Neutral Citation Number: [2022] EWHC 1532 (TCC)

Case No: HT-2019-000339

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

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Dated: 20 June 2022

Before :

MR ALEXANDER NISSEN QC
Sitting as a Deputy High Court Judge

- -

Between :

BRACEURSELF LIMITED	**Claimant**
- and -	
NHS ENGLAND	**Defendant**

- -

Jonathan Holl-Allen QC and Amardeep Dhillon (instructed by **Goodman Grant Solicitors Ltd**) for the **Claimant**
Fenella Morris QC and Benjamin Tankel (instructed by **Blake Morgan LLP**) for the **Defendant**

APPROVED JUDGMENT

Hearing dates: 28 February, 1 March, 2 March, 3 March and 4 March 2022

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MR ALEXANDER NISSEN QC sitting as Deputy Judge of the High Court:

Introduction

1. In these proceedings, the Claimant claims damages against the Defendant pursuant to the Public Contracts Regulations 2015. The Defendant, NHS England, is the statutory authority responsible for, amongst other things, NHS South, Central and West Commissioning Support Unit ("SCW"). In February 2019, the Defendant completed a nationwide procurement for the provision of orthodontic services of which Lot reference PR002368 (WSX18), located in an area of East Hampshire, formed part. The Claimant, Braceurself Ltd, was the incumbent provider and was one of two bidders for the Lot, which comprised a seven-year contract. The Claimant's bid was unsuccessful. In its proceedings, the Claimant initially sought relief against the Defendant setting aside the award of the contract to the successful bidder, Orthodontics by Eva Petersfield & Alton Ltd ("PAL"). The stay was lifted on the automatic suspension in November 2019 so the contract was let to the successful bidder. In December 2019 the relief sought by the Claimant was amended to include a claim for damages. Those damages were claimed in the sum of £4.7m for loss of profit, bid costs of £26,500 and loss of goodwill, which was not separately quantified.

2. A feature of this case is that the outcome of the competition was very close. The Claimant's bid scored 80.25% whereas PAL's bid scored 82.5%. The difference was therefore only 2.25% in a two-horse race. It follows that even minor breaches of duty by the Defendant could have had a decisive impact on the outcome. That explains why the Claimant had cast its net quite widely in respect of its complaints. The Claimant contends there should have been both upwards adjustments of the Claimant's score and downward revisions of PAL's score.

3. On 12 February 2021, Fraser J ordered a split trial whereby the Court would first determine issues of liability including the seriousness of any breach.

4. The in-person trial on liability took place over 5-days from 28 February until 4 March 2022. The Claimant was represented by Mr Holl-Allen QC and Mr Dhillon. The Defendant was represented by Ms Morris QC and Mr Tankel. I am grateful to all counsel for their assistance.

5. The Claimant called one witness of fact namely its director and shareholder, Mr Spathoulas. The Defendant called a number of witnesses of fact, each of whom was involved in the procurement. One witness gave evidence by live link as she was in Singapore at the time of the trial.

6. The parties have agreed a list of issues to be determined, although they were at odds over the definition of one of those issues. I have answered those issues in an Appendix to this Judgment.

7. I begin by setting out the background to and terms of the procurement. I will then set out the Regulations and legal principles. I will then deal with some general observations on the evidence, including technical evidence, which apply to all matters. Then, I turn to the list of individual issues to be determined. Finally, I deal with the consequences.

Background to and terms of the procurement

8. In September 2015, the Defendant produced a "Guide for commissioning dental specialties – orthodontics" also known as the National Guide for Commissioning Orthodontics 2015. It stressed the importance of promoting equality which was said to lie at the heart of the Defendant's values. The Guide was to be used by commissioners to offer a consistent and coherent approach and described the direction required to commission dental specialist services with a view to improving dental care and outcomes for patients. Immediately after the Foreword, Section 2 of the document contained an "equality and health inequalities statement" as follows:

> *"Promoting equality and addressing health inequalities are at the heart of NHS England's values. Throughout the development of the policies and processes cited in this document, we have:*
>
> - *Given due regard to the need to eliminate discrimination, harassment and victimisation, to advance equality of opportunity, and to foster good relations between people who share a relevant protected characteristic (as cited under the Equality Act 210) and those who do not share it; and*
> - *Given regard to the need to reduce inequalities between patients in access to, and outcomes from, healthcare services and to ensure services are provided in an integrated way where this might reduce health inequalities."*

9. The procurement exercise was in relation to services to be provided pursuant to a "Personal Dental Services" agreement for the relevant Lot area.

10. The competition rules were set out in an "Invitation to Tender Document" ("ITT"). The same ITT was used across the NHS England South region divided across 97 lots.

11. For the purposes of the ITT, the Defendant prepared a Service Specification. Paragraph 1.4 of the Service Specification recorded that the prevalence of orthodontic clinical need was between 30.5% and 33% of the child population.

12. Paragraph 3.1 of the Service Specification provided:

> *"**3.1 Aims and Objectives of Service***
>
> *The overall aim is to provide equitable, accessible, high quality and cost effective specialist orthodontic services from April 2019, in line with the National Guide for Commissioning Orthodontics 2015 and NHS PDS Regulations 2005 and any subsequent revisions.*
> *…*
> *Orthodontics is mainly approved for children and adolescents who meet the agreed criteria for NHS treatment and for adults where there is clinical justification and where prior approval has been agreed with the commissioner.*
>
> *The provider must treat all eligible patients and not discriminate in any manner contrary to the relevant regulations. There are no geographical boundaries."*

13. Paragraph 3.3 of the Service Specification, dealing with Service Description, provided:

> "**3.3 Service Description**
>
> *The service will include:*
> - *assessment and treatment delivered according to each patient's clinical needs, including interceptive treatment and in hours urgent care;*
> - *treatment will include examination taking of radiographs, diagnosis, preventative care, advice, planning of orthodontic treatment, supply and repair of orthodontic appliances including retainers for a period of 12 months following the completion of active orthodontic treatment."*

14. Paragraph 5 of the Service Specification dealt with "Premises and Equipment Requirements". Its contents form an important part of this dispute. It provided as follows:

> *"**5.1 Premises and Equipment Requirements***

Providers are required to secure facilities and equipment suitable for services delivery. The provider must indicate potential premises and number of surgeries planned for the provision of the service, this may include the development of outreach clinics (as a hub and spoke arrangement), plans to work with other practices or other innovations.

The provider will be responsible for the funding of all premises and service delivery costs including but not limited to, consumables, equipment, laboratory services, appliances and IT operational infrastructure (including electronic data interchange [EDI]).

The provider shall ensure that the premises used for the provision of the orthodontic service:

...

- *are suitable for the delivery of orthodontic services and meet the reasonable needs of patients*

...

- *comply with the Disability Discrimination Act (DDA) with a minimum of one surgery wheelchair accessible;*

...

- *has appropriate radiographic facilities, as part of their contractual provision, eg orthopantomogram (OPG) or cephalometric lateral radiology. For the avoidance of doubt where a hub and spoke (satellite) arrangement exists it is not essential that both the hub and spoke has these facilities and it is acceptable for patients to access these facilities at one site only;*

...

- *the telephone number to be used by patients and or professionals in connection with the delivery of the orthodontic service must not start with the digits 087, 090 091 or consist of a local personal number, unless the service is provided free to the caller.*

5.2 Location of Services

...Premises must be based within the location(s) set out in Appendix D...[1]

Providers will need to demonstrate that the premises proposed for the delivery of the service are in a convenient location (eg close to school, places of work, good transport links or homes) within the defined location(s) advised as part of the procurement process. The premises should be easily accessible to patients arriving by foot, public transport, or car.

5.3 Additional Requirements

In addition to the requirements detailed in 6.1, the provider must ensure that:

...

[1] Appendix D comprised a geographical plan of the Lot area, which included Alton, Ropley, Petersfield and Horndean. Relevantly, Winchester was outside the Lot area.

- *Dental services are in accordance with best practice as set out in the following guidance …*

  …
  Equalities Act 2010
  …
  Disability Discrimination Act (1995) and Disability Equality Duty (DED) 2005
  …"

15. Paragraph 7 of the Service Specification provided as follows:

> *"**7. Accessibility and Opening Hours***
> *The service will be flexible and responsive to individual patient need in accordance with the Equality Act 2010 and the Health and Social Care Act 2008."*

16. Section 13 contained the Provider Specification which included the following:

> *"Facilities: Accessible, appropriately equipped and CQC registered clinical setting for the provision of orthodontic services. To have in-contract access to:*
>
> - *Digital OPG/lateral CEPH radiology equipment"*
>
> *…*
>
> *Management of Service: …Flexible and responsive service able to adapt to patients' needs including those with physical or learning disabilities and different cultural needs, ethnicity, language."*

17. Section 15 concerned the location of Services. It contained the following statement:

> *"**Appendix D: NHS England – Location(s) of Services***
>
> *It is expected that activity will be delivered within the location(s) identified for each of the Orthodontic Planning Areas (OPAs):*
> *Individual lot data sheet[2]".*

18. Evidence from a number of the Defendant's witnesses, which I accept, was that the Service Specification was used to draw up the questions for the procurement.

19. The Invitation to Tender document comprised a Call for Competition for the provision of Orthodontic Services for East Hants, carrying the procurement reference WSX18. It is of marginal relevance to these proceedings that the procurement was, in fact, a re-run of an earlier competition. On that occasion, the Claimant had also been the unsuccessful

[2] As noted above, the data sheet comprised a geographical plan.

bidder but it became apparent that not all tenderers had been provided with the same documentation. Accordingly, the Defendant withdrew the competition and it was re-run.

20. The letter dated 2 November 2018 invited bidders to tender. Section 1 contained Key Information and General Information. Section 2 contained the Contract and Service Specification with Appendices. Section 3 contained the Evaluation Methodology, the Evaluation Questions, the Financial Template and the Declarations. In short, the Service was to operate on a fixed price tariff in which the successful provider would be paid at the agreed rate per Unit of Orthodontic Activity ("UOA"). The contract would run for 7 years with provision for its extension.

21. The Evaluation Methodology was described in detail. The approach was conventional. Evaluators, appointed for their knowledge and experience, would complete an individual evaluation of the bids including the provision of scores and justification for those scores. Evaluations were to be of bids in their own right rather than by comparison with other bids. There would then be a process of moderation with the evaluators to discuss the consistency and appropriateness of each individual score. (This was to occur even if their scores had been the same.) Moderation would usually be an in-person meeting. A final score resulting from the moderation was then recorded for each applicable question, to which the weightings were then deployed. (After the moderation, the individual scores by the evaluators were no longer relevant.) The highest total combined score for Quality and Finance would then be recommended for an award.

22. The scoring for the quality questions was as follows:

Assessment	**Interpretation**	**Score**
Deficient	Response to the question (or an explicit requirement) significantly deficient or no response received	0
Limited	Limited information provided or a response that is inadequate or only	1

	partially addresses the question	
Acceptable	An acceptable response submitted in terms of the level of detail, accuracy and relevance	2
Good	A good response submitted in terms of detail and relevance	3
Excellent	As Good but to a significantly better degree or likely to result in increased quality (including improvement through innovation)	4

23. Other points of detail about the marking process were not given within the tender documents but these are uncontroversial and it is appropriate to record them here. The evaluators all received training, whether they were experienced in the process of evaluation (as some clearly were) or new to the role (as some others were). The witnesses described the training as of good quality. There were different compositions of evaluator teams for different questions, depending on the subject matter. The marking was done by uploading evaluations to a portal called In-tend, which is a CSU platform. The moderations were conducted by a person from CSU. Contemporaneous notes were taken by another person in attendance from CSU to summarise the essence of the discussions. These notes were then used to complete a spreadsheet which, in turn, provided the feedback information given to the unsuccessful bidders.

24. The bidders were required to answer six compliance questions and ten substantive questions, which contained the relevant criteria to be addressed. The compliance questions were self-certifying questions with a pass/fail outcome. One such question required the bidder to:

> *"confirm that your offer is fully compliant with the requirements given in the service specification, please note that non-compliance with even one element must be answered as no."*

25. I do not propose to set out all the questions. As I have said, they were prepared with the Service Specification in mind. Principally relevant to the main issues that arise in this case were questions CSD01 and CSD02. These provided as follows:

*"**CSD01 – Service Delivery***

In line with the service specification and LOT data information sheet, bidders should describe how they intend to deliver the service within the geographical area you are bidding for, to meet the service aims, objectives and outcomes.
Your response should reference, but not be limited to, the following considerations:

- *Equity of care for all patients including how you will improve service user pathway and outcomes*
- *Provision of services in line with the National Guide for Commissioning Orthodontics 2015;*
- *How services will be run/managed;*
- *Protocols and inclusion/exclusion criteria;*
- *Opening hours and appointments to patients, in particular appoint times outside of school hours;*
- *Management of referrals;*
- *Assessment;*
- *Waiting lists;*
- *Management of abandoned and discontinued cases;*
- *Describe how the proposed services delivery to be procured fit in line with the Public Services (Social Value) Act 2012*

CSD02 – Premises and Equipment
Bidders should provide an overall description of accessibility of the proposed location of the service to demonstrate compliance of the premises and equipment with the relevant guidance. The service must be provided in the specific LOT geographic area as per the LOT data sheet.
Your response should reference, but not be limited to, the following considerations:

- *Description of the location(s) for the proposed service and rationale for this choice;*
- *Accessibility to patients via private and public transport;*
- *Accessibility to patients in terms of Equality Act 2010*
- *Provision of parking;*
- *Identification of patients access needs/requirements;*
- *Provision of premises which conform with all relevant guidance/legislation;*
- *Compliance with HTM0105 best practice standards;*
- *Facilities, equipment and access to British Orthodontic Society, Orthodontic Radiographic Guidelines (2015) to meet patient needs."*

26. In this procurement, both bidders scored equal marks in respect of Finance, namely the maximum mark of 20%, so during the trial it was unnecessary for me to consider any matters in relation to that criterion.

Causes of action including the Public Contracts Regulations 2015

27. Regulation 89(1) of the Public Contracts Regulations provides:

> *"This regulation applies to the obligation on a contracting authority to comply with:*
> *(a) the provisions of Parts 2 and 3…"*

28. Part 2 contains regulation 18 which provides:

> *"(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner…"*

29. Regulation 91(1) provides:

> *"A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers or risks suffering, loss or damage."*

30. Regulation 98 provides that the Court may award damages to the economic operator which has suffered loss or damage as a consequence of breach where the contract has already been entered into.

31. In these proceedings, the Claimant contends that the Defendant is in breach of the Regulations because:

    (a) the treatment it received was not transparent; and/or

    (b) it did not receive equal treatment to that of the successful bidder, PAL; and/or

    (c) there were manifest errors in the Defendant's evaluation of the bids.

32. The Claimant had also pleaded a duty owed by the Defendant under the Equality Act 2010 not to discriminate, directly or indirectly, against persons with a disability when undertaking and evaluating the tenders: see paragraph 4 of the Particulars of Claim. This was, rightly, not pursued as a cause of action which lay with the Claimant against the Defendant. In opening, the Claimant pointed out that the Defendant was subject to a public sector equality duty, contained at s.149 of the Equality Act, to eliminate discrimination and advance equality of opportunity between persons who share a relevant characteristic and those who do not. However, the Claimant was not alleging any breach of the public sector equality duty in this case. For these reasons, I do not need to consider those points any further. However, as I shall shortly explain, it is necessary to refer to the content of the Equality Act in the context of the procurement challenges.

33. In its pleaded case, the Claimant had also alleged the Defendant was subject to a duty to investigate the content of PAL's bid: see paragraph 11(2)(b) of the Particulars of Claim. In opening submissions, this allegation was not pursued in those terms but, in its place, the Claimant floated a submission that the Defendant was under a duty, which it was said to have breached, to seek clarification of PAL's bid. The Claimant's case was that, had the Defendant done so, the resulting clarification would have impacted upon the outcome. The Defendant pointed out that this supposed duty to clarify had not been pleaded. In closing submissions, Mr Holl-Allen properly accepted that the claim based on a duty to investigate was not sustainable and further confirmed that he would also not pursue a claim based on a duty to seek clarification. In those circumstances, I need not consider those aspects any further.

34. The Claimant also complained that there were undisclosed award criteria used by the Defendant. The Defendant objected that this did not go to any pleaded issue. There is force in that objection. But, for the avoidance of doubt, I will briefly address it now. In no case did the Claimant identify the undisclosed award criteria that the Defendant was said to have deployed. I am satisfied on the evidence that there were none. In any event, I cannot see that this complaint really adds anything to the issues arising in respect of the principles of transparency and the principle of equal treatment, which I consider as they arise below.

Transparency – The Law

35. The principles of transparency are well understood and are set out in Healthcare at Home Ltd v Common Services Agency [2014] UKSC 49 and [2014] 4 All ER 210. In that case the Supreme Court considered the approach which should be applied by reference to the reasonably well-informed and normally diligent tenderer (known as the "RWIND tenderer"). The propositions are not controversial in these proceedings and can be summarised as follows:

    (a) The principle of transparency requires award criteria to be formulated in such a way as to allow all RWIND tenderers to interpret them in the same way, the test being whether the court considers the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers: [8];

(b) The standard is an objective one: [10];

(c) The application of the standard involves the making of a factual assessment taking into account all the circumstances of the particular case: [14];

(d) Evidence of what the bidders actually thought is irrelevant but evidence of technical terms and context may show how a document would be understood by a notional RWIND tenderer: [27].

(e) The issue is not what the invitation to tender meant but whether its meaning would be clear to any RWIND tenderer, and is suitable for objective determination: [27].

36. A breach of the transparency obligation does not allow for any "margin of appreciation": see Woods Building Services v Milton Keynes Council [2015] EWHC 2011 (TCC) at [8] referring to Lion Apparel Systems Ltd v Firebuy Ltd [2007] EWHC 2179 (Ch).

Equal Treatment – The Law

37. The principle of equal treatment was reflected in Fabricom v Belgium [2005] ECR I-01559 as requiring the provider to treat comparable situations in the same way and to treat different situations differently unless such treatment is objectively justified. See, also, Abbvie Ltd v The NHS Commissioning Board [2019] EWHC 61, TCC at [46]. Abbvie also points out that it must be shown that any such different treatment amounts to a proportionate means of achieving a legitimate aim: [68].

38. It is not in dispute that, in this context, the authority enjoys a margin of appreciation but, in this case, the parties are not agreed about the extent of its application in law. In particular, the Defendant contends that the margin of appreciation applies both in respect of its differential treatment of the bidders and, separately, at the stage of considering the objective justification of that treatment. The Claimant contends that the margin of appreciation does not apply to the second stage. I will have to determine that issue if it arises.

39. As I have said, it is common ground that there is margin of appreciation, at least at the first stage. It was well expressed by HHJ Davies (sitting as a Judge of the High Court) in Ryhurst Ltd v Whittington Health NHS Trust [2020] EWHC 448 (TCC); also at 189 Con LR 83. At [41] he said:

> *"I agree with Mr Coppel that the decision in Rotherham does show that equal treatment is not a hard-edged issue where there are always two logical steps in the enquiry, with no room for a margin of appreciation in the first question as to whether or not the claimant has been treated unequally. It is also apparent from the decision that the extent of the margin of appreciation must depend on the particular circumstances of the individual case. It may be observed that the facts of the Rotherham case clearly justified the conclusion that a very large margin of appreciation was appropriate."*

40. The Claimant submits that the circumstances of this particular case are such that the Defendant did not enjoy a particularly wide margin of appreciation because the nature of the decision being made was not a complex one, made at national level, involving the allocation of finite resources between competing claims. Rather, it was a low-level decision about the award of an orthodontic contract in a local area where the allocation of finite recourses between competing alternatives played no part. The Defendant submitted that those factors did not detract from the wide level of discretion it enjoyed. It said it did not matter that it was a local decision or that it did not involve financial allocation of finite resources and contended that the width of discretion was still considerable. In my judgment, it is not very helpful to measure the discretion which arises in this case by reference to any specific width. Rather, it is to be applied to the issues that arise, having regard to all the circumstances.

Manifest error – The Law

41. In terms of the approach to be adopted where a complaint of manifest error is raised, I respectfully refer to and adopt Fraser J's analysis in Bechtel Ltd v High Speed Two (HS2) Ltd [2021] 195 Con LR 124; [2021] EWHC 458:

> *"19. The court will only interfere in an evaluation if there has been "manifest error", and when assessing that, evaluators are entitled to act within what is called a "margin of discretion". The court does not routinely substitute its own view in terms of score for an item, against that of the evaluator who awarded the score to that item, to compare if the two scores align. That would not be the correct legal approach. As Coulson J (as he then was) stated in* ***Woods Building Services v Milton Keynes (No.1) [2015] EWHC 2011 (TCC)*** *:*

> *"12. The first (and still best-known) case in which a judge worked through a tender evaluation process to see whether or not manifest errors had been made was* ***Letting International Ltd v London Borough of Newham [2008] EWHC 158 (QB)****. There, Silber J followed the approach of Morgan J in* ***Lion Apparel*** *as to the law, and went on to say:*
>
> > *115. Third, I agree with Mr Anderson that it is not my task merely to embark on a remarking 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."*
> >
> > *(emphasis added)*

20. That is undoubtedly the correct approach, and it is the one I adopt in these proceedings. Absent manifest error or breaches of other obligations (such as equal treatment or transparency) there is no basis for the court to interfere with evaluations. Proceedings such as this are not an appeal against the outcome of a procurement competition.

21. The approach of the courts to procurement challenges is one of exercising "supervisory jurisdiction", a phrase used by Stuart-Smith J (as he then was) at [58] and [59] in ***Lancashire Care NHS Foundation Trust and another v Lancashire County Council [2018] EWHC 1589 (TCC)*** *and also found in a number of earlier authorities of note, including the Court of First Instance in* ***Strabag Benelux NV v Council of the European Union (Case T-183/00) [2003] ECR II-138, ECLI: EU:T:2003:36*** *and the Supreme Court in* ***Healthcare at Home Limited v The Common Services Agency [2014] UKSC 49****.*

22. This approach to judicial supervision of procurement competitions is in parallel with the approach of the Administrative Court to public law challenges generally. The courts will respect the decision making of the evaluators and those involved in assessing the different bids. It will also approach the matter of whether a tender is abnormally low in the same way, paying attention to the margin of appreciation afforded to the contracting authority, which is the decision maker. I observed the following in ***SRCL Ltd v NHS Commissioning Board [2018] EWHC 1985 (TCC)*** *at [197]:*

> *"I also consider that the court's function in a challenge such as this one is not to substitute its own view for that of the contracting authority on whether a tender has the appearance of being abnormally low. The correct approach, which I consider to be entirely consistent with the approach of the courts to procurement challenges generally and the principles summarised in* ***Woods v Milton Keynes,*** *is only to interfere in cases where the contracting authority has been manifestly erroneous. The courts, in so many cases over the years in this field, have made it clear that their function is not to reconsider and remark every evaluation of each tender in which a challenge is brought. In matters of*

> *judgment, the contracting authority has a margin of appreciation. In matters of evaluation, only manifestly erroneous conclusions or scores will be reconsidered. This approach has its parallel in other public law fields, for example decisions of Ministers."*

23. The test for "manifest error" is a high one in the field of public law generally, and is simply another way of expressing irrationality. Stuart-Smith J (as he then was) in ***Stagecoach East Midlands Trains Ltd and others v Secretary of State for Transport*** *[2020] EWHC 1568 (TCC) at [64], cited with approval Coulson J (as he then was) in* ***Woods Building Services v Milton Keynes Council [2015] EWHC 2011 (TCC)*** *to the following effect:*

> *""Manifest error" is broadly equivalent to the domestic law concept of irrationality: see* ***Woods Building Services v Milton Keynes Council [2015] EWHC 2011 (TCC)*** *at [14];* ***Energy Solutions v Nuclear Decommissioning Authority [2016] EWHC 1988 (TCC)*** *at [312]."*
>
> *(emphasis added)*

24. I respectfully accept and adopt that statement. Manifest error is a high hurdle. It therefore requires something more than a disagreement with the score that was awarded to a particular element of an evaluation in a competition such as this one.

25. In ***The Queen (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade [2017] EWHC 1754 (Admin)*** *, a decision of the Divisional Court (Burnett LJ and Haddon-Cave J, as they both then were), the court referred at [209] to finely balanced matters being "subject to scrutiny in the High Court, but with a suitable recognition of the institutional competence of those charged with the decision-making process". That case does not concern procurement at all, and is concerned with very different facts and decisions of an entirely different nature. However, in my judgment, the phrase "suitable recognition of the institutional competence" of decision makers usefully encompasses the way in which the court, in a procurement challenge (grounded as it is in the relevant Regulations and the public law landscape), will approach challenges to evaluation. The High Court recognises the competence of evaluators, in particular those who are what is called Subject Matter Experts or SMEs. SMEs evaluate details in a tender that are in their specialist fields; that is why they are experts. They are likely to know the subjects in which they are expert. That is not to say that they can never be wrong. However, the court will recognise their competence.*

26. Some procurement competitions are not governed by the different sets of regulations, but can be subject to judicial review. Some procurement challenges start life both as Part 7 proceedings in the Technology and Construction Court, and also judicial review challenges in the Administrative Court. In those circumstances the cases will proceed jointly before one single judge, but one with the necessary authorisation to sit in both courts. Judicial review proceedings require a claimant to obtain permission to bring judicial review as a preliminary filter. There is no matching preliminary filter in the Regulations

> *for Part 7 claims to be brought, although a defendant can apply to have allegations struck out. Regardless of the precise nature of the claim or the underlying procurement, the approach of the courts will be broadly the same. Challenges to evaluations will only be upheld if there has been manifest error, taking into account the margin of discretion available to the decision-maker, or other breach of obligation. There are parallels, as I have explained, with the test of irrationality in public law proceedings. Not only that, but breaches have to be "sufficiently serious" within the meaning of what is called the* ***Francovich*** *case law (the subject of Issue 23 below) in order to entitle a claimant to damages. This has been made clear by the Supreme Court in* ***Nuclear Decommissioning Authority v Energy Solutions EU Ltd [2017] UKSC 34*** *at [37] to [39] per Lord Mance.*
>
> *27. Of course, some procurement challenges do succeed, and there are a number of judgments where that has occurred, including some very sizeable and high profile ones. In some cases, the conduct of the procurement has been somewhat stark, and in breach of the Regulations. I will not list specific cases, but examples include failures to advertise sizeable procurement competitions at all; potential bidders learning of the existence of competitions only from press announcements once the contract has been actually awarded; clear failures to treat bidders equally; manifestly wrong evaluations; and failures to disqualify bidders who obviously ought to have been disqualified. However, the number of successful challenges is likely to be a small proportion of all the procurement competitions conducted each year in this jurisdiction under the different sets of Regulations. The scope of potential remedies available to a disgruntled bidder is comprehensive, and include some powerful orders available to the court in the event of a successful challenge. On the other side of the scales, providing balance, these powers are exercised with restraint. Challenges are considered by the court with the supervisory jurisdiction in mind. The court approaches these challenges with the "suitable recognition" to which I have referred above.*
>
> *28. It does appear from some aspects of this case that it might be thought that procurement law imposes a counsel of perfection upon contracting authorities, and that any failure to achieve perfection will result in the court's interference. That would not be an accurate depiction of what procurement law requires, and it is not the approach that the court has adopted in this case."*

The evidence – general observations

42. The Claimant's witness, Mr Kostas Spathoulas was an honest and genuine witness who did his best to assist the Court. Subject to one topic, which I address below, I largely accept his evidence. I found each of the Defendant's nine witnesses to be honest and genuine. Each of them sought to do their best to assist the Court. Understandably, a number of them had conducted many other procurements since the one with which the Court was concerned and this one was, in many respects, unremarkable. It is unsurprising that a number of them could not, therefore, recall the detail of the procurement, which was undertaken some years ago, even when shown the

contemporary documents. Nonetheless, I am able to accept the thrust of their evidence save where I say otherwise. In particular, I was generally impressed by the careful way in which the evaluators had tried to carry out their functions.

43. Although the evidence did not uniformly point in this direction, it is clear to me that all evaluators were provided with the Service Specification and would have had it well in mind when carrying out their evaluations.

The evidence – technical background

44. Before the pre-trial review, the Claimant had applied to adduce expert evidence in respect of orthodontics but, in the end, the application was not pursued. Instead, both parties led evidence about aspects of orthodontics through the various factual witnesses. This was a sensible way to have proceeded and saved both parties' expense. I was therefore able to understand the relevant background so far as it related to orthodontic treatment. In this context, I found the evidence of Mr Hinman, a retired orthodontist, to be of particular assistance. Prior to his retirement, Mr Hinman had acted as an expert witness in relation to General Dental Council proceedings and he had considerable experience in the field. Where his evidence was not wholly reconcilable with that of Mr Spathoulous, as set out in the findings below, I prefer the evidence of Mr Hinman.

45. At this stage, I set out the relevant findings on matters relating to orthodontic treatment:

(a) As already noted, the public health requirement for orthodontic treatment is considerable. Almost a third of children and adolescents require some form of treatment;

(b) Whilst some general dental practices provide orthodontic services, the treatment is distinct and more commonly operates from specialist premises;

(c) Orthodontic practitioners would be expected to follow the Guidelines for the Use of Radiographs in Clinical Orthodontics. Whilst recognising the obvious benefits of X-rays, these guidelines identify the need to limit the damaging effects of radiation, especially on children. The Guidelines therefore set out the relevant

considerations which would enable a practitioner to decide whether and when to carry out X-rays;

(d) The first step in any orthodontic process is a clinical assessment. Once it is determined that a patient is suitable for orthodontic treatment, the common requirement is for an orthodontic radiograph or Orthopantomogram (known as an "OPG") to be undertaken. An orthodontic radiograph is, essentially, a panoramic radiograph or X-ray which show how the teeth sit within the jaw. The Guidelines indicate that it is not a requirement for all new patients to have an OPG but that it is often appropriate. Mr Hinman said, and I accept, it was established wisdom within the profession that an OPG scan is necessary prior to any orthodontic treatment;

(e) It is not usual for a patient to require another OPG during or at the end of treatment. The Guidelines indicate that radiographic monitoring may be needed during treatment but that it is important to make a careful clinical assessment to ensure the patient will benefit from further imaging. Mr Spathoulas acknowledged that it was only a minority of cases which required X-rays during treatment. He also said he would consider the need for imaging at the end of treatment on a case by case basis. However, Mr Hinman described radiography during or at the end of treatment as "very, very rare". In this respect, I prefer the evidence of Mr Hinman;

(f) Lateral cephalometric radiographs can be used to aid diagnosis and treatment planning and, when appropriate, provide a baseline for monitoring progress. Mr Spathoulas suggested 20% of his patients would need them. However, Mr Hinman suggested that, of his patients, 40% would fall within Class 2 and that 25% of those would be severe Class 2, so as to require a lateral cephalometric X-rays. In other words, 10% of his patients would require an assessment using lateral cephalometric radiographs. Again, I prefer the evidence of Mr Hinman;

(g) Many general dental practices do not have OPG facilities but orthodontal practices would be expected to have them, given the prevalent need to carry them out;

(h) OPGs and lateral cephalometric radiographs can be taken by a trained dental nurse. They do not have to be performed by an orthodontist. What matters are the images themselves, which are reviewed and reported upon by the orthodontist. Ms John, a consultant in Dental Public Health said this in terms. She had trained a dental nurse to perform OPGs. She explained that the review of the end product – the X-ray – was what mattered. Mr Spathoulas agreed that, from the patient's perspective, there was nothing clinically adverse which would arise from a delay in the period between the taking of the X-ray and the review of it, save where the patient was in pain or with a very loose tooth;

(i) In general dentistry, there is a need to ensure provision for both emergency and urgent care. An emergency case would be more severe than an urgent one. Emergency care is required where a patient is in severe pain and it would take too long to resolve through an urgent appointment. The risk of pain resulting from orthodontic treatment is less likely to arise, and where it does so, can usually be considered as a matter of urgency, rather than as an emergency.

The List of Issues

46. Having regard to the matters set out above, it is now necessary to turn to the individual issues set out in the List of Issues.

Compliance with the Equality Act 2010 as a requirement of the Service Specification

Issue 1

47. The parties have been unable to agree the appropriate formulation of the first issue. The variants are:

> *"Did the invitation to tender allow bidders to arrange for any patients with a physical disability to access radiographs outside of the LOT area by way of reasonable adjustment under the EqA?" (Claimant's formulation); or*
>
> *"Did the invitation to tender allow bidders to arrange for any patients who, by reason of their disability, could not access specific radiographics at the service inside the LOT area, to access them outside of the LOT area by way of reasonable adjustment under the EqA?" (Defendant's formulation).*

48. This first issue therefore concerns compliance with the Equality Act as a requirement of the Service Specification. In that context, it is helpful to set out some of the factual

and statutory background relating to disability since this was the main (but by no means only) contention which divides the parties.

49. Both the Claimant and the successful bidder, PAL, tendered on the basis that their orthodontic practices would operate from first floor premises. In the ordinary course of things this would not particularly matter but, in the context of disability, it obviously becomes a significant consideration, namely how the bidder would expect to treat those patients with a disability whose disability was such that access to first floor premises would either be difficult or impossible. As the Service Specification made clear, equitable and accessible specialist orthodontic services was a feature of this procurement. Premises to be provided for this service had to be compliant with the Equality Act.

50. Section 20 of the Equality Act provides:

> ***"Duty to make adjustments***
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposes is referred to as A.*
> *(2) The duty comprises the following three requirements.*
> *…*
> *(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*
> *…*
> *(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to (a) removing the physical feature in question, (b) altering it, or (c) providing a reasonable means of avoiding it.*
> *(10) A reference in this section, section 21 or 22 or an applicable Schedule to a physical feature is a reference to (a) a feature arising from the design or construction of a building, (b) a feature of an approach to, exit from or access to a building, (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or (d) any other physical element or quality.*
>
> ***21 Failure to comply with duty***

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 2(2) The duty

(1) A must comply with the first, second and third requirements.

(2) For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally.

(3) Section 20 has effect as if, in subsection (4), for "to avoid the disadvantage" there were substituted—
"(a) to avoid the disadvantage, or
(b) to adopt a reasonable alternative method of providing the service or exercising the function."

(4) In relation to each requirement, the relevant matter is the provision of the service, or the exercise of the function, by A.

(5) Being placed at a substantial disadvantage in relation to the exercise of a function means—

(a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or
(b) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment."

51. As the Defendant has submitted, the Equality Act does not require complete equivalence of access as between a disabled and a non-disabled patient. Rather, it requires a provider to offer a reasonable alternative method of providing the same service, through a reasonable adjustment.

52. The pass/fail question which required bidders to self-certify that their offer was compliant with the requirements of the Service Specification must have included certification that, in respect of the premises, the bid was compliant with the Equality

Act[3]. It follows that it was not within the remit of the evaluators to determine that question. That was consistent with the evidence of Ms Falgayrac-Jones who also explained that the contract award to the preferred bidder would have been conditional on the premises being compliant with legal requirements including the Equality Act. Had it not been, the award would not be made. For that reason, she explained that the evaluators were entitled to assume, rather than evaluate, legal compliance. I therefore conclude that they were entitled to consider the merits, or otherwise, of the solutions provided for by way of reasonable adjustment on the basis that both bids complied with the Act.

53. The Claimant's solution was the proposed deployment of a device known as a stair climber. A stair climber is not the same as a stair lift which usually comprises a seat and rail permanently fixed to the wall . A stair climber is a mobile piece of equipment which can be stored in a cupboard or elsewhere when not in use. When required, the powered climber is deployed by an assistant who uses it to help lift the seated patient up and down the stairs. Once at the top, the patient would be able to access the full range of orthodontic services.

54. In respect of those patients with a disability who were unable to access the first floor either at all or without difficulty, the preferred bidder's solution was to offer alternative access to orthodontic services at a buddy practice called The Lodge, located on the ground floor and situated about 100m from the principal premises. (A buddy practice is one not owned by the practice but with whom it has commercial arrangement. It is to be contrasted with a sister practice, with which it shares common ownership.) The Lodge was a general dental practice. According to the evidence provided in the bid, it was apparently able to offer all orthodontic services at The Lodge save one: it had no facility to provide OPGs or lateral cephalometric radiographs. When patients required an OPG or lateral cephalometric imaging, they were to be offered a pre-paid taxi to and from PAL's sister orthodontic practice in Winchester, where radiograph facilities were

[3] The Service Specification referred to the Disability Discrimination Act. It is ironic that, in a Specification that sought to emphasise the importance of having regard to protected characteristics, the outdated legislation was referred to. The procurement was taking place eight or nine years after the introduction of the Equality Act.

fully available and accessible. Reports on the radiographs could then be discussed at a subsequent appointment back at The Lodge.

55. Central to the Claimant's complaint is the agreed fact that Winchester is outside the Lot area. Accordingly, the Claimant's case is that the preferred bidder's solution to the accessibility issue was in breach of the bid rules which, to a RWIND tenderer, required the whole of the Service, including the taking of radiographs, to be delivered within the Lot area. Its complaint is that the criteria were not sufficiently clear in showing that it was permissible, if it was, to offer part of the Service outside the Lot area. Based on the same argument, its further complaint is that it did not receive equal treatment to PAL. Particularly, the Claimant submits that the Defendant should have treated PAL's bid less favourably than that of the Claimant because its proposal would require patients dependent on a wheelchair to be treated outside the Lot area.

56. It is not my function to construe the tender documentation in absolute terms. Rather, it is my function to determine how that tender documentation would have been understood by the RWIND tenderer. It is first necessary to identify the rival contentions[4]. The Claimant's case is that a RWIND tenderer would have understood that bidders were not entitled to arrange for any patients with a disability to access radiographs outside the Lot area by way of reasonable adjustment under the Equality Act. The Defendant poses the question differently. Its case is that the RWIND tenderer would have understood that, for those patients who, by reason of their disability, could not access specific radiographs at the service inside the Lot area, it was possible to access them outside of the Lot area by way of reasonable adjustment under the Equality Act. I prefer the Defendant's formulation of the question[5] although it makes no difference to the outcome. In respect of that formulation, the Claimant's contention is that a RWIND tenderer would not have understood that access to specific radiographics outside the Lot area was permissible by way of reasonable adjustment.

57. I have earlier identified the material provisions of the Service Specification. At one stage the Defendant appeared to suggest that the statement "There are no geographical

[4] These are evident from the different formulations of Issue 1 of the List of Issues.
[5] The Claimant's formulation is too wide since it is not limited to patients whose disability is impacted by the stairs. Further, it refers to all radiographs, yet standard X-rays were available within the Lot area.

boundaries" implied that it was actually permissible to provide Services outside the Lot area but it was ultimately common ground that this provision would have meant no more than that patients from anywhere in the UK could access the Services within the Lot area. There is no doubt that the Service Specification emphasised the need for the premises to be based within the Lot area but that is not determinative because both bidders' premises were, indeed, based there. It also required those premises to have appropriate radiographic facilities but contemplated a possible hub and spoke arrangement. Against that, the importance of equitable and accessible treatment was also emphasised, including the need for compliance with the Equality Act. The requirement to be flexible and responsive to patient needs was also emphasised.

58. I accept the Defendant's submission that the Service Specification should be viewed in its wider context and that it would be wrong to treat those paragraphs which focus on the provision of all Services within the Lot area as immutable rules, which cannot be disapplied when the wider philosophy of equal access to treatment calls for an exception. The Defendant submits, and I agree, that the Claimant's construction of the specific wording on which it relies is unduly narrow and is as a result of this litigation. What is necessary is to look at the whole of the Service Specification.

59. A RWIND tenderer would be a familiar user of the NHS and how it functions. It would have understood the importance of equitable and accessible treatment and, particularly, the concept of reasonable adjustment under the Equality Act. As applied in this situation, the statutory duty is to make a reasonable adjustment for the patient whose disability was impacted by the first-floor premises. The RWIND tenderer would also have understood that the geographical boundary of the Lot area, created by the procurement, would have no bearing on the patient. It is simply a construct of the procurement. The reasonable adjustment, by providing access to premises outside the Lot area, for the limited purpose of carrying out specific radiographs, would therefore be regarded as a permissible exception to the general provisions which presuppose that the Services will all be provided within the Lot area.

60. It is also relevant to take into account that the circumstances in which this exception would have to be deployed would be very narrow. Firstly, it would relate only to those patients whose disability was impacted by the stairs. Secondly, it would not apply to all

radiographs but only to OPGs and lateral cephalometric radiology. Thirdly, whilst most patients would require one OPG, it would be unusual to require more than one OPG and lateral cephalometric radiology requirements are themselves unusual. Fourthly, the adjustment must be a reasonable one from the patient's perspective. The alternative offer of treatment 100 miles away would not have been a reasonable one. But the RWIND tenderer would have regarded the offer of pre-paid private transport to Winchester, about half an hour from both Alton and Petersfield, as a reasonable adjustment. Fifthly, all other elements of the treatment would, in this situation, be provided within the Lot area, including the reporting on the OPG.

61. I therefore conclude that a RWIND tenderer would clearly have understood that the invitation to tender allowed bidders to arrange for a certain category of disabled patients, in appropriate circumstances, to have an element of their treatment outside the Lot area if to do so would constitute a reasonable adjustment under the Equality Act. Expressing it differently, there was no reason for a RWIND tenderer to have assumed that all reasonable adjustments under the Equality Act had to be capable of being provided within the Lot area.

62. Based on this understanding held by the RWIND tenderer, it also follows that the Defendant was not required to treat PAL's bid less favourably than that of the Claimant merely because an element of the treatment would be provided outside the Lot area in circumstances constituting a reasonable adjustment under the Equality Act.

63. Issue 1 is therefore determined in the Defendant's favour.

Issue 2

64. Issue 2 asks whether the Defendant was under any additional duty to consider the Equality