which had been decided while the appeal in *Fairclough* had been pending. He observed, at p.30, that the issue in *Blackpool* had been that the plaintiff's tender had not been considered at all whereas in *Fairclough* the process of considering the tender had begun but the authority had then identified an issue on which it had to decide what course of action to take. Parker LJ endorsed as consistent with the later decision in *Blackpool* the prescient submission made to the trial judge that the implied contract gave rise to "a small and limited obligation" to consider the plaintiff's tender.

52. In the *JBW Case*, the Ministry of Justice ("the MoJ") invited tenders for a number of contracts for bailiff services. The contracts were for service concessions and so excluded from the ambit of the *Public Contracts*

Regulations 2006. JBW tendered for three contracts but was unsuccessful and brought proceedings alleging that the MoJ had been in breach of an implied tender contract. JBW argued that, by offering the contract out to tender, the MoJ had impliedly entered into a contract which would oblige it to treat all tenders equally and with transparency and in accordance with the terms of the tender document.

53. Elias LJ was prepared to accept, in line with *Blackpool*, that the MoJ would in principle be under an obligation to consider the tender. He also had no difficulty in implying that such consideration should be in good faith. "Indeed," he explained, at [61], "if a tender is not considered in good faith, I do not think that it can sensibly be said to have been considered at all". The Court of Appeal rejected JBW's more ambitious argument that the implied contract extended to requiring the MoJ to treat all tenders equally and with transparency.

54. Elias LJ accepted, however, at [60]:

> "A tendering authority is not obliged to comply with the [*Public Contracts Regulations 2006*] where a service concession is in play, but there is in principle no reason why it could not choose to do so and I do not see how it could be illegal for it to do so. The parties could expressly agree to contractual terms mirroring the Directive and the Regulations if they so wished, and therefore there is no reason in principle why implied terms could not cover that same ground."

55. That said, Elias LJ immediately added this note of caution:

> "Having said that, the difficulties of implying terms akin to those found in the Regulations, terms necessarily premised on the assumption that this was the common intention of the parties, in circumstances where the MoJ has throughout been acting on the assumption that the Regulations did not apply, is obvious."

56. Rejecting JBW's broader implied contract, Elias LJ concluded, at [62], that there was simply no basis on which it could be contended that such terms necessarily had to be implied to give efficacy to the contract, or that JBW had established such a common intention. He added, at [63]:

> "Mr Knox relied upon the fact that there are fundamental EU principles of transparency and equality, and he submitted that these would mould the nature of the implied term. However, I agree with Mr Vajda that there is no proper basis for assuming that EU principles can alter the way in which terms are implied at common law. It is common ground that these principles are not engaged as a matter of EU law, since there is no cross-border element in the arrangement. In effect Mr Knox is seeking to use the implied term as

a means of expanding the reach of EU law and that is not, in my judgment, a legitimate exercise."

57. In the *Adferiad Case*, the procurement was not subject to the *Public Contracts Regulations 2015* because the value of the procurement was below the financial threshold in those regulations. The case was therefore put on the basis of an implied tender contract. The claimant argued that the procuring authority was in breach of its duties of transparency and equal treatment under regulations 18 and 76 of the 2015 Regulations and of its duties under general principles of retained EU law.

58. The claimant argued that the defendant's issue of the invitation to tender and the claimant's submission of a tender gave rise to a contract that included terms that the tenders submitted would be evaluated fairly, in good faith, in accordance with the tender procedure set out in the tender documentation, and that the assessment would be free from any manifest error.

59. His Honour Judge Keyser QC reviewed the *Blackpool Case* and summarised the applicable principles, at [133]:

> "First, contracts are not lightly to be implied. Second, a contract will not be implied unless the facts show that both parties intended to create contractual relations. Third, a claim will not succeed unless the contract that the parties intended to make was to the effect contended for by the claimant. Fourth, in the *Blackpool Case* the necessary contractual intention was shown by facts that included, in particular, the relation between the council and those invited to tender, the public obligations of the council as a fiduciary, the express prescription of a clear, orderly and familiar procedure, and the manifest intention that all timeous tenders would be considered. Fifth, the contract that was held to exist merely obliged the council to consider all timeous tenders. Sixth, the defendant council had not said anything to negative the inference that it intended to create contractual relations to the limited extent alleged by the plaintiff. Seventh, Bingham LJ expressly prescinded from expressing any view beyond the facts of the case."

60. Judge Keyser concluded, at [136], that there is no general rule as to the existence of implied contracts in procurement cases and that the decision in *Blackpool* rested on the application of basic rules of contract to the facts of that case. He added that *Fairclough* did not purport to go beyond *Blackpool* in that regard and that neither decision could be taken as authority for the proposition that an implied contract arises as a matter of law in all public procurement cases.

61. The judge found the claimant's claim in contract to be untenable. At [139], he rejected the wider contract contended for by the claimant which, he observed, went "far beyond" the limited contracts found in *Blackpool* and *JBW*. He added that such a contract "could only be implied upon compelling factual grounds" which he considered to be "wholly lacking". Further he found that the crucial requirement of objectively demonstrated intention to undertake the contractual obligations relied on was not only absent but expressly negatived by the following provisions in the invitation to tender:

    61.1 Clause 1.6 of the prefatory notice which provided that the authority reserved the right to change the basis of, or the procedures for, the competitive process, or to reject any or all tenders, and which further provided that the authority would not incur any liability in respect of such matters.

    61.2 Section 11.3 which provided that the authority reserved the right to make amendments at any time up to the award of the contract.

    61.3 Section 21.2.6 which provided that nothing contained in the invitation to tender constituted an agreement, contract or representation, and that receipt of the invitation did not imply the existence of any contract or commitment.

    61.4 Section 21.2.7 which provided that the authority reserved the right to change any aspect of, or cease, the tender process at any time.

62. Judge Keyser said the documentation was inconsistent with an intention on the part of the authority to undertake the wider contractual obligations alleged by the claimant. Indeed, he added that it was even inconsistent with any intention to enter into voluntary contractual obligations at all, including a *Blackpool* style limited implied tender contract.

63. In the *Excession Case*, O'Farrell J accepted, at [152], that it had become "well established that a contract can be implied governing the conduct of a tender exercise". O'Farrell J then considered the well-known test for implication of terms into commercial contracts from the Supreme Court's decision in *Marks and Spencer plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 approving the Privy Council's test in *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1977) 180 CLR 266, at p.283:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

64. *Excession* was also a case under the *Defence and Security Public Contracts Regulations 2011*. O'Farrell J accepted the authority's argument that the Regulations did not apply to the claimant because the selection explicitly stated that the exemption set out in regulation 7(1)(b) applied owing to the sensitive nature of the requirements which entailed both intelligence services and classified information. While the authority considered it helpful to maintain the structure of having a selection questionnaire and an invitation to tender stage as per the Regulations, the questionnaire also made clear that the utilisation of this familiar process did not "oblige the authority to comply with [the Regulations] in full" and that the authority reserved the right in its sole discretion to change the process at any time. That same express term was also included at a later stage in the procurement.

65. Having found that the defendant was entitled to rely on the claimed exemption and that the Regulations did not apply to the procurement, O'Farrell J concluded, at [159], that there was an implied contract that the claimant's tender, if compliant with any tender requirements and submitted by the deadline, would be considered in good faith if other such tenders were considered.

66. Accordingly, there is no rule of law that a tender contract will always be implied or as to the scope of the terms of any implied contract. It will all depend on the facts of the individual case but, where the court has found there to be an implied tender contract, its scope has generally been limited to an obligation to consider the tenders submitted on time and to do so in good faith.

IMPLIED TENDER CONTRACTS IN FAVOUR OF TENDERERS EXCLUDED FROM STATUTORY PROTECTION

67. The cases considered thus far have been cases in which no relevant statutory regime applied. The procurement exercises in *Blackpool* and *Fairclough* predated the statutory regulation of tendering. In *JBW*, the procurement was excluded from the then applicable *Public Contracts Regulations 2006* because those regulations did not at that time cover service concession contracts. In *Adferiad,* the value of the procurement was below the financial threshold in the *Public Contracts Regulations 2015*. In *Excession,* the MOD was entitled to rely on an exemption from the Regulations.

68. What then is the position where a regulatory regime does apply more broadly to the procurement but the claimant asserting an implied tender contract is not entitled to the protection of that regime? While not the factual position in the authorities discussed so far, the possibility that some tenderers might be able to enjoy the protection of a statutory scheme while others are excluded from such protection is inherent in defining

economic operators by reference to where their businesses are established. Where at least one tenderer is entitled to such protection, it follows that the authority must conduct the procurement in accordance with the relevant regulations.

69. Statements in the tender documents of an authority's intention to conduct a procurement in accordance with the law are not surprising. While the facts of each case will vary, a simple statement that a procurement will be conducted in accordance with relevant regulations is unlikely, of itself, to evince an intention to extend the reach of that statutory regime to those expressly excluded from its protection.

70. The guidance issued by the MOD about the Regulations in December 2017 addressed the issue of the Ministry's obligations to suppliers outside the EU at paras 8-11:

> "8. Our obligation to comply with the DSPCR is solely to potential suppliers in the Member States of the European Union and Norway who have adopted the Directive under the European Economic Area agreement.
>
> 9. The duty to comply with the DSPCR does not extend to potential suppliers established outside the EU and Norway. These suppliers are not economic operators as defined in the DSPCR. They do not have the right to participate in a procurement procedure, and do not have access to the remedies in Part 9 (Applications to the court) of the DSPCR (except to the extent that procurers extend such rights either expressly or by implication).
>
> 10. The DSPCR sets out the procurement rules by which we procure defence and sensitive security works, goods and services. Procurers are free to allow potential suppliers from outside the EU to participate in a procurement procedure and MOD procurers should do so as a matter of policy.
>
> 11. Procurers should be aware that where you seek and receive responses to an invitation to tender, an implied contract may come into existence, whereby the procurer agrees to consider all tenderers fairly and equally. This may benefit suppliers from outside the EU whom you have allowed to participate in the procurement."

71. Following Brexit, the Regulations were amended to restrict the definition of economic operators to suppliers established in the UK and Gibraltar. The revised 2020 guidance explained, at paras 16-17:

> "16. Left unchanged, the original wording would mean UK industry would not have legal rights to participate in procurement opportunities or access to remedies in the UK market.

> Moreover, EU-27 industry would continue to enjoy the right to participate and have remedies in the UK market.
>
> 17. Suppliers established outside the UK and Gibraltar are no longer economic operators as defined in the DSPCR. They do not have the right, under the DSPCR, to participate in a procurement procedure, and do not have access to the remedies in Part 9 (Applications to the court) of the DSPCR. Suppliers in the EU-27 will now be treated the same as suppliers outside the EU were treated when the UK was an EU member State."

72. The revised guidance added that the change did not mean that competition should be limited to UK industry only and that it was MOD policy to use open competition as widely as possible to provide best value for money. Paragraph 20 cautioned:

> "Procurers should be aware that where you seek and receive responses to an invitation to tender, an implied contract may come into existence, whereby the procurer agrees to consider all tenderers submitted on the basis of the terms set out in the tender. This may benefit suppliers from outside the UK or Gibraltar whom you have allowed to participate in the procurement. Alternatively, a public law claim (judicial review) may also be available to such suppliers."

73. The change in the definition of economic operator was plainly designed to ensure that suppliers from countries outside the UK only had the benefits of the Regulations where there was mutual protection for UK suppliers tendering for procurement opportunities in that country's market. Indeed, mutuality was always the basis of EU Directive 2009/81/EC which was implemented into UK law by the Regulations. That has been confirmed in two recent decisions of the Court of Justice of the European Union:

73.1 In *Kolin Inşaat Turizm Sanayi ve Ticaret AŞ v. Državna komisija za kontrolu postupaka javne nabave* (2024) Case C-652/22, the European Court concluded at [63]:

> "In the absence of acts adopted by the European Union, it is for the contracting entity to assess whether economic operators of a third country which has not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement should be admitted to a public procurement procedure and, if it decides to admit them, whether provision should be made for an adjustment of the result arising from a comparison between the tenders submitted by those operators and those submitted by other operators."

73.2 In *CCRC Qingdao Sifang Co. Ltd v. Autoritatea pentru Reformă Feroviară* (2025) Case C-266/22, the Court cited and reaffirmed those principles adding, at [66], that suppliers from third countries which did not have an international agreement with the EU guaranteeing equal and reciprocal access to public procurement do not enjoy a right to no less favourable treatment.

74. Of course, these post-Brexit decisions of the European Court do not bind me. They do, however, confirm what in any event I distil from the EU Directive and the Regulations as to the rationale for excluding suppliers from third countries from the benefit of the regulatory regime.

75. The EU case law confirms that it was not competent for member states to confer the benefit of the Directive upon suppliers from third countries. That would appear to have been obviously right and avoids the situation in which the European Court might be asked to rule upon a claim by a supplier from a third country. Any claim by such a supplier was said to be a matter for national law. Likewise, under English law, it is not competent for the MOD to extend the reach of the Regulations. Recognising however the parties' freedom of contract, there is, in my judgment, no reason why the MOD should not invite tenders on the basis that it would commit to dealing with foreign suppliers that were not entitled to the protection of the Regulations "as if the Regulations applied". That possibility was expressly recognised by Elias LJ in *JBW,* at [60], and more generally in an entirely different statutory context by Gloster LJ in *NRAM plc v. McAdam* [2015] EWCA Civ 751, [2015] 3 All E.R. 665, at [54].

76. In the *Dukes Case,* His Honour Judge Tindal observed, at [103], that an "as if" claim is never straightforward and that versions of it were rejected in *JBW, Adferiad* and *Excession*. He added:

> "If the Court has closed the front door by holding the *Public Contracts Regulations 2015* [do] not apply, getting into it by the back door is not easy and takes unusual facts, as His Honour Judge Keyser QC said in *Adferiad*."

77. The *Dukes Case* was, however, a judgment given on applications for summary judgment and to strike out the claim. Judge Tindal was dubious but allowed the contract claim to go to trial.

78. I was also referred tentatively to the *Harmon Case* in which His Honour Judge Humphrey Lloyd QC found an implied tender contract that all tenderers would be treated fairly. He observed, however, at [214], that to imply terms that were wider than a *Blackpool* contract "there must be something more than a request for a tender which is to be submitted competitively with others", adding that otherwise the court would be intruding into the ordinary commercial freedom or discretion to accept or reject a tender or to negotiate with whoever seemed best in the eyes of the authority. Thus the case is again a decision on its facts.

79. In the *Scott Case,* Weatherup J found an implied tender contract that the tendering authority had to act fairly and in good faith. The report is, however, brief and it is not clear what evidence justified the implication of a duty that went beyond that of good faith in that case.

APPLICATION OF THE LAW TO THIS CASE

Issue 1

80. The starting point can be simply stated:

80.1 There are no grounds for exemption and accordingly the Regulations applied to this procurement.

80.2 The procurement was started before Brexit with the consequence that the Regulations protected tenderers from the EU (which of course at that time included the UK), Norway and Iceland: regulation 4 of the *Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019* as amended by the *Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020*. Accordingly, the MOD owed obligations to Sodexo and any other EU, Norwegian or Icelandic bidder.

80.3 Ecolog - being a company established in the United Arab Emirates – was not entitled to the protection of the Regulations. That was because the policy of the Regulations, both before and after Brexit, was only to afford protection to suppliers from countries that afford British suppliers reciprocal access to their public procurement competitions.

80.4 MOD policy was, however, to use open competition where possible in order to secure best value for money. Where the MOD accepted tenders from third-country suppliers, that could not confer any direct rights under the Regulations.

81. Taken in the round, I conclude that the PQQ did not evince any intention on the part of the MOD to enter into a binding tender contract. On the contrary, para. 41 made clear that only the express terms of any written contract should have any contractual effect in connection with the matters to which the PQQ related. I do not therefore accept that any binding tender contract arose when Ecolog participated in the procurement by submitting its completed PQQ.

82. On the other hand, I am satisfied that the subsequent issue of the ITN to Ecolog impliedly offered at least to consider any tender submitted by the company. For the reasons explained by Elias LJ in *JBW,* the law would imply that any consideration of such an offer was necessarily to be conducted in good faith. The MOD's offer to enter into such an agreement was, in my judgment, accepted by Ecolog when it submitted its tender in response to the ITN. Just as in *Excession,* I do not accept the argument

that the reservation of contractual powers to change or cancel the procurement process prevented there from being, at the very least, a limited tender contract requiring the MOD to consider Ecolog's bid in good faith. I would therefore answer issue 1 "yes".

Issues 2 & 3

83. To adapt Judge Tindal's metaphor, where Ecolog cannot access the front door because it is not entitled to the protection of the Regulations, getting in through the back door will not be easy and will take unusual facts. There is, however, no rule of law that an implied tender contract will be limited to the term found in the *Blackpool Case* and the question of the terms of the implied tender contract in this case must be determined by reference to the facts and by proper application of the *Marks & Spencer* principles.

84. Statements that the procurement was to be conducted in accordance with the Regulations were, without more, simply an express recognition of the MOD's legal obligations under the Regulations to any EU, Norwegian and Icelandic suppliers that submitted a tender. Indeed, of itself, a statement that the procurement was to be conducted in accordance with the Regulations would necessarily incorporate the territorial limits on the suppliers that could bring a claim for breach of the duties imposed by the Regulations.

85. Equally statements such as those in paras 52 and 60 of the PQQ (taken together with the later ITN) that the MOD was required by regulation 5(2) to ensure that all "potential providers" were treated equally and in a non-discriminatory way cannot be properly construed as evincing any intention to extend such protection beyond those suppliers from the EU, Norway and Iceland that were protected by regulation 5(2).

86. I accept that, as a responsible public body cognisant both of the applicability of the Regulations to the procurement (even if not to each of the tenderers) and the importance of good governance, the MOD will have attempted to apply the Regulations and the principles set out in the ITN to all suppliers bidding for this contract. That is, however, not sufficient to prove something quite different, namely a common intention that the MOD should accept a contractual obligation that mirrored some or all of the duties that it would have owed to Ecolog had it been an economic operator within the meaning of the Regulations.

87. I do not accept that the tender documents evinced any intention by the MOD to enter into some broader tender contract or to accept any obligation to treat Ecolog as if it had been entitled to the protection of the Regulations. Further, the reservations of right as to the amendment or

cancellation of the procurement process negatived any suggestion that the MOD offered to contract on the basis of the procedure set out in the ITN.

88. In particular, I do not accept that a broader tender contract was necessary to give business efficacy to the procurement process or that the parties would have responded in unison to the hypothetical officious bystander that they had of course intended that Ecolog should be owed duties as if it had been entitled to the protection of the Regulations. In my judgment, the MOD evinced a clear intention to comply with its legal duties under the Regulations but Ecolog has failed to prove an intention to extend such duties to those not protected by the Regulations.

89. The latest version of the MOD's guidance wisely advises at para. 19:

> "Procurement documents must clearly state that even if competition is opened up to economic operators from EU member states, it is not an admission that rights under the DSPCR are being extended to those economic operators from outside the UK and Gibraltar."

90. That guidance was expressly framed in the context of making the position clear to EU bidders post Brexit. I acknowledge that a similar point could of course be made about the wisdom of including such a statement when opening up a procurement competition to any supplier from outside the UK and Gibraltar. Such guidance was not, however, in place at the time of the ITN in this case and, in any event, the absence of a clear statement does not prove the opposite; namely a common intention that the MOD should accept a contractual obligation to third-country suppliers such as Ecolog as if the Regulations applied in their case.

91. In my judgment, there is no merit in the argument that the existence of the MOD's duty to treat Sodexo equally made no sense unless there was also a duty to treat the only other tenderer, Ecolog, equally. The whole point is that Sodexo, as a UK supplier, was entitled to the protection of the Regulations whereas Ecolog enjoyed no such rights. The issue is not whether Sodexo should or should not have been treated equally with Ecolog, but whether the MOD evinced an intention to confer a contractual right of equal treatment upon Ecolog absent any such right arising under the Regulations. Further, while I acknowledge that regulation 5(2) required Sodexo to be treated equally rather than no less favourably, the company would have had no claim in the event that it had been treated more favourably.

92. In any event, Ecolog's superficially attractive equality argument only gains traction from the chance circumstance that the third tenderer dropped out leaving only one UK supplier who enjoyed the protection of the Regulations and one foreign supplier who did not enjoy such protection. I

do not accept that the MOD's intention in inviting Ecolog to tender can realistically be said to vary depending upon the number of suppliers who responded to its invitation.

93. Even if any implied tender contract had been limited to an obligation to consider Ecolog's bid in good faith, the company argues that such duty extended to requirements to carry out the procurement fairly, equally, transparently and/or in accordance with the ITN and/or the Regulations. I reject this argument:

93.1 The limited contract recognised by the Court of Appeal in *Blackpool, Fairclough* and *JBW* was not a broad duty to conduct the procurement in good faith but simply to consider the claimant's tender in good faith.

93.2 As the trial judge explained in *Fairclough,* it was a duty not to issue a sham invitation to tender and honestly to consider the tenders submitted unless there were reasonable grounds for not doing so.

93.3 It is plain from his judgment in *JBW* that Elias LJ rejected any suggestion that good faith included obligations to consider the tenders fairly, transparently and in accordance with the invitation to tender.

93.4 Likewise in *Adferiad,* Judge Keyser rejected terms that the authority should evaluate tenders fairly or in accordance with the tender procedure, and that the assessment should be free from manifest error. Such terms went, he observed at [134], far beyond the contract found in *Blackpool* and sought to create a contractual basis for obligations that would have arisen had the procurement been subject to the *Public Contracts Regulations 2015.*

93.5 In *Excession,* O'Farrell J rejected any extension of the core obligation to consider the claimant's tender in good faith and concluded, at [161], that additional detailed terms were not required.

94. In my judgment, Ecolog's claim gains no support from the decisions of Leggatt J and Leggatt LJ (as he then was) in the *Yam Seng Case* and *Sheikh Al Nehayan v. Kent* [2018] EWHC 333 (Comm). The content of a duty of good faith is sensitive to the context: *Yam Seng,* at [141] & [144], but includes the core value of honesty. Good faith may also require fair dealing in the sense of refraining from conduct which would be regarded as commercially unacceptable by reasonable and honest people: *Al Nehayan,* at [175].

95. I accept that evidence of unfairness, inequality of treatment, lack of transparency and breach of the terms of the ITN and/or the requirements of the Regulations might go some way to raising an inference that a particular tender was not considered in good faith; but that is not to

equate a requirement that a tender be considered in good faith with the broader formulation of good faith contended for by Ecolog.

96. Accordingly, I reject Ecolog's argument that the implied tender contract extended beyond the basic *Blackpool* duty to consider its bid in good faith. There was no broader implied contract that the MOD should conduct the procurement fairly, equally, transparently or in accordance with the ITN or the Regulations, whether as an incident of the duty to consider the bid in good faith or as a matter of freestanding obligation.

Issue 4

97. This issue does not arise in view of my conclusion on issue 2.

OUTCOME

98. I therefore decide the preliminary issues as follows:

98.1 Issue 1: An implied tender contract was created between Ecolog and the MOD in consequence of the issue of the invitation to negotiate and Ecolog's further participation in the procurement.

98.2 Issue 2: The terms of the implied contract were limited to an obligation to consider Ecolog's bid (alongside all other bids) in good faith.

98.3 Issue 3: The implied tender contract did not extend to an obligation that the MOD should carry out the procurement fairly, equally, transparently or in accordance with the ITN or the Regulations.

98.4 Issue 4: This issue does not arise.