Neutral Citation Number: [2014] EWHC 3191 (TCC)

Case No: HT 13 166

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2014

Before :

MR. RECORDER ACTON DAVIS QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

WILLMOTT DIXON PARTNERSHIP LIMITED	**Claimant**
- and -	
LONDON BOROUGH OF HAMMERSMITH AND FULHAM	**Defendant**

- -
- -

Mr. Michael Bowsher QC and Ms. Anneliese Blackwood (instructed by **Norton Rose Fulbright**) for the **Claimant**
Mr Nigel Giffin QC and Mr Joseph Dalby (instructed by **Tasnim Shawkat, Director of Law London Borough of Hammersmith and Fulham**) for the **Defendant**

Hearing dates: 23rd-26th June, 30th June-2nd July, 14th July, 9th October 2014

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JUDGMENT

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr. Recorder Acton Davis QC

Mr Recorder Acton Davis QC:

1. The claim arises from the unsuccessful tender by Willmott Dixon Partnerships Limited (WDP) for a contract awarded by the Defendant Council (HF) for a range of repairs and maintenance services ("the Services"). On 8th April 2013 HF decided to award the new contract for the supply of the Services to Mitie Property Services (UK) Limited ("Mitie"). WDP, who was the incumbent provider of a number of the Services in the south of the Borough, submitted a tender for the contract(s) but was unsuccessful.

2. On 7th May 2013 WDP commenced proceedings against HF for breaches of statutory duty under the Public Contracts Regulations 2006 (as amended), breaches of principles of EU law and breaches of an implied contract. On 28th June 2013 HF applied for an order pursuant to Regulation 47H of the Public Contracts Regulations 2006 (as amended) bringing to an end the requirement in Regulation 47G(1) of those Regulations that HF refrain from entering into the contract the subject of the proceedings. By a Consent Order made on 18th September 2003: [**A/B/9]** WDP agreed to that requirement being brought to an end.

3. By an Order made on 5th August 2013: **[A/B/1]**, Ramsey J ordered that the trial be heard in two stages, the first being the "liability trial" the second stage being for the determination of quantum. This Judgment arises out of the liability trial.

4. WDP performed repairs, maintenance and voids services for HF from 1st August 2005 until 31st October 2013 when Mitie took over the provision of those services: **[B/A3/8]**. On 16th March 2007 WDP, known then as Inspace Partnerships Limited, entered into two repairs and maintenance contracts with HF (these being the original contracts) although the provision of the Services had actually commenced on 28th November 2005: **[B/A1/3 at paragraph 8]**. Following an extension, the first contracts expired on 31st October 2013: **[B/A1/3 at paragraph 9]**.

5. There were issues with the structure of the original contracts which gave rise to some problems between WDP and HF: **[B/A3/45-49 at paragraphs 17 to 27]**. HF also struggled to remain within its annual budget with regard to the maintenance, repairs and voids works which at times caused tension between WDP and HF.

6. It was recognised by HF that the difficulties were predominantly caused by the design of the original contract. It was also recognised within HF that the perceived service failings were not the fault of WDP. Mr Stephen Kirrage makes plain in his second witness statement: **[B/B10/122-123 paragraph 15]** that:

> *"Willmott Dixon should not see themselves as being the cause of the problem. We had issues of contract performance and KPI's with them and indeed with other incumbent contractors under the old régime, but even if we had not, the problems that we had identified still remained. The issues we had related to high cost, and low customer satisfaction..... But it was the old contractual regime that permitted incumbent contractors to charge for the work that they did, without the incentive to get things right first time. ...."*

7. Thus, for example, one of the changes in the new contractual arrangements was to move the initial Call Centre contact with the tenant from HF to the contractor with a view to trying to make certain that the initial diagnosis of the problem was correct because if the initial diagnosis at the Call Centre is wrong it is probable that the wrong operative will be sent out and thus the ability to get the diagnosis right first time is hampered.

8. In anticipation of the expiry of the original contracts, HF conducted an extensive review to determine how best to procure the repairs and maintenance services it required: **[B/B3/33 paragraph 27]**. In November 2011 Northgate Information Solutions UK Limited (Northgate) were appointed to assist with the exercise. Northgate seem to have been the "architects" of the procurement procedure. Mr Vickery, a Principal Services Manager of Northgate, and Mr Hyde, another employee of Northgate, were part of the Northgate team which assisted HF and they were resident in HF's offices for that purpose: **[B/B11/127-128 paragraph 9]**.

9. On 21st May 2012 a recommendation was made to the Cabinet of HF that all the responsive repairs, gas, voids and as much of the planned maintenance work as possible should be packaged together and offered for tender in a single contract or in two contracts: **[C1/67]**. On 23rd June 2012 HF published a Contract Notice in the Official Journal of the European Union: **[C1/134]**. HF specified that it was tendering a range of housing and repair services for its residential properties and that two options had been considered for delivery of these services:
(i) Option 1 – Borough-wide sole supply contractual arrangement (Lot 1);
(ii) Option 2 – two separate Lots based on north (Lot 2) and south (Lot 3) of the Borough.

10. The contracts represented a change from the original contracts and altered the manner in which HF delivered its housing repair and maintenance services: **[B/A2/25 paragraphs 20-21]**. In particular, it integrated a number of maintenance contracts to achieve economies of scale, transferred the Customer Contact Centre functions for the repairs and maintenance service to the Service Provider and shifted a greater proportion of the financial risk of budget management to the Service Provider through fixed price rates for maintenance, voids and gas servicing.

11. On 27th April 2012 HF held a "meet the buyer" event at White City Community Centre which was attended by representatives from WDP: **[B/A2/31 paragraph 49]**.

12. On 20th June 2012 HF made available the Pre-Qualification Questionnaire which was superseded shortly afterwards by a version dated 25th June 2012 ("PQQ").

13. The PQQ required applicants to indicate whether they wished the assessment of their PQQ response to be based on a consortium arrangement, a sub-contracting arrangement (Lead Applicant with Significant Sub-Contractors) or sole Service Provider: **[E5/36 and 61]**. A Significant Sub-Contractor was defined as a sub-contractor whose work would account for 7% or more of the contract value: **[E/61]**. The PQQ provided that:-

> *"The Council recognises that .. sub-contracting arrangements where it may (within limits) be subject to future*

*change. Applicants should therefore respond in the light of such arrangements as are currently envisaged. In the event that a Lead Applicant proposes a change in the membership of its ... Significant Sub-Contractors following the submission of this PQQ, the Lead Applicant must immediately inform the Council of such a change ... The Council reserves the right to refuse to consider or consent to changes in ... Significant Sub-Contractors and/or to de-select any applicants whose proposed change means that they no longer need the Council's minimum criteria identified in the PQQ and/or if any proposed change would have an effect on the ranking of Applicants selected to be invited to tender.": **[E/62]***

14. The PQQ also required the Lead Applicant to provide details of its experience of using Information and Communication Technology (ICT) to deliver service improvement: **[E/19]**.

15. On 25th July 2012 WDP submitted its response to the PQQ: **[B/A2/24 paragraph 17]**. In its response WDP stated that it was not intending to tender with a Significant Sub-Contractor: **[E/80]**. At that time WDP intended to self-deliver the Services and did not intend to use a Significant Sub-Contractor: **[B/A1/5 paragraph 22]**.

16. On 11th October 2012 WDP was notified that it had been successful at the PQQ stage. On 30th October 2012 WDP was invited to tender for Lots 1 and 3: **[H1/85]**. On 29th October 2012 HF issued the Invitation to Tender for the Services ("the ITT") and the deadline, after extension, for submission of the tenders was 11th January 2013.

17. Clause 1.2 of the ITT specified that the contract was divided into three Lots:
    (i) Lot 1 – Borough-wide sole supply;
    (ii) Lot 2 – north of the Borough;
    (iii) Lot 3 – south of the Borough: **[F1/1/1-2]**.

18. Clause 6.1 of the ITT provided that HF would evaluate the Tenderers' completed tender submissions in accordance with the evaluation methodology set out in Annex 1: **[F1/1/7]**. Annex 1 to the ITT set out the evaluation methodology to be applied by HF and provided further information about the award criteria. The information provided included the following:
    (i) The contract was to be awarded to the most economically advantageous tender (Clause 2.2, Annex 1 of the ITT): **[F/1/14]**;
    (ii) Tenders were to be evaluated on a 40% weighting for quality and a 60% weighting for price (Clause 2.2, Annex 1 to the ITT): **[F1/1/14]**;
    (iii) Quality was to be evaluated on the basis of the Tenderers' response to the Tenderers' Method Statement (ITT Section 8) and in relation to the requirements of the "Technical Specification" (ITT Section 4) (Clause 2.3, Annex 1 to the ITT): **[F1/1/14]**;

(iv) The criterion of quality was sub-divided into "criteria" and "sub-criteria". These criteria, save for the ICT criteria were set out in Table 2 together with their weightings (Table 2, Annex 1 to the ITT):**[F1/1/14-16]**;

(v) The ICT criteria together with their weightings were set out in Table 3 (Table 3, Annex 1 of the ITT): **[F1/1/17]**; and

(vi) As regards "quality" the Tenderers' responses were to be marked between 0-5 for each sub-criterion on the basis of a quality scoring guide set out in Table 4 (Table 4, Annex 1 to the ITT): **[F1/1/19]**.

19. Section 4 of the ITT set out the ICT Specification. Clause 2 of Section 4 of the ITT stated that the Tenderers' systems "… shall be capable of importing/exporting data to and from the client's Asset Management System, currently (Codeman (SAM)) at the Northgate Housing System …": **[F1/2/24]**.

20. Section 5 of the ITT set out the financial award criteria and evaluation methodology. HF provided the Tenderers with Excel spreadsheets to complete as part of their tender submissions in relation to that element of the bid.

21. Section 8 of the ITT set out the Tender Method Statement. Question 3.1 provides "the gas safety certification compliance regime is of paramount importance and it should be noted that the KPI for gas compliance is 100%": **[F1/4/63]**.

22. Clause 2.9 of Annex 1 to the ITT provided that:

> *"The scores (which will be decided by way of consensus) for each of the quality criteria and sub-criteria set out in Tables 2 and 3) will be multiplied by the weighting factor shown Tables 2 and 3 and weighted scores will be added together to give an initial total weighted score for the Quality element of the evaluation": **[F1/1/19]**.*

23. Section 4 of Annex 1 to the ITT was headed "Final Selection of Recommended Tenderer". Clause 4.1 of Annex 1 to the ITT provided that the quality score would be added to the price score and the Tenderers would then be ranked according to their total score. Clause 4.1 of Annex 1 to the ITT then provided that the highest ranked Tenderer would be carried forward to the further financial assessment: **[F1/1/21]**.

24. Section 6 of Annex 1 to the ITT, headed "Award Decision", specified the means by which HF was to decide between Delivery Option 1 which provided for one Borough-wide sole supplier (Lot 1) and Delivery Option 2 which provided for two separate suppliers, one for the north and one for the south Borough (Lots 2 and 3).

25. The Mid-Tender Review was held on 14th November 2012. WDP were given a general de-brief document and were provided with feedback on its PQQ submission.

26. Following the Mid-Tender Review HF produced a document setting out the questions asked by tenderers and the answers provided by HF in response.

27. On 10th January 2013 WDP submitted its Tender for Lot 1 and Lot 3. In Section 3 of its Method Statement WDP indicated that it would be sub-contracting the gas

appliance services to P H Jones Facilities Management Limited ("Jones"). As the gas compliant services to be provided accounted for more than 7% of the value of the contract(s) Jones was a significant sub-contractor as defined in the PQQ.

28. Jones was one of two incumbent gas servicing contractors that provided services to HF in the north of the Borough. WDP did not make the decision to include Jones as part of its tender submission until January 2013; a mere matter of days before submitting its tender: **[B/A1/6, paragraph 26; B/A2/28, paragraph 35]**. WDP did not have an opportunity to notify HF of its decision to include Jones as a significant sub-contractor before it submitted its tender: **[B/A/1/7 paragraph 29; B/A2/30 paragraphs 43-44]**.

29. The tender evaluators were Mr Ian Watts who was Commercial and Contract Manager of HF, Mr John Everett who was Head of Repairs of HF, Mr Roger Thompson who was Head of Planned Maintenance of HF, Mr Matthew Merton who was Head of Building Services of HF, Mr Tony Churton who was Interim Area Technical Manager of HF and Mr Angus Lynch a Borough resident who marked only sections 2 and 4 of the Method Statement. Those gentlemen evaluated the quality element of the tenders. Additionally the ICT element was evaluated by a Mr Alistair Nimmons, who was the Head of Systems and Programme Management of HF, assisted by Ms Parvinder Roopray of the Bridge Partnership. That was a joint venture vehicle between HF and a third party to service the ICT needs of HF.

30. The financial element of the tender was evaluated by Keegans Limited, a consulting firm of quantity surveyors.

31. The whole procurement process, including the evaluation, was managed by Northgate Information Solutions UK Limited, in particular Mr Gary Vickery and Charles Hyde, as mentioned above.

32. The evaluation process lies at the heart of the disputes in this case and I deal below with the evidence and submissions in relation to that process. For present purposes it is sufficient to record that the Evaluators were provided with access to copies of the tenders so that they could be read separately over the course of the 2 to 3 weeks from 14th January 2013 until 28th January 2013: **[B/B2/13, paragraph 7]**. The Evaluators noted down their individual scores and comments in relation to each tender on spreadsheets: **[B/B2/13, paragraph 7]**. The spreadsheets were then sent to Mr Vickery, who proceeded to compile them into a single score sheet :**[B/B2/13, paragraph 7]**.

33. On 29th January 2013 a clarification meeting was held :**[B/B/1/4, paragraph 11]**. There is little evidence as to what took place during that meeting.

34. On 4th February 2013 the Quality Evaluators were sent, by Mr Vickery, the quality elements of the tenders combined sheets showing all of their individual scores along with the mean and mode averages which he had calculated. That was known as the Master Sheet :**[H1/201]**.

35. The consensus meetings were held over a period of two days commencing on 6th February 2013. The meetings were chaired by Mr Vickery. Mr Hyde recorded the

scores. No record of the discussions appears to have been kept :**[B/B2/8, paragraph 33; B/B2/15, paragraph 15]**.

36. It seems that the Quality Evaluators did not discuss a number of the scores awarded but accepted scores previously calculated by Mr Vickery on their basis of their individual indicative scores and which were included in the Master Sheet. Where the initial marks were considered to indicate a consensus score the modal score was usually taken to be the consensus score without further discussion. That applied to about two-thirds of the consensus scores awarded :**[B/B2/15, paragraph 12]**. Only where there was no obvious consensus score did a discussion take place until a consensus was reached:**[B/B2/14, paragraph 11]**.

37. Where the Quality Evaluators could not unanimously agree on a score for a particular submission, the "consensus" score awarded was that voted for by the majority of the quality evaluators :**[B/B7/102, paragraph 19]**.

38. Again, some of what occurred at the consensus meeting goes to the core of the disputes between the parties. I deal below with the issues which arise out of the consensus meeting; that includes the marking of the ICT element of the tenders to which a degree of controversy attaches.

39. On 21st February 2013 a tender appraisal meeting was held which was attended by Mr Kirrage, Mr Everett, Mr Thompson, Mr Watts and Mr Vickery amongst others: **[C3/495-946]**. The minutes of the meeting records that they considered that "the single Borough-wide contract (Lot 1) achieves the best value for money and is approximately £2 million per annum more cost-effective than if the dual Borough approach (Lots 2 & 3) were adopted": **[C3/946]**. The minutes also noted that the "… two highest rank tenders in Lot 1 are very close ….": **[C3/946]**. The minutes record that Mr Kirrage stated that Mitie were the preferred bidder to be presented to the Cabinet : **[C3/947]**.

40. Towards the end of March 2013 rumours began to circulate that Mitie had been awarded the contract: **[B/A/1/7, paragraph 32]**. Mr Irvine contacted Mr Watts about the rumours on 22nd March 2013: **[B/A1/7, paragraph 32]**.

41. On 27th March 2013 Mr Watts telephoned Mr Durkin: **[H1/290]**. He apologised for the way in which the award of the contract(s) to Mitie had come out: **[B/A/17, paragraph 33]**. Mr Watts told Mr Durkin that WDP had come a fighting second: **[B/A/1/7, paragraph 34]**. He said that WDP had been the cheapest on price but had lost the contract(s) due to its quality submission, in particular its ICT proposal: **[B/A1/7, paragraph 34; H1/290]**. He added that HF had been looking for a "sea-change" in the approach to the delivery of the Services and that this had not come across in WDP's tender submission: **[B/A/1/7, paragraph 34, H1/290]**. Mr Durkin asked Mr Watts why HF had not favoured WDP when the scores were so close. Mr Watts replied that all was not well in relation to the original contracts and that HF had concerns relating to WDP's current performance: **[B/A1/7-9, paragraph 34; H1/290]**.

42. On 27th March 2013 HF issued a Press Release announcing the appointment of Mitie as the Service Provider under the new contract. The Press Release stated amongst other things that:

> *"The Council has spoken to numerous tenants about the repair service that they receive and generally the feedback has shown a poor diagnosis of default, poor communication on what repairs are ordered and missed appointments leading to wasted visits, resident dissatisfaction and extra costs. Residents have also said that in some cases numerous follow-up calls are needed to get the repair completed, by teaming up with Mitie, these problems will be dramatically reduced, according to the Council.":* **[H12/288]"**

43. The Cabinet of HF were provided with an open report: **[C3/954-978]** and an exempt report: **[C3/1008-1016]** concerning the award of the contract(s). The reports were written by Mr Watts and reviewed by Mr Kirrage: **[B/B10/122, paragraph 14]**. The reports recommended that Mitie be awarded the contract(s) and set out reasons why a single contract under Lot 1 should be awarded rather than two separate contracts under Lots 2 and 3: **[C3/939, paragraph 3.8; C3/971-972, section 6; C3/1012, paragraph 2.11]**. The exempt report noted that the scores of the two highest tenderers for Lot 1, WDP and Mitie, were extremely close and that either service would achieve the savings target and provide an improved service: **[C3/1012, paragraph 2.10]**. However, it stated that Mitie achieved a markedly higher score than WDP in relation to their ICT solution: **[C3/1012]**. On 8th April 2013 the Cabinet approved the recommendation to award a single contract under Lot 1 to Mitie: **[C3/1025]**.

44. On 10th April 2013 HF sent a letter to WDP informing it that HF had chosen not to award a contract to it and that Mitie had been awarded the Lot 1 contract: **[C/1017]**. An evaluation report was attached to the letter which indicated that HF had awarded WDP and Mitie the following scores: **[C3/1018-1020]**:

SCORE	WDP	Mitie
ICT Score	269	311
Total Quality Score	2513	2645
Weighted Quality Score = Total Quality Score/ Maximum Possible × 40	25.32	26.65
Price Score = Lowest Price/Tenderers' Price × 60	60.00	59.50

SCORE	WDP	Mitie
Total Score	85.32	86.15

45. Thus, the scores awarded to WDP and Mitie were very close. If WDP had been awarded a Total Quality Score of 2597, i.e. 65 extra weighted quality points, it would have won the contract. WDP was awarded the fourth highest Total Quality Score :**[C3/831]**.

46. HF also informed WDP that it had decided not to award any contracts under Lots 2 and 3: **[C/1017]**.

47. On 11th April 2013 a de-brief meeting was held between Mr Williamson, Mr Durkin, Mr Watts and Mr Vickery.

48. Mr Watts informed Mr Williamson and Mr Durkin that WDP were a “fighting second” and had been the lowest price but that the biggest factor had been quality, in relation to which WDP had been awarded the third highest score, in particular IT. He said that WDP were behind the curve in relation to their ITC submissions. When Mr Durkin asked for further feedback Mr Watts said that including Jones as a sub-contractor was seen as a “big negative”: **[C3/1029, paragraph 6; B/A3/56, paragraph 82; C3/1043; C3/1023]**. He said that WDP had not promised 100% compliance but instead referred to Jones’s performance: **[C3/1023]**.

49. Mr Watts also said that what had failed to come across in WDP’s bid was the need to show a “sea-change” in delivery: **[C3/1030, paragraph 6; C3/1023; D/A1/10, paragraph 46, D/A3/56-57, paragraph 85]**. He explained this was very important to HF and Mitie had demonstrated this: **[C3/1030, paragraph 6]**.

50. Mr Durkin said that he thought WDP would have been considered strong in terms of management and organisation. Mr Watts said that WDP’s bid was not considered strong in that area. On the contrary WDP was seen as “resting on their laurels” and did not appreciate the need for change: **[C3/1030, paragraph 10; C33/1024]**.

51. There was then discussion about the Press Release. Mr Watts said:

> *“It was not the way we wanted to handle it but it’s Political – we tried to stress that the current issues were the contractual arrangements, not the contractor. We tried to get it toned down as far as we could but the present administration like to blame the previous administration and so on.*”: **[C33/1024]**

52. There was a Performance Review Meeting on 11th April 2013 attended by Ms Mercer and Mr Everett. During that meeting Mr Everett referred to there being a weak manager and that Jones was a “failing sub-contractor”.

53. The foregoing is intended to be a summary of the chronology. Inevitably, when considering the issues I will have to make further reference to the evidence.

54. At paragraph 10 of the written Closing Submissions put in on behalf of WDP, Counsel helpfully set out the issues in dispute. I adopt them with gratitude. I set them out in full.

> *(i) Issue 1: Did the Quality Evaluators evaluate the tender by reference to criteria which were not aimed at identifying the most economically advantageous tender, in particular:*
>
> *(a) Did the Quality Evaluators take into account Jones's ability to provide the gas compliance services under the Contract(s) when it scored WDP's quality submission?*
>
> *(b) Did the Quality Evaluators take into account the ability of Andrew Murphy when it scored WDP's quality submission?*
>
> *(ii) Issue 2: Did the Quality Evaluators evaluate the tender by reference to award criteria which were not specified, or at least not specified in a clear, precise and unequivocal manner, in the ITT documents, in particular:*
>
> *(a) Was the requirement to demonstrate a "sea change" in how the Services were to be delivered as compared to delivery under the Original Contracts an award criterion specified in the ITT and did the Quality Evaluators apply this evaluation criterion when it evaluated WDP's submissions?*
>
> *(b) Did the Quality Evaluators take WDP's performance under the Original Contract(s) and/or the general political desire to change from an incumbent provider when it evaluated WDP's submissions?*
>
> *(c) Did Mr Nimmons evaluate WDP's ICT submissions by reference to criteria which were not in the ITT?*
>
> *(iii) Issue 3: Did the Quality Evaluators fail to score the quality submission in accordance with the methodology specified in the ITT when they reached the "consensus" score by adopting the mode score by default without further discussion and/or when they determined the "consensus" score by majority vote?*

(iv) Issue 4: Did the Quality Evaluators fail to treat the economic operators in an equal and non-discriminatory way when they scored the tenders, in particular:

(i) Did the Quality Evaluators give Mitie a higher score than WDP for certain criteria and sub-criteria when objectively WDP's submissions were as good as or better than Mitie's submissions?

(ii) Did the Quality Evaluators give Mitie and WDP the same scores for certain criteria and sub-criteria when objectively WDP's submissions were better than Mitie's submissions?

(iii) Does the evidence show that there was a systemic defect in the valuation process such as the tenderers' submissions were not evaluated in an equal and non-discriminatory manner?

(v) Issue 5: In the alternative, if it is accepted that the quality scores awarded to Mitie and WDP were properly awarded in accordance with the award criteria specified in the ITT documents, were the award criteria insufficiently sensitive to distinguish between different qualities of submissions such that HF breached the principle of equality and non-discrimination when it designed the criteria?

(vi) Issue 6: Did the quality evaluators fail to verify Mitie's compliance with the award criteria in breach of the principle of equal treatment?

(vii) Issue 7: Was there an implied contract between HF and WDP that the Council would award the Contract(s) in accordance with the 2006 Regulations, General Principles of EC Law and/or the common law such as equality, non-discrimination, transparency and fairness?

(viii) Issue 8: Is WDP prevented from claiming that there is an implied contract by virtue of Section 3.6 of the ITT?

(ix) Issue 9: Did HF breach the implied contract?

(x) Issue 10: Would WDP have won the Contract(s) but for the breaches of statutory duty and/or implied contract by the Council?

(xi) Issue 11: Alternatively was WDP deprived of the chance of winning the Contract(s) as a result of the breaches of statutory duty and/or implied contract by the Council?

(xii) Issue 12: What is the appropriate contract period over which it is to be taken that any hypothetical contract would have been performed by WDP?

(xiii) Issue 13: Limitation issues arising out of what are described as "clarifications" to the Particulars of Claim.

55. WDP has abandoned its claim that there was apparent bias in the evaluation of tenders as a result of Northgate's rôle in the evaluation process. Similarly WDP has abandoned its claim in relation to the evaluation of the financial element of the tenders. It is no longer suggested that WDP were treated unequally when HF corrected an arithmetical error in its financial submissions.

The Legislation

56. This is a claim brought under the Public Contracts Regulations 2006, Part 9. Regulation 47A provides that the Regulation

"… applies to the obligation on a contracting authority to comply with any provision of the regulations or any enforceable EU obligation".

57. By Regulation 47A (2) "that obligation is a duty owed to an economic operator". It is common ground that HF is a "contracting authority" and that WDP is an "economic operator".

58. By Regulation 4(3):

"A contracting authority shall (in accordance with Article 2 of the Public Sector Directive) –

(a) treat economic operators equally and in a non-discriminatory way; and

(b) act in a transparent way."

59. The procedures leading to the award of a public contract are set out in Regulations 11, 12 and 16.

60. The criteria for the award of a public contract are set out in Regulation 30 which produce or are intended to produce an answer that one bid or other is the most economically advantageous tender.

61. Then, the decision having been taken, Regulations 32 and 32A set out the procedure for informing bidders of the decision. Regulation 32(2) and (2A) set out what is to be in the Award Decision Notice.

62. Regulation 32A provides for a standstill period during which time, the issue of a claim form, if it comes to the knowledge of the contracting authority prevents the contract from being entered into: see Regulation 47G. That is what happened in this case: HF applied under 47H to bring an end the requirement imposed by Regulation 47G(1) which was not opposed by WDP.

63. Regulation 47C provides for a breach of the duty under Regulation 47A to be actionable.

64. Regulation 47D provides for the general time limits for starting proceedings.

65. In essence HF was obliged:
    (i) To conduct the procurement in a manner free of any manifest error;
    (ii) To conduct an objective evaluation of tenders by reference to criteria and sub-criteria which it was appropriate and lawful to apply to the process of tender evaluation and which had been sufficiently disclosed to the economic operators including WDP;
    (iii) Evaluate all the tenders fairly and objectively and without either actual or apparent bias.

66. Each of these obligations was owed to WDP, any breach of which was and is enforceable as a tortious breach of statutory duty pursuant to Regulations 47A and 47C of the 2006 Regulations which I have set out above.

67. No infringement of these obligations in the evaluation process is permitted. There is no requisite mental element in establishing breaches of the principles. Breach of the principles is established by considering objectively the conduct of the authority and those conducting the bid for the authority.

68. Thus, if for example the evaluators applied the stated criteria with an overlay of additional unstated criteria or with the application of other parameters they were in breach of their obligations of equal treatment and transparency.

69. When the Court is asked to review a decision taken, or a step taken, in a procurement process it will apply the principles which I have summarised above.

70. The standard of review to be adopted by the Court was set out by Morgan J in **Lion Apparel Systems Ltd v Firebuy Ltd** [2007] EWHC 2179 (Ch):

> *"35. The Court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.*
>
> *36. If the Authority has not complied with its obligations as to equality, transparency or objectivity, there is no scope for the Authority to have a 'margin of appreciation' as to the extent to which it will, or will not, comply with its obligations.*
>
> *37. In relation to matters of judgement, or assessment, the Authority does have a margin of appreciation so that the Court should only disturb the Authority's decision where it has committed a 'manifest error'.*
>
> *38. When referring to 'manifest' error, the word 'manifest' does not require any exaggerated description of obvious. A case of 'manifest error' is a case where an error has clearly been made."*

71. At the tender stage of the procurement process a contracting authority must not evaluate tenders by reference to the tenderer's ability to perform the contract: **Lianakis v Alexandroupolis**: Case C–532/02.

> *"29. However, although in the latter case Article 36(1) of Directive 92/50 does not set out an exhaustive list of the criteria which may be chosen by the contracting authorities, and therefore leaves it open to the authorities awarding contracts to select the criteria on which they propose to base their award of the contract, their choices are nevertheless*

limited to criteria aimed at identifying the tender which is economically the most advantageous ….

30. Therefore, 'award criteria' do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question.

….

32. Consequently, it must be held that in a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36(1) of Directive 92/50 from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment or their ability to perform the contract by the anticipated deadline."

72. In **EVN v Austria,** Case C-448/01, the European Court of Justice said:

"47. It should be recalled that the principle of equal treatment of tenderers which, ... underlies the directives on procedures for the award of public contracts ... implies, first of all, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority ... .

48. More specifically, that means that when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers…..

49. Second, the principle of equal treatment implies an obligation of transparency in order to enable verification that it has been complied with, which consists in enquiring, inter alia, review of the impartiality of procurement procedures ...

50. Objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the

information and proof provided by the tenderers being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria.

51. It is thus apparent there where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure.

52. Therefore, an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community Law in the field of public procurement."

73. I was referred also to **Environmental Waste Controls Ltd v Lancashire County Council** [2010] EWCA Civ 1381. In that case the Judge at first instance had held that the authority had breached its duty under Regulation 4(3) in that it had taken into account concerns about the claimant's financial standing and the price at which it had tendered when considering the competing bids, and that had been likely to have influenced the assessment process, rendering it unfair, and resulting in serious and manifest error.

74. In the Court of Appeal the first judgment was given by Pill LJ, who, having set out at paragraph 9 that the parties accepted the accuracy of the approach described by Morgan J in **Lion Apparel** which I refer to at paragraph 70 above, said:

"32. I would be prepared to hold, in an appropriate case, that a judge would be entitled to find that the decision-maker was in fact influenced by an irrelevant consideration, even though he was obviously not aware that he was influenced. I am not prepared to do so on the findings in this case. The issue must be considered in the context not of a 'hunch' preference for one tenderer over another but in the context of a carefully devised and operated assessment procedure, with scores under many headings. If that procedure is honestly operated, as the judge found it was, it is extremely difficult to go on to find that the process was deflected by reason of regard for an irrelevant consideration. Subconscious bis as between SITA and EWC

was expressly found not to have been present on another aspect of the choice.

33. Mr Birch was acting professionally and had been advised to ignore the financial standing of EWC. He said that he followed the advice and ignored the issue. He was found by the judge to have been an honest witness. A court should in my view be very slow in such circumstances to find that he was influenced by that issue. Even lay jurors are relied on in criminal cases to ignore against one defendant evidence admitted as material to another.

34. Moreover even though I accept that in the case of witnesses found to be honest, a judge may on some occasions hold that they were influenced by subconscious considerations, contrary to their belief, it is vital that it is put to them in the plainest terms that they were so influenced."

75. The second judgment in that case was given by Jackson LJ who said at paragraph 44:

> *"It frequently happens that judges, tribunal members and other decision-makers are aware of facts which from a common sense point of view, are relevant (and possibly even important) but which they are not permitted to take into account. The decision-maker is human. The best that he or she can do is to embark upon an objective assessment, consciously focussing upon the matters which he or she is required or permitted to consider and consciously putting out of his or her mind the other matters. If the decision-maker does that any court or higher court reviewing the decision should not embark upon the question whether subconscious influences were at work, as EWC contended in this case."*

76. The third judgment was given by Patten LJ who agreed with both judgments.

77. As Mr Giffin suggested to me when opening the case: **[Transcript, Day 1 page 121 lines 17-25]** there is a slight difference in emphasis between Pill LJ and Jackson LJ. Jackson LJ says that a court reviewing the decision should not concern itself with the

question of whether subconscious influences were at work whereas Pill LJ says that it is extremely difficult to establish subconscious bias.

78. In **BY Development Ltd & Others v Covent Garden Market Authority** [2012] EWHC 2546 (TCC) Coulson J, on an application to tender expert evidence in support of a challenge of a public procurement decision set out at paragraph 8 the general principles of law:

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

79. At paragraph 11 Coulson J said "The test of 'manifest error' applied in the European cases, which is that required by the 2006 Regulations, is very similar to, if not the same as the **Wednesbury** test … of irrationality in domestic judicial review proceedings …".

80. At paragraphs 50 – 90 inclusive Coulson J set out the approach in a number of reported decisions beginning with that of Morgan J in **Lion Apparel**. Coulson J concluded at paragraph 20:

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

81. As to that, Mr Bowsher QC for the Claimant said **[Transcript Day 1 page 75 lines 3 – 13]**:

> *"What my learned friend will no doubt be saying is that you are not supposed to re-score. Fine, but what we are saying is you are certainly entitled to look at the scoring and seeing whether or not that plainly reflects a breach of the relevant principles.*
>
> *It may be when you come to causation you do have to take a view on the scoring, even though you may not actually say: Yes I definitely know there would have been 33 more points here or whatever. But you may have to take some view when it comes to causation, as to whether or not the effect is minimal or substantial."*

82. In **Letting International Limited v Newham London Borough Council** [2008] EWHC 1583 QB (when dealing with what was described in that case as Issue C which was the contention that Newham failed to mark its tenders fairly, reasonably and objectively with the result that it acted in breach of Regulation 30, Regulation 4(3) and the EU law principles of transparency and equal treatment), Silber J said at paragraph 111 that the correct principles were set out by Morgan J in **Lion Apparel Systems.** At paragraph 112 he said: "The thrust of the case for Newham is the claimant's allegations of errors fall well short of reaching the threshold of there being a *manifest* error in the assessment of the tenders. Mr Giffin sought to show that there were manifest errors by cross-examining Mr MacCool to show that the panel should have reached a different decision. In other words this became an appeal on the facts to show that wrong marks were awarded to the claimant and some of the other tenderers, in both cases it was said that such awards were to the claimant's disadvantage with the claimant's case having to reach the threshold of showing manifest errors in order to succeed. It is not sufficient for the claimant to show that there was an error, which does not amount to a "manifest error" made by Newham".

83. At paragraph 115 Silber J said: "Third, I agree with Mr Anderson that it is not my task merely to embark on a re-marking exercise and to substitute my own view but to ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded. Fourth, the issue for me is to determine if the combination of manifest errors made by Newham in marking the tenders would have led to a different result."[116] "I propose to comment on various marks which the claimant contends were clearly wrong; then I will stand back and ascertain if the claimant's complaints are justified bearing in mind the margin of discretion to which Morgan J referred in the passage which I have set out in [111] above".

84. As Mr Giffin QC explained to me: **[Transcript Day 1 page 117 line 21- page 118 line 7]**

> *"In other words, if manifest error is alleged, the court does have to look at what marks have been awarded in the relevant*

respect and why, because it can't otherwise adjudicate on it, but it does not say: Was it correct to award a 4? still less: Was this bid better than that? The question the court asks itself is: Was there a manifest error? Which, as Mr Justice Coulson explains, is tantamount to asking itself: Was this a mark that no reasonable authority could have awarded from that bid? Has it gone outside the ambit of legitimate judgment so as, in effect, to be without rational foundation?"

The Issues

Issue 1: Did the Quality Evaluators evaluate the tender by reference to criteria which were not aimed at identifying the most economically advantageous tender, in particular:

(a) Did the Quality Evaluators take into account Jones's ability to provide the gas compliance services under the Contract(s) when it scored WDP's quality submission?

Issue 1(a)

85. In an e-mail from Mr Watts to Mr Churton dated 23rd January 2013 Mr Watts stated "My worry with WDP is that they've chosen to partner with PH Jones": **[H1/180].** On 23rd January 2013 Mr Churton sent an e-mail to Mr Watts in which he said:

*"All I have heard today is how badly PH Jones are doing; lack of resources being put on the contract being the problem. Interesting in the light of the Method Statement tendered": **[H1/185]**.*

86. When asked why he made this comment Mr Churton replied that he was "just comparing": **[Transcript /4/123/9-12]**. Mr Watts accepted that this was not a conversation that should have been relevant to be taken into account in the evaluation of WDP's tender: **[Transcript 7/14/2-10]**.

87. Mr Watts accepted that issues about historical past performance should only have been dealt with at the PQQ stage: **[Transcript 7/22/21-25]**. Nonetheless Mr Watts' personal evaluation comments in relation to WDP's submissions including:

"*112. Disappointingly it's the same old, same old plus PH Jones – what were they thinking of? ...*

4.6 What about sub-contractors (PHJ for instance)?

…

8.1 It's very thorough – too much reliance on PHJ?": **[C1/348-349]**

88. In respect of those comments Mr Watts submitted that in making them he was falling into the trap of second guessing WDP's ability to perform the contract: **[Transcript 7/15/7-16]**. However he says that he would have been brought back into line at the consensus meeting.

89. The difficulty with that answer is that the final ITT consensus marking (quality) sheet contains the following very similar comments:

"*112 Satisfactory response although the introduction of PH Jones raises concerns – not the same as PQQ …*

4.6 Satisfactory response. What about sub-contractors (PHJ for instance)? …

*8.1 Satisfactory response. It's very thorough – too much reliance on PHJ?" : **[C3/1056-1058]***

90. At the debrief meeting following the Award Decision Mr Watts said that WDP's inclusion of PH Jones as a sub-contractor, particularly the move from self-delivery to sub-contracting was seen as a "big negative": **[C3/1029, paragraph 6;B/A3/56 paragraph 82;C3/1043;C3/1023]**. He said that Jones had been "giving the Council a lot of grief": **[C3/1043; B/A1/10, paragraph 45]**. Similarly in the review meeting Mr Everett said that WDP made "two significant mistakes in the bid": **[H2/307]** the second of which was using Jones as a sub-contractor.

91. At paragraph 87 of Mr Giffin's written closing submissions he said:

*"It is important to bear in mind that the underlying principle in **<u>Lianakis</u>** [2008] ECR 1-251 Case C-53/02..... is that what is taken into account in the evaluation of tenders must be limited to matters which are relevant to the identification of the most economically advantageous tender. So considerations as to the bidder's financial standing, or its general ability to perform a contract of this kind, are matters which are relevant to the bidder, not the bid and which should be assessed only at PQQ stage. However, matters such as the identity of particular*

> *individuals or sub-contractors who are to be deployed on the contract may be relevant for consideration if that is a facet of how the contract is to be performed, and so potentially relevant to how economically advantageous it is. As a general rule of thumb, it will not normally be wrong for the contracting authority to take account of matters which the bidder has itself deployed in its tender to explain how it will perform the contract."*

92. In its witness statements HF said that the comments made in relation to Jones merely reflected HF's concerns that:
    (i) WDP had failed to mention PH Jones as a Significant Contractor in its PQQ submissions; and
    (ii) WDP did not present a proposal in its tender submissions which aimed to achieve 100% gas safety compliant.

93. Thus, for example, Mr Watts said at: [**B/B2/22 paragraph 44]** that the Quality Evaluators' comments in relation to items 1.12 and 8.1 were included because WDP had "departed from its own PQQ" and WDP's Method Statement did not provide a proposal which was designed to achieve 100% gas certification compliance: **[B/B2/22, paragraph 44]**.

94. Mr Parkinson explained that WDP only finally decided to include Jones in its bid after receiving a Case Study document about its current performance on 7th January 2013 at most 3 days before WDP submitted its tender on 10th January 2013: **[Transcript Day 2 page 37 lines 9 – 18]**. It is said on behalf of WDP that given the brief time lapse it was not unreasonable for WDP not to notify HF about the change before submitting its tender.

95. As I understand the evidence called on behalf of HF and, as is said by Mr Giffin QC at paragraph 88 of his written closing submissions, the evidence is that the use of Jones featured in the thinking of the Evaluators in two ways: "First, there was concern that, having applied at the PQQ stage on the basis that there would be a sole provider using no significant sub-contractors, WDP's tender was then submitted (without any prior notification to HF or accompanying explanation) on the basis that the significant gas works would be sub-contracted to PH Jones. This raised questions as to what had prompted a very late change, and whether there was a well established supply chain in place." In my judgment those were perfectly legitimate matters with which the Evaluation Panel was entitled to concern itself under the published criteria. Seen in that way, those matters had nothing to do with the past performance of Jones and thus do not fall foul of the principle in **Lianakis**.

96. As to the issue of the 100% gas certification compliance Mr Bowsher QC says that HF was wrong to suggest that WDP's submissions did not provide a proposal which was designed to achieve the required gas certification compliance.

97. Those submissions said: **[F2/210]** "PH Jones our proposed supply chain partner are delivering this service in the north of the Borough and over the last quarter (July to September 2012) have achieved 99.75% compliant on gas servicing. We will build on the robust foundations of this existing arrangement with you to quickly lift and shift this accomplished performance into the south of the Borough".

98. Mr Watts understood that to mean that the proposal was to maintain that existing level of performance, which fell short of the 100% compliance required by the new contract.

99. That may well be the natural reading of the proposal. In any event, it simply cannot be said that the Panel's reading was so plainly wrong as to amount to a manifest error. Thus there is no basis on which the Court can interfere.

100. Mr Bowsher QC says that if HF did have real concerns about WDP's change in position it was open to HF to refuse to accept the changes in the tender submissions or to deselect WDP as a tenderer. Mr Watts accepted in evidence that that was the correct approach: **[Transcript 6/51/5-13; Transcript 7/13/15-24]**.

101. In fact HF chose not to adopt either of those courses of action. But that does not of itself make the manner in which HF reacted to the sudden involvement of Jones impermissible. The issue remains whether or not HF applied illegitimate criteria. I am not satisfied that they did so. What Mr Everett said at the Quarterly Review Meeting on 11th April 2013: **[H2/307]** was that he thought it had been a significant mistake to tie in with what he regarded as a failing contractor, but that was not a matter which had any impact on the scoring. The test of that is the score which was in fact achieved, and WDP did not in any relevant respect receive a score of less than 3. They were not marked down.

102. I find that HF did not wrongly take into account the ability of Jones to perform the services when its scored WDP's quality submission.

Issue 1(b):

(b) Did the quality evaluators take into account the ability of Andrew Murphy when it scored WDP's quality submission?

103. Mr Murphy was general Manager. It seems apparent that HF had not formed a favourable view of his skills. In particular, Mr Everett is recorded as having made at performance and review meetings comments which were unfavourable of Mr Murphy: [see for example H**1/58 and H1/1229]**.

104. There is some evidence that Mr Watts shared that view: **[Transcript 6/40/16-24]**.

105. In the feedback provided by Mr Everett at the review meeting he said that WDP had made "two significant mistakes" in its tender, the first of which was putting a "weak manager" in as General Manager: **[H2/307]**. He referred to Mr Murphy having a

"proven track record of failure": **[H2/307]** and that he was disappointed that Mr Murphy was included in the bid despite the feedback that had previously been given.

106. At the debrief meeting Mr Watts said of Mr Murphy "You can't push a jelly": **[C3/1030, paragraph 11; B/A3/57, paragraph 89]**.

107. When scoring WDP's quality submission Mr Watts said "[WDP] is resting on its laurels and doesn't see the need for significant change – nor will it change with AM at the helm": that being a reference to Mr Murphy. A similar content found its way into the final ITT Consensus Marking (Quality) Sheet: **[C3/1056]**: "1.1.1 … It is resting on its laurels and doesn't see need for significant change – disconcerting".

108. The evidence suggests that if there was any mention of Mr Murphy at the consensus meeting any such mention must have been brief as Mr Vickery records no conversation about any individual: **[B1/paragraph 27]**. Mr Watts says there was no discussion of Mr Murphy: **[B2/paragraph 51]**. Mr Everett thinks "he may have been mentioned": **[B4/paragraph 29]**. Mr Thompson has no recollection of him being mentioned: **[B9/paragraph 17]**. Mr Martin does not have a clear memory, says there was no significant discussion but thinks that he may have been mentioned:**[B7/paragraph 22]**.

109. As to the evidence of the meetings that took place on 11th April 2013, the notes of the meeting confirm that Mr Everett made plain that whilst he thought it was a mistake for WDP to have planned to use Mr Murphy in running the contract, it was not a matter that had affected the scoring: **[H2/307]**.

110. At the debrief meeting between Mr Watts and Mr Durkin, Mr Murphy was mentioned only when Mr Durkin introduced his name into the conversation. I accept, that in effect, Mr Durkin indicated that he was aware that HF did not have a high opinion and Mr Watts made a comment indicating assent. He could hardly have done otherwise. But nothing was said to suggest that this was a matter which had influenced the scoring of the bid: **[C3/1022]**.

111. In terms of scoring, whilst Mr Watts gave WDP a score of 2 for the relevant section, everybody else gave a score of 3 (or in the case of Mr Everett a score of 4). It was the score of 3 which prevailed. I do not accept HF wrongly took into account the ability of Andrew Murphy when it scored WDP's quality submission. Whilst there is evidence that Mr Murphy's abilities were held in low esteem, there is no evidence that that was carried into the scoring.

> Issue 2*: Did the Quality Evaluators evaluate the tender by reference to award criteria which were not specified, or at least not specified in a clear, precise and unequivocal manner, in the ITT documents, in particular:*
>
> *(a) Was the requirement to demonstrate a "sea change" in how the Services were to be delivered as compared to delivery under the Original Contracts an award criterion*

specified in the ITT and did the quality evaluators apply this evaluation criterion when it evaluated WDP's submissions?

(b) Did the quality evaluators take WDP's performance under the Original Contract(s) and/or the general political desire to change from an incumbent provider when it evaluated WDP's submissions?

(c) Did Mr Nimmons evaluate WDP's ICT submissions by reference to criteria which were not in the ITT?

Issue 2(a)

112. At the debrief meeting Mr Watts said that what had failed to come across in WDP's bid was the need for a "sea-change" in delivery: **[C3/1030, paragraph 6; C3/1023; B/A1/10, paragraph 46; B/A3/56-57, paragraph 85]**. He explained that this was important to HF and that Mitie had demonstrated that: **[C3/1030, paragraph 6]**. When Mr Durkin said that he had not seen any requirement to demonstrate a "sea-change" in the documentation: **[C3/1030, paragraph 7; C3/1023; C3/1042; B/A1/10, paragraph 48]**. Mr Watts responded that he thought HF had been clear during the mid-tender reviews that all contractors had to demonstrate a "sea-change": **[C3/1030, paragraph 7; C3/1023]**. Mr Watts made a similar comment in a telephone call on 27th March 2013 when he spoke to Mr Durkin: **[B/A1/7, paragraph 34; H1/290]**. Mr Watts said in evidence "We never made any secret of the fact that we were looking for a significant change": **[Transcript 7/42/22-23]**.

113. The final ITT Consensus Marking (Quality) Sheet) included a number of comments which may be germane:

"*1.1.1 ... it is resting on its laurels and doesn't see need for significant change – disconcerting*

1.1.3 ... it doesn't take us anywhere new ...

1.4.1 satisfactory response: well, I think they can do it – the response is still in the pig-sty ... and based on the old expensive régime ...": **[C3/1056-1058]**

114. The evaluation comments provided to WDP on 10th April 2013 in relation to Section 1 of the Method Statement stated:

"… the management structure and approach was generally acceptable although it failed to acknowledge that a significant change was required to meet the enlarged scope of works and revised ways of working … .": **[C3/018]**.

115. On 17th January 2013 Mr Watts had sent an e-mail to Mr Churton in which he commented:

*"WDP was lightweight, skimpy and under the misapprehension that their current service is excellent … Mitie sounded quite exciting … I'm reading Kier now – it's a bit like WDP skimpy and the same old same old … .": **[H1/138]***

116. Mr Watts' personal comments on WDP's bid included:

"*1.1.1 It is resting on its laurels and doesn't see the need for significant change – nor will it change with AM at the helm.*

1.1.2 Disappointingly it's the same old same old.

1.3.1 This doesn't take us anywhere new … ." : **[C1/348-349]**

117. WDP did choose, especially at the start of their tender, and in various subsequent sections to place a great deal of emphasis on what they portrayed as the successes of the existing contract. They did so although HF thought that the existing contract was far from successful, had made that plain and that WDP were well aware that HF was looking for radical change: **[Transcript Day 2 pages 21-22 lines 21-1]**:

"The term 'sea-change' may not have been used, Mr Parkinson but it was made pretty clear by the Council, wasn't it, that it was looking for radical change?

A. My Lord, I cannot deny that it says 'radical change' in this document."

118. The need for a sea-change was a decision that HF was perfectly entitled to take. But it does not follow that HF was looking for a new contractor. As Mr Giffin QC argues: "If a bidder, knowing that the Authority does not like at all what went before, chooses to make its opening message a hymn of praise to that previous régime, it cannot be surprised if the message conveyed to the Authority is that the bidder intends its performance of the new contract to hark back to what went before, nor if the authority is less than enthused by that" :[paragraph 96 of the Defendant's Written Closing Submissions]. But it by no means follows that in consequence there was discussion at the meeting of the Evaluation Panel about the incumbent contractor's current performance. The evidence of those present is clear that this was not a matter which was applied as a criterion. The Panel had in mind that they were not to evaluate WDP's tender on the basis of any views about its current performance: see Mr Vickery paragraph 25, Mr Watts; first statement paragraph 55, Mr Everett paragraphs 23 – 28, Mr Churton paragraphs 19, 22, Mr Lynch paragraph 7, Mr Martin at paragraph 20 and Mr Thompson at paragraph 16.

119. In my view the comments relied upon by Mr Bowsher QC at paragraph 196 of his written Closing Submissions do not show that HF considered illegitimate criteria. They are explicable and justifiable on the ground that WDP had made the choice to hark back to the old contract as a means of explaining or evidencing what it was proposing for the new contract. Having done so it could have no complaint if HF looked at what WDP had said and expressed its own view about it. HF had made plain that change was what it wanted to see. If a bidder included responses to particular sub-criteria in a manner which did not recognise the need for change but suggested a future performance based upon what had happened before, there is nothing objectionable about saying that this did not represent a good response to the sub-criterion.

120. In any event WDP scored a 3 for the relevant items. Thus the submission was not marked down. Merely, the submission did not show enough of the added value that HF were seeking in order to award a higher score.

121. I do not accept that HF impermissibly evaluated WDP's tender by reference to criteria that were not specified in a clear, precise and unequivocal manner from the beginning of the procurement procedure. The Quality Evaluators did not consider any requirement to demonstrate a sea-change as an evaluation criterion. They considered only the manner in which WDP chose to demonstrate how it would comply with the requirements of the new contract.

Issue 2(b)

122. WDP argue that the Evaluators appears to have wrongly taken into account WDP's performance under the Original Contracts and the general political desire not to award the Contract(s) to an incumbent provider, when it evaluated WDP's tender.

123. I have set out at above a selection of the e-mails between the Evaluators. Mr Bowsher QC asks me to conclude based on those e-mails that "the Quality Evaluators plainly took into account WDP's performance under the Original Contracts when marking WDP's bid": **[see paragraph 202 of his Closing submissions]**. To some extent I have considered this issue already because those comments reflect the way in which WDP chose to present its bid: **[see paragraphs 112- 121 of this judgment]**. In any

event I can see nothing intrinsically objectionable about the kinds of comment that are within the e-mails. They may reflect only what might have been discussed orally before the advent of e-mail systems. There is nothing illegitimate about the robust expression of views.

124. It is clear that there is a greater enthusiasm for some bids than for others. Mr Watts, for example, liked what he saw in the Mitie bid and was enthusiastic about it. He said so in evidence. But there is nothing in the exchange of e-mails which indicates to me that the evaluators are going through the motions. Rather the e-mails suggest to me that the evaluators were trying to read the bids conscientiously and judging by their content. There is nothing to suggest that WDP were treated as unappointable because of concerns about prior performance.

125. The e-mails from Mr Watts could be construed as an attempt to influence his fellow evaluators. However, had that been his intention, he would have sent them to all members of the Evaluation Team and not merely his colleague Mr Churton.

126. I recognise, and I record, that on a first reading some of the e-mails caused me disquiet. However in answer to a question from me Mr Bowsher QC informed me that a feeling of disquiet is insufficient: **[Transcript Day 8 page 92 lines 6-9]**.

127. Mr Bowsher QC suggests that the Quality Evaluators appear also to have factored into their evaluation "the fact that there was a political desire for regime change"; for that he relies upon an e-mail Mr Watts sent to Mr Vickery on 5th February 2013 in which he said "Bearing in mind the fact that there is no political will or departmental will to maintain the status quo should we identify the pricing issue before we start to agree a consensus for the marks": **[H1/201]**.

128. In respect of that, Mr Watts said, consistent with the other e-mails which were passing contemporaneously, that "the pricing issue" with which this e-mail was concerned was nothing to do with WDP or Mitie. The relevant issue was whether Kier's tender should be disqualified as abnormally low and whether that possibility should be made known to the Evaluation Panel. Mr Watts explained that he wanted and expected Kier's tender to be disqualified, because there was no merit in moving from one failing contract to another – to accept an unviably low bid would have maintained precisely that status quo of a failing service.

129. I am not entirely satisfied that that explanation meets the point. The e-mail refers to an absence of "political will or departmental will to maintain the status quo". It may be that the "status quo" intended to be referred to is another failing contract but on my reading it is a reference to the contractor rather than the contract. That is not inconsistent with the reference to the "pricing issue" which Mr Watts explains, and I accept, refers to Kier's tender.

130. But it is impossible to read that e-mail which refers to an absence of enthusiasm for maintaining the status quo as a reference to a political or departmental wish to positively change the contractor. The status quo is unsatisfactory. There is a wish to change the contract but I cannot read that e-mail as referring to a political desire for positive regime change.

131. Mr Bowsher QC also refers to the feedback provided by Mr Everett in the review meeting where it is suggested that Mr Everett said that the Council Leader and Member for Housing were not "crying in their beer" over Kier's departure and that of WDP: **[H2/309]**. Mr Everett denies that he said that remark and it is not included in the hand-written note of the meeting. I accept Mr Everett's evidence.

132. In reality there is absolutely no evidence of any political pressure being applied through the chain of command. Mr Kirrage and Mr Everett deny receiving or communicating any such message and any suggestion to the contrary is speculation without evidential foundation. Mr Giffin QC points out, and I agree, that "if officers had been anxious to obtain political favour it is remarkable that they gave WDP the top score at PQQ evaluation stage".

133. Mr Bowsher QC also relies upon the instruction to Mr Nimmons to review the ICT scores and their subsequent reduction by Mr Nimmons as evidence of political influence. It is said that the Quality Evaluators told Mr Nimmons to review his scores because they considered them too high. Following that further review Mr Nimmons reduced the score by almost 5%. That has to be seen in context: on Mr Nimmons' original scoring WDP scored less than any of the other bidders: 278 out of 500, (with nobody else scoring less than 297). At: **[C2/473]** Mr Vickery is recorded as having asked whether the low score indicates that WDP would struggle with the ICT. Given WDP's low score, that seems to me to be a perfectly legitimate query.

134. In much the same way as I mention at paragraph 126 the re-mark by Mr Nimmons caused me disquiet. But the context is that I am not persuaded that there was any perceived or actual political influence on the minds of the Evaluators.

135. Mr Nimmons was asked: **[Day 5/44/15-20]** whether he was pressured to reduce WDP's marks. He was asked "Are those marks that you thought were appropriate marks or marks that you felt you had been pressured into giving?" To that Mr Nimmons said "No, I felt very comfortable with those marks." I accept that evidence.

136. The Quality Evaluators did not illegitimately take into account WDP's performance under the Original Contract(s). There is no evidence that there was any general political desire to change from an incumbent provider. In any event the Evaluators did not take into account any perceived or actual political desire in their evaluation.

Issue 2(c)

137. Mr Nimmons stated that he considered WDP's ICT submission to be weak because WDP "did not use a specialist interfacing software tool and did not have a financial interface": **[B/B8/106, paragraph 9]**. That view is reflected in the final ICT Marking Sheet for WDP which stated that there were "some omissions that gave rise to concerns such as lack of finance interface of generic interface tool": **[C3/1069]**.

138. Mr Bowsher QC argues that the need to provide specialist interfacing software tools was not a requirement set out in the ICT Specifications in Section 4 of the ITT. WDP's IT system has the capacity to incorporate such tools and WDP could have offered to provide the same functionality by different means: **[B/A4/65, paragraph 7]**. Therefore, argues Mr Bowsher, WDP was unfairly marked down in relation to the

ICT section of its bid by reference to criteria which were not specified prior to the submission of the tender.

139. In **Varney & Sons Waste Management Ltd v Hertfordshire County Council** [2011] EWCA Civ 708 at paragraph 34 Stanley Burnton LJ said that the "definition of "criterion" in the New Shorter Oxford English Dictionary as meaning "principle, standard, or test by which a thing is judged, assessed or identified" was not appropriate because "if that definition is appropriate it would mean that Regulation 30 requires every standard by which a bid is to be evaluated, no matter how minor or subsidiary, to be disclosed as such with its proposed weighting. That would seem to me to be impracticable, and I do not think it is what Community law requires".

140. In fact, in this case, bidders were asked: **[F1/24]** to provide an overview of their full IT solution, including integration with third party systems, and also how their systems would interface with the HF's financial requirements. On the application of the passage which I have just cited from **Varney** it is clearly unnecessary for a contracting authority to spell out anything and everything which will improve a bid if it is included, and will lose credit if it is omitted. Mr Nimmons said that other bidders' submissions did recognise the importance of describing such software.

141. In respect of this issue there was no evaluation by reference to criteria which were not in the ITT, but should have been.

Issue 3: Did the quality evaluators fail to score the quality submissions in accordance with the methodology specified in the ITT when they reached the "consensus" score by adopting the mode score by default without further discussion and/or when they determined the "consensus" score by majority vote?

142. It is argued on behalf of the Claimant that HF failed to score the quality submissions in accordance with the methodology set out in the ITT. Clause 2.9 of Annex 1 to the ITT provided that the scores in relation to the quality element of the tender would be "decided by way of consensus":**[F1/19]**. It is said that the scores were not awarded in that way.

143. What is said is that the majority of the scores awarded appear to have been the mode score which was adopted by the Quality Evaluators by default without any discussion. It is said that it is likely that up to three-quarters of WDP's scores were awarded in this way, hence, that would result in different scores being awarded to two different tenderers without the Quality Evaluators reaching any consensus between them as to whether different scores were justified on the basis of the tender submissions. That was not the methodology specified in the ITT.

144. It is also said that some of the scores appear to have been awarded as a result of a majority vote: **[B/B7/102, paragraph 19]**. Those scores were clearly not reached by consensus and thus represent another departure from the scoring methodology set out in the ITT.

145. In practice what happened is that:
   (i) The whole of the Quality Submissions other than the ICT section were given to 5 Evaluators;
   (ii) Relevant sections of the Quality Submissions were given to the resident Evaluator (Mr Lynch)
   (iii) The ICT section of the Submissions was given to Mr Nimmons;
   (iv) All of the individual Evaluators assigned their own scores under each of the sub-criteria for which they had the Submissions;
   (v) Consensus meetings were held on 6th and 7th February 2013;
   (vi) Mr Vickery prepared and calculated, shortly in advance of the Consensus Meetings, a Table showing the mean (rounded) and mode scores for each sub-criterion. A column of consensus scores was completed using the mode value. The table highlighted those sub-criteria where there was, statistically, a particular level of differences between individual Evaluators;
   (vii) At the Consensus Meetings, the Evaluators were asked in every case whether they were content to take the mode value as the consensus score, which led either to them signifying that they would, or to a discussion of what the score should be.

146. On that basis, amongst the scores ultimately awarded, there were some that were not the subject of any collective discussion beyond the Panel confirming that they were content for the mode to be used as the consensus score. In other cases there was a collective discussion which led to unanimous agreement on a particular score. In other cases there was a collective discussion which led to the taking of a vote on what the consensus score would be.

147. It seems to me that the ITT ought to be given an interpretation which is consistent with practical workability. Before coming to the Consensus Meetings, 5 officers had spent of the order of 4 to 6 days each reading and scoring the tenders. Two days were devoted to the Consensus Meetings as they were in fact conducted. If it had been necessary to have a meaningful substantive discussion about every score, that would clearly have taken a great deal longer.

148. What was required was that the scores be "decided by way of consensus". As Mr Giffin QC argues there is nothing in the word "consensus" which required there to be a specific discussion of every score. It must follow that if the Panel knowing what score they had individually chosen to assign and what the mean and mode scores and the proposed consensus were, were content to adopt the proposed consensus score without further discussion, then the consensus reached by those present was to adopt that score. Similarly, where the members of the Panel were content to take a vote and to adopt its outcome, the consensus was to adopt a score which secured majority approval.

149. There is no suggestion that the approach adopted for the score of WDP was not adopted equally for every bidder.

150. There is no evidence that the scores in relation to the quality element of the tender were not decided by way of consensus. The scoring was carried out with the methodology specified in the ITT.

Issue 4: *Did the quality evaluators fail to treat the economic operators in an equal and non-discriminatory way when they scored the tenders, in particular:*

(i) Did the quality evaluators give Mitie a higher score than WDP for certain criteria and sub-criteria when objectively WDP's submissions were as good as or better than Mitie's submissions?

(ii) Did the quality evaluators give Mitie and WDP the same scores for certain criteria and sub-criteria when objectively WDP's submissions were better than Mitie's submissions?

(iii) Does the evidence show that there was a systemic defect in the valuation process such as the tenderers' submissions were not evaluated in an equal and non-discriminatory manner?

152. HF is under an obligation to comply with the principle that tenderers should be treated equally: Case C – 496/99P **Commission v CAS Succhi di Frutta** at paragraph 108. That obligation requires that when tenders are assessed, the award criteria must be applied objectively and uniformly to all tenderers: C-19/00 **SIAC Construction v County Council of Mayo** at paragraph 44.

153. The Claimant says that the award criteria could not have been applied objectively and uniformly to the tenders as the scores awarded to Mitie and WDP do not properly reflect the difference in quality between their submissions in relation to a number of quality criteria and sub-criteria. It is submitted that in relation to these scores "an error has clearly been made" by HF which gives rise to a breach of the principles of equal treatment and non-discrimination: see **Lion Apparel** at paragraph 38. HF has no margin of appreciation regarding compliance with these principles: see that case at paragraph 36.

154. In order to make good its case, the Claimant called its Director of Operations at WDP, Mr Mark Gelder. Mr Gelder prepared a witness statement dated 24th March 2014: **[G/2/535-529]**. That was responded to by Mr Watts who prepared a statement dated 12th June 2014: **[G/3/586-587]**.

155. Mr Gelder does not involve himself in procurement matters: see paragraph 12 of his witness statement: **[G/2/2/537]**. He was asked to review the Mitie bid. He considered

the initial scores that WDP and Mitie were awarded by the individual members of the Evaluation Panel before the Consensus Meetings took place. He reviewed the tender submissions of Mitie and WDP and assessed the scores that were awarded for both tenderers in relation to each question by reference to the evaluation methodology and criteria. He said: "In so doing, I have considered the extent to which the scores that were awarded seem fair and capable of being objectively justified by reference to the contents of each bid": **[G/2/2 page 537 paragraph 15]**. Then, in that witness statement he goes through various sections finding fault with the scores, see for example paragraphs 31, 37, 42, 47, 54, 64, 68, 73, 85, 91, 98, 105, 109, 113, 115, 121, 126, 130, 137, 140, 145, 149, 153 of his witness statement. His evidence consisted of his opinion on the relevant merits of the two tenders: **[Transcript Day 3, page 113-116 lines 22-11]**.

156. Mr Giffin QC made plain that he did not accept that the exercise carried out by Mr Gelder was an appropriate exercise for the Court to be engaging in at all: **[Transcript Day 3, page 46 lines 15-21]**. Nevertheless he made no objection to Mr Gelder's evidence on these issues.

157. As set out above in **BY Development Ltd & Others v Covent Garden Market Authority** [2012] EWHC 2546 (TCC) Coulson J decided that whilst it could not be said that expert evidence would never be admissible in public procurement cases concerned with manifest error, such evidence would not be generally admissible or relevant. That is because, as Coulson J said at paragraph 8: "The court's function is a limited one. It is reviewing the decision solely to see whether or not there was a manifest error and/or whether the process was in some way unfair. The court is not undertaking a comprehensive review of the tender evaluation process; neither is it substituting its own view as to the merits or otherwise of the rival bids for that already reached by the public body."

158. I am guided also by the decision of Silber J in **Letting International Ltd v Newham London Borough Council** [2008] EWHC 1583 (QB) (set out above) where that Judge said at paragraph 115: "… I agree with Mr Anderson that it is not my task merely to embark on a re-marking exercise and to substitute my own view but to ascertain if there is a manifest error which is not established merely because of on mature reflection a different mark might have been awarded. Fourth the issue for me is to determine if the combination of manifest errors made by Newham in marking the tenders would have led to a different result."

159. I therefore intend to follow the course adopted by Silber J in that case which was to consider the "various marks which the Clamant contends were clearly wrong then … stand back and ascertain if the Claimant's complaints are justified bearing in mind the margin of discretion to which Morgan J referred in Lion Apparel."

160. In performing that exercise I deal with those criteria or sub-criteria mentioned by Mr Bowsher QC in his written Closing Submissions in the same order in which he addressed them.

Issue 4(i)

The claim that Mitie were awarded a higher score when WDP's submissions were as good or better.

(a) Section 1.2.6: Reporting accidents

Mitie received a 4 whereas WDP were awarded 3.

161. As Mr Gelder says at paragraph 49 both responses were broadly similar in terms of how accidents and near misses were to be reported but Mr Gelder argued that WDP's response focuses more on reporting near misses as demonstrated by the Near Miss Board and Safety Alert System. The comment made in relation to WDP's submission for this criteria was "satisfactory response although no thought had been given to informing the client": **[C3/1056]**. That was wrong.

162. A case of 'manifest error' is a case where an error has clearly been made. This is such a case. However I must also consider whether the consequence of that manifest error is an error in the score.

163. In order to obtain a score of 4 (rather than a 3), it was necessary for the panel to think that 4 was the appropriate score which would mean demonstrating some element of added value which the panel thought was sufficiently material to deserve such a score. But the misreading identified by Mr Gelder does not, or does not necessarily, go to added value. I cannot conclude that there was manifest error in the score.

(ii) Section 1.2.7: Risk of injury to third party

WDP received a score of 3 for this question whilst Mitie received a score of 4.

164. Mr Gelder doubts whether a number of the mitigation measures considered by Mitie could be implemented and complains that the Mitie response is generic whilst that of WDP is detailed. He concludes that Mitie's response is overly optimistic and likely to be unachievable.

165. Whether that be right or not, the criticism does not in my view amount to manifest error.

(iii) Section 1.3.1: Quality management processes

WDP received a score of 3 whilst Mitie received a score of 4.

166. Mr Gelder says that both responses to the question were strong but in different ways. It is unclear to him why WDP received a lower score than Mitie.

167. I cannot conclude on that basis that there was manifest error.

(iv) Section 2.18: Undertaking inspections

WDP was awarded a score of 3 and Mitie was awarded a score of 4.

168. Mr Gelder comments that Mitie's response is extremely brief and that the level of detail is great in WDP's response when compared with Mitie.

169. I cannot conclude from that criticism that there was manifest error.

(v) Section 219: Delivering best value for money for small communal repairs
WDP was awarded a score of 3 and Mitie scored a 4.

170. Mr Gelder explained that WDP's response was more comprehensive and detailed than that of Mitie.

171. Again, I cannot conclude that there was manifest error. Greater detail does not of itself necessarily mean enhanced value for money and it is that which entitles a score of 4. Thus, I am unconvinced that there was manifest error, if that be wrong it had no effect on the score.

(vi) Section 3.1.5: Dealing with winter peak demands for central heating
WDP were awarded a score of 3 and Mitie were awarded a score of 4.

172. Mr Gelder says that he does not understand the basis for awarding WDP a lower score than Mitie.

173. The comment made in relation to WDP's submission for this criterion was "satisfactory response – reservations about how they will keep servicing to summer months with a 10 month programme – sooner or later it will end up at a different time of year": **[C3/1057]**. Mr Watts said that that was why WDP was not considered to have potentially provided "added value". In its bid WDP said that it would have a 10 month Servicing Programme and that "servicing peaks will be managed to ensure they remain within the Spring and Summer months …".

174. It seems to me that the criticism was unjustified in the light of that extract and if that was the reason why 3 points were awarded and not 4, as is suggested by Mr Watts, both the comment and the score consist of manifest error. In the light of the weighting: **[C3/1056]** that would have closed the gap by 6 marks in the overall evaluation.

(vii)Section 3.5.2: Building Regulations Part "P" and Part "L"
In relation to this criterion WDP was awarded a score of 2 and Mitie was awarded a score of 3.

175. Mr Gelder suggests that a negative comment "Minor reservations Part L is not all about gas safe, what about thermal insulation etc?": **[C3/1057]** may have influenced the score. Mr Watts recognised that the Quality Evaluators made a mistake in assumING that WDP were proposing to use Gas Safe solely to check that the installations were safe when in fact the company was being used to check all Part L certifications, including thermal insulation: **[G2/2/556, paragraph 135; G2/3/583, paragraph 103]**.

176. That comment represents a manifest error. Mr Bowsher QC argues "The comments and scores awarded by the Quality Evaluators show that the two bids were not being treated equally and that WDP's score was marked down due to a manifest error in the Council's interpretation of WDP's submissions". I do not accept that conclusion

follows. A mistake was made but it does not follow that there was unequal treatment or that the score was consequent upon the error. It is enhanced value for money which entitles a score of 4.

(viii) <u>Section 4.4: Progressing the works with minimal inconvenience</u>

177. This item is not mentioned by Mr Gelder, nor is it pleaded. It was raised by Mr Parkinson and he was cross-examined on it but it was not raised with any of the witnesses called by HF.

178. In relation to this criterion WDP was awarded a score of 3 and Mitie was awarded a score of 4. The comment made in relation to WDP's submission was "satisfactory response, but doesn't cover neighbours". In fact WDP addressed the issue of communicating with neighbours: **[F2/5/254, paragraph 4]**.

179. Whether or not there was a manifest error in relation to this criteria, and I tend to the view that there was, there is no material before me which enables me to conclude that there was manifest error in the scoring.

(ix) <u>Section 9.1: Support the Council and deliver the contract in non-detrimental manner to the environment</u>

WDP was awarded a score of 4 and Mitie was awarded a score of 5.

180. Mr Gelder comments that both tenderers provided an excellent response.

181. Mr Bowsher QC argues that the reason for the difference in scores is likely to have been simply due to the use of the mode as the default "consensus" score rather than any principled assessment of whether the submissions of Mitie and Willmott warranted different scores.

182. As set out above under Issue 3, I do not accept that there was any breach of the obligations of equal treatment and transparency through the consensus approach. In any event there is no material before me which enables me to conclude that there was manifest error in the scoring on this criterion.

<u>*Same scores awarded when it is claimed that WDP's submissions were better.*</u>

(i) <u>Section 1.1.1: Proposed management structure</u>

Both Mitie and WDP were awarded scores of 3.

183. Mr Gelder criticises the staffing structure and staffing numbers proposed by Mitie as well as the Resident Liaison Officer structure. He queried the comment received by WDP "It is resting on its laurels and doesn't see any need for significant change – disconcerting": **[C3/1056]**. Mr Parkinson explained that WDP had included a reference to its current performance because WDP believed that to do so would satisfy the evaluation criterion.

178. Mr Watts recognised that it was that which he did not like. He described the opening session of WDP's submissions as "Blowing its own trumpet in no uncertain terms": **[Transcript 7/29/25 - 7/30/5].**

179. There is no material upon which I can conclude that there was any manifest error in appraisal, still less in the score.

(ii) Section 1.1.2: Training experience and qualifications of management

In relation to this criterion both WDP and Mitie were awarded scores of 3.

180. Mr Gelder comments that WDP's response is much more comprehensive because it sets out who will be deployed and permanently committed to the operation of the contract.

181. Whether that be true or not, I am unable to conclude that there was manifest error either in the appraisal or in the scoring.

(iii) Section 1.1.3: Communication benefits
Both WDP and Mitie were awarded scores of 3.

182. The gist of Mr Gelder's comments is that WDP's bid had a value over and above Mitie's bid in that it provided information about how co-location would specifically bring communication benefit.

183. The comment made in relation to WDP's submission that this criterion was "satisfactory response – it has thought through the principles of communication and co-location – haven't yet identified a base (leaving it a bit late)" **[C3/1056]**. It was the case that WDP had not identified a firm base although they had identified potential suitable accommodations. Mr Bowsher says it was not possible for WDP to identify a firm base in advance of submitting its tender.

184. Whether or not Mr Watts' criticism is justified, it clearly was not a manifest error. In any event I cannot identify any manifest error in the scoring. There is no evidence of any element of added value within the WDP submissions on this criteria.

(v) Section 1.2.3: Lone working arrangement
Both WDP and Mitie were awarded scores of 3.

185. The essence of Mr Gelder's complaint is that WPD offered a bespoke system whereas Mitie offered a generic system; but that of itself does not establish manifest error in the appraisal. In any event there is no evidence upon which I can conclude that WDP's submission included some element of added value which is what is required to justify a score of 4.

(vi) Section 1.3.2: Quality and Management Reporting
Both Mitie and WDP were awarded scores of 3.

186. Mr Gelder comments that WDP gave specific answers according to the individual heading whereas Mitie's response did not adequately answer the questions.

187. In essence, there was a difference of approach. That does not result in manifest error in appraisal, nor in scoring. In any event WDP's submission demonstrated no element of added value which is what is required to justify a score of 4.

(vii)Section 1.4.3: Year on year efficiencies
Both Mitie and WDP were awarded scores of 3.

188. Mr Gelder's evidence is to the effect that WDP provided a more comprehensive and robust response than Mitie.

189. I cannot conclude that there was manifest error either in appraisal or in scoring. There is no evidence that WDP's approach demonstrated some element of added value such as to justify a score of 4.

(viii) Section 2.1.3: How a request will be diagnosed
Both WDP and Mitie were awarded scores of 3.

190. In Mr Gelder's view Mitie's method of diagnosing faults and allocating work was flawed and likely to increase costs and cause delay. By contrast WDP's detailed diagnosis of the faults on the telephone ensured that the correct workmen with the right tools was allocated first time.

191. Mr Watts' evidence: **[G2/3/575, paragraph 59]** was that the advantages and disadvantages of Mitie's system was a matter of judgement and different contractors were entitled to operate different systems according to what worked for them.

192. There is no material upon which I can conclude that the appraisal of the competing submission was manifestly in error, nor that the score was manifestly wrong. In the case of this criterion there is evidence from Mr Gelder that WDP's response might have had an element of added value, but whether that evidence be correct or not I prefer the suggestion from Mr Watts that it is a matter of judgement. That being so I cannot conclude that the score of 3 to WDP was an example of manifest error.

(ix) Section 2.1.5: Ensuring right first time is achieved
Both WDP and Mitie were awarded scores of 4.

193. Mr Gelder's evidence is to the effect that WDP's response was in greater detail and designed to ensure that the correct tradesman is allocated with the right material and enough time to complete the job.

194. I cannot conclude that there was manifest error in the material: similarly Mr Gelder's evidence does not satisfy me that there was no element of added value in the Mitie response such as to disentitle Mitie to a score of 4.

(x) Section 1.4.1: Managing works within budget
Both WDP and Mitie were awarded scores of 3.

195. Mr Gelder says that Mitie's approach is fundamentally flawed. In his view Mitie's approach to diagnostics/first time fix was likely to lead to an increased number of visits for the same repair. He described the WDP response as being very detailed and pragmatic providing several examples of where costs could be reduced.

196. The comment made in relation to WDP's submission for this criterion was "satisfactory response well I think they can do it – the response is still in the pig-sty,

the communal budget is 50/50 shared savings, with no containment and based on the old expensive regime": **[C3/1056]**.

197. Mr Watts explains the comment as being a comment in relation to the old costs regime: **[B/B11/133, paragraph 27]**.

198. I accept that evidence. On that basis, there is no manifest error whether in the appraisal or in the scoring. In any event there is nothing to suggest that there was anything in WDP's submission in relation to this criterion which contained some element of added value such as to justify a score of 4.

(xi) Section 2.,2.1: Ensuring voids meet MLS.
Both WDP and Mitie were awarded scores of 3.

199. Mr Gelder comments that Mitie's response to the question is brief whereas WDP is more detailed and describes the life of voids.

200. I can identify no manifest error whether in appraisal or score.

(xii)Section 2.3.9: Procedures to manage faults or defects
Both WDP and Mitie were awarded scores of 4.

201. Mr Gelder explains that WDP gave a more thorough answer. Mitie, in addition, failed to consider existing boiler warranties which can result in considerable additional costs.

202. However, both bid submissions were good for this criterion. To gain a score of 4 they do not have to be identically good.

203. I can identify no manifest error in appraisal or scoring.

(xiii) Section 3.4.1: Programme of periodic electrical testing of properties and communal areas

Both WDP and Mitie were awarded scores of 3.

204. Mr Gelder comments that WDP's response was more detailed.

205. Whether, that be accurate or not, there is no evidence upon which I can conclude manifest error in the appraisals. I can identify no manifest error in the score: there is no evidence that WDP's tender in relation to this criterion demonstrated some element of added value such as to justify a score of 4.

(xiv) Section 4.12: Local SME's
Both WDP and Mitie were awarded scores of 3.

206. Again, Mr Gelder says that WDP's submission was more thorough and cited two examples of evidence of working with SME's.

207. Again, I cannot conclude on that evidence that there was manifest error in appraisal or score. I can identify no evidence of an element of added value in WDP's response such as to justify a score of 4.

(xv)Section 5.2: Response to reports of dampness
Both WDP and Mitie were awarded scores of 3.

208. Mr Gelder says that WDP's response is stronger in that it provides a number of practical examples.

209. I can identify no manifest error in appraisal nor score.

(xvi) Section 6.1.5: Processes to ensure that all management and supervisory staff are in place for mobilisation and contract

Both WDP and Mitie were awarded scores of 3.

210. Again, Mr Gelder says that WDP's response is more robust and goes into greater detail.

211. The comment made in relation to WDP's submission was "satisfactory response, it's a plan rather than a process, but it's well rehearsed": **[C3/1058]**.

212. When cross-examined Mr Watts conceded that he was probably being "a bit picky": **[Transcript 7 (in private)/76/10-12]**.

213. I do not accept that that recognition of "pickiness" necessarily leads to a finding of manifest error either in appraisal or scores.

214. In relation to each of the criteria which are dealt with above I find that there was only one manifest error which was carried through to the scoring. That would not have changed the final outcome.

(iii) *The marking of Willmott's bid was systematically unfair*

215. At paragraph 313 of his Closing Submissions Mr Bowsher QC makes plain that for this allegation he relies upon what he describes as "the failings set out in the two previous sub-sections" of his written Closing Submissions.

216. I have come to the conclusion that there was only one example of manifest error which was carried through to the scoring. I thus reach the conclusion that the Claimant has not established that there were numerous breaches of the principles of equality and non-discrimination in the marking of the quality aspect of the bids. There was no systemic defect in the evaluation process whereby the tenderers' submissions were not evaluated in an equal and non-discriminatory manner.

217. The marking of WDP's bid was not systematically unfair.

218. Issue 5: *In the alternative, if it is accepted that the quality scores awarded to Mitie and WDP were properly awarded in accordance with the award criteria specified in the ITT documents, were the award criteria insufficiently*

sensitive to distinguish between different qualities of submissions such that HF breached the principles of equality and non-discrimination when it designed the criteria?

219. At paragraph 163 of his written Closing Submissions Mr Bowsher QC argues that "the Council had to select criteria that not only treated like cases in the same way but also treated different cases differently. By failing to select sufficiently sensitive criteria the Council treated different quality submissions in the same way".

220. The gist of that paragraph is repeated at paragraph 317 of his written Closing Submissions with no amplification.

221. The Council adopted recognised practice in using marking scales with a limited number of points. No example is given by the Claimant of the award criteria being "insufficiently sensitive". Nor is any positive submission made as to what criteria would have been sufficiently sensitive.

222. On the material before me I am unable to conclude that the award criteria were insufficiently sensitive. I am not satisfied that in the design of those criteria HF breached the principles of equality and non-discrimination.

<u>Issue 6</u>: *Did the quality evaluators fail to verify Mitie's compliance with the award criteria in breach of the principle of equal treatment?*

223. The Claimant argues that HF should have "verified" certain aspects of the Mitie tender. In particular, it is said that Mitie's proposals in respect of lone working arrangements (Section 1.2.3), risk of injury to third parties (Section 1.2.7), costs control/managing works within budget (Section 1.4.1), how requests will be diagnosed (Section 2.1.3), and ensuring right first time is achieved (Section 2.1.5) consisted of unrealistic proposals.

224. It is said that the proposals put forward by Mitie were unrealistic and unlikely to be capable of being implemented in practice. HF made an error when it failed to recognise that those proposals were unrealistic and unlikely to be implemented in practice.

225. It is argued for the Claimant that as a matter of law the principles of equality and transparency require contracting authorities to take steps to verify whether the award criteria are in fact satisfied: <u>**EVN v Austria**</u> [2003] ECR1-14527, supra.

226. In the <u>**EVN**</u> case, the amount of electricity produced from renewable sources entered into the procurement process in three ways: it was a mandatory requirement that the tenderer had produced at least a certain minimum of quantity of electricity from such sources annually, the amount produced over and above that minimum was a major (45%) element in the evaluation of the tenders, and there would be a contractual requirement to supply electricity from renewable sources under the contract. Yet the authority had no way of knowing whether any claims made about the source of electricity generated were correct or not. Accordingly, it was open to a bidder to say whatever it liked about its current sources and its future commitments, regardless of

the reality. It was held that state of affairs was not consistent with transparent and equal competition.

227. That is an entirely different case to that in which I give judgment. Here there had already been quality control in that the ability of Mitie and the other bidders who were invited to deliver contracts of this kind had been directly tested at the PQQ stage by way of requiring information about reference contracts. All of the proposals identified at paragraph 323 of the Claimant's written Closing Submissions are no more than Mitie's normal working practices. At the tender evaluation stage that is something which an authority should normally be entitled to take for granted. Indeed there is a significant risk that re-opening the question of the bidder's general ability to deliver on contracts of this kind would infringe the principles in **Lianakis**.

228. As a matter of common sense, it seems to me it is not practical or necessary for the HF evaluator to second guess the relative effectiveness of different ways in which a bidder's business might be run.

229. Nowhere in the Claimant's written submissions (apart from a reference to site visits in paragraphs 319 and 320) is there any suggestion of what HF failed to do but should have done.

230. But the intention not to hold site visits until after selection of the preferred bidder was made clear in the ITT and was not challenged at the time **[F1/9, paragraph 10.1]**. Thus, HF's lawyers were correct to advise that any attempt to introduce site visits into an evaluation process in a fair and equal way would be fraught with difficulty.

231. Mr Bowsher QC also cites paragraph 63 of the judgment of Cranston J in **Public Interest Lawyers v Legal Services Commission** [2010] EWHC 3277 (Admin) in support of an argument that there is a breach of the principle of equal treatment where a contracting authority selects award criteria which are capable of being verified but fails to verify a tender's compliance with those award criteria.

232. But paragraph 63 must be read subject to paragraph 64 where Cranston J said that the authority in that case was "entitled to take the view that at least initially it would not be a sensible use of resources for it to seek independently to verify compliance by providers".

233. The Judge did not formulate any statement of general principle as to when something more than that would be required. Moreover, in that case, there does not appear to have been any discrete PQQ stage to test bidders' ability to perform the contract.

234. I am not persuaded that in the circumstances of this case verification after the PQQ process was required or would have been appropriate. There was no breach of the principle of equal treatment.

235. Issues 7, 8 and 9 can be taken together.

> *Issue 7: Was there an implied contract between HF and WDP that the Council would award the Contract(s) in accordance with the 2006 Regulations, General Principles of*

EC Law and/or the common law, such as equality, non-discrimination, transparency and fairness?

<u>Issue 8</u>: Is WDP prevented from claiming that there is an implied contract by virtue of Section 3.6 of the ITT?

<u>Issue 9</u>: Did the Council breach the implied contract?

236. The question of the implied contract is relevant only if I were to find that any of the claims made by WDP fail only because of limitation. I deal with the question of limitation below. I have considered first all claims on their merits.

237. In **<u>J Varney & Sons v Hertfordshire CC</u>** [2010] EWHC 1404 (QB) at paragraphs 233 – 235 Flaux J held that in a claim for breach of the Regulations there is no basis for the implication of a contract. I respectfully adopt his reasoning at paragraphs 233 – 235. That finding does not appear to have been challenged in the Court of Appeal [2011] EWCA Civ 708.

238. In **<u>JBW Group Ltd v Ministry of Justice</u>** [2012] EWCA Civ 8 Elias LJ (with whom the Master of the Rolls and Kitchin LJ agreed) accepted at paragraph 59 that a concession by Counsel that it would be inconsistent with the purpose of the Directive to imply any such a contract, was rightly made.

239. It is to be noted from paragraph 58 of the Judgment that contrary to the position taken by Mr Bowsher QC in this case, Counsel in that case abandoned the suggestion that the implied contract argument would entitle him to circumvent the time limit in the Regulations.

240. There is no room for the implication of any contract, this being a case governed by the Regulations.

241. Issues 8 and 9 fall away.

<u>Issue 10</u>: Would WDP have won the Contract(s) but for the breaches of statutory duty and/or implied contract by the Council?

242. I have decided that there is no room for the implication of a contract. I have also decided that WDP have not established any breaches of statutory duty by HF. I do not therefore need to consider causation.

Issue 11: *Alternatively was WDP deprived of the chance of winning the Contract(s) as a result of the breaches of statutory duty and/or implied contract by the Council?*

243. There is no room for the implication of a contract. On the findings which I have made on the evidence before me this is not a case for the assessment of the loss of a chance. There was no breach. A loss of chance might have arisen for assessment if I had decided that there was greater evidence of manifest error than was the case. On the findings which I have made there is no chance to assess.

244. The need to adopt the alternative measure of calculating the value of any loss arises only if I had concluded that it is impossible to predict how the Evaluators would have actually have scored the bids if they had conducted themselves and the bid in accordance with their relevant obligations. I have found that they conducted themselves and the bid in accordance with their relevant obligations. The value of the chance lost does not arise.

Issue 12: *What is the appropriate contract period over which it is to be taken that any hypothetical contract would have been performed by WDP?*

245. I deal with this issue in case I am wrong in my conclusion on the central issue in the case.

246. The Invitation to Tender provided for the Conditions of Contract to be those of the ACA Term Partnering Agreement 2005 as amended in 2008 as amended by Special Conditions.

247. Clause 13.1 of the ACA Conditions provides for the duration of the Term to be as stated as the Term Partnering Agreement executed by the original Partnering Team members, which would in this instance have been the Defendant and its chosen contractor.

248. Clause 13.3 of the ACA Conditions provides so far as material:

> *"If stated in the Term Partnering Agreement that this Clause 13.3 applies, the Client may terminate the appointment of all other Partnering Team members … at any time during the Term or as otherwise stated by the period(s) of notice to all other Partnering Team members stated in the Term Partnering Agreement."*

249. A document entitled "Preliminaries" issued by the Defendant as Section 2-2 of the Invitation to Tender provided at Section A20 for the Term Partnering Agreement to be completed as there set out. In particular:

(i) Under Clause 13.1, the term was to commence on a date to be identified and to continue for a period of 10 years extendable at the Defendant's option by 5

further consecutive periods of 1 year each, subject in all cases to the remainder of Clause 13;

(ii) It was provided that Clause 13.3 was to apply, and that the Partnering Team members entitled to serve notice of termination, and the period of such notice, should be as follows:

> *"The Client may terminate the appointment of the Service Provider by giving 26 weeks' notice at any time after the first anniversary of commencement of the Contract."*

250. Thus, argues the Defendant, it would have been entitled to terminate the contract with effect from the date 78 weeks after the commencement of the contract and the Claimant would have earned no further profit after the date of termination. The damages for the Defendant's failure to award the contract cannot exceed the damages to which the Claimant would have been entitled if a contract had been awarded to it and then terminated, namely damages in respect of the net profit that the Claimant would have earned in the first 78 weeks of the contract.

251. The Claimant argues that it is entitled to loss of profit calculated by reference to a 10 year period as set out in its Supplemental Response of 7th August 2013.

252. Mr Bowsher QC points to the evidence filed by the Defendant in support of its application under Regulation 47H of the Public Contracts Regulations 2006 (as amended) including the witness statement of Mr Stephen Kirrage dated 27th June 2013. Mr Kirrage there advanced the proposition that the Court should treat damages as an adequate remedy for the Claimant in respect of any breach of the Public Contracts Regulations 2006 (as amended) and did so on the basis in paragraph 108: **[B/B3/58, paragraph 108]** that the loss of profit claim would be calculated on the basis of a 10 year contract term.

253. Mr Bowsher's primary argument is one of estoppel although by the time that he made his oral closing submissions his nomenclature had changed somewhat. Mr Bowsher relies also upon the provisions of the Unfair Contract Terms Act. His fallback is that in order to identify the relevant period over which the hypothetical contract is to be treated as being performed for the purposes of calculating the correct level of damages, it would be necessary for the Court to undertake an analysis of the circumstances and context of the contract and its performance, the wider economic and commercial context in which it would have been performed as well as any other matter such as political or budgetary considerations that would or may have affected the Defendant's decision to terminate the contract. That is not an investigation that was undertaken during the course of the trial.

254. Mr Giffin QC relies upon the principle, that as a matter of ordinary contract law the authority would be entitled to perform any contract that it awarded in the manner least burdensome to itself.

255. My attention was drawn to **TSG Building Services PLC v South Anglia Housing Ltd** [2013] EWHC 1151 (TCC) where Akenhead J, in a dispute over jurisdiction in relation to an adjudication, had to consider whether Clause 1 of the ACA Standard

Form of Contract for Term Partnering provides for any constraint, condition or qualification on the apparently unfettered right of either party to terminate in effect for convenience (or without any already given reason) under Clause 13.3. He decided at paragraph 42 that "Clause 1.1 does not require Anglia to act reasonably as such in terminating under Clause 13.3". Further at paragraph 51 he rejected the suggestion that there was an implied term of good faith.

256. Mr Bowsher QC argued that the case was wrongly decided. Alternatively he suggested that it be distinguished.

257. I do not regard the decision of Akenhead J in that case as being determinative of the issue before me. I am asked to decide what the Council would have done as a matter of fact had it awarded the contract to WDP. As decided by Akenhead J there is no requirement on HF to act reasonably, but that begs the question of whether they would have acted in a particular way or not.

258. I believe I am most helped by the decision of the Court of Appeal in **Durham Tees Valley Airport Ltd v BMI Baby Ltd & Anor.** [20101 EWCA Civ 485 where at paragraph 79 Patten LJ said:

> *"The court, in my view, has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual assumption in the exercise. On the basis of that premise, the court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the defendant would have adopted. The judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time. But the court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interest very much in mind."*

259. Thus, had it arisen, on the evidence available to me I would not have been able to decide this issue. I would have agreed with what is said by Mr Bowsher QC at paragraph 355 of his written Closing Submissions. At such a hearing Mr Bowsher QC would have been able to canvass all the arguments which he outlined to me.

Issue 13: *Limitation*

260. It is said by HF that Issues 2(c), 3 and 5 are time-barred.

261. I have decided those issues on the merits and not by reference to any limitation defence. Under Regulation 47D(2) proceedings must be started within 30 days

beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

262. In **DWF LLP v Secretary of State for Business Innovation and Skills** [2014] EWCA Civ 900, a pleading which amounted to pleading further on more specific aspects of the case that had already been pleaded in general terms was treated as an amendment that ought not to be regarded as the plea of a new cause of action. Thus amendment was permitted. Here, the core claim and cause of action was set out in paragraph 50 of the Amended Particulars of Claim. It involves:

> *(i) Evaluating the WDP tender by reference to a criteria, requirements or other factors which had not been previously stated;*
>
> *(ii) Conducting a process in which individual scorers formed opinions but the consensus which led to the mark on each element of the bid was based on certain individuals' views and was not the product of individual scoring of each element of the bid;*
>
> *(iii) Evaluation was conducted on the basis of inappropriate criteria that ought only to have been material to the bidders' selection decisions.*

262. In my view the controversial claims (that is to say those to which objection is taken) amount to no more than pleading further, more specific aspects of a case which had already been pleaded in general terms.

263. If that be wrong, I would have allowed the amendments under CPR 17.4(2) which is permissive of an amendment "if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings".

264. Thus, if the claims are new claims, I would have allowed the amendments in my discretion because they arise out of substantially the same facts. I would have exercised my discretion in granting the amendments because it is important that all matters are considered by the Court. No prejudice was caused to HF because they were able to deal adequately with the arguments raised arising out of the amendments.

265. However, in the result, the claims are dismissed. There will be judgment for the Defendant.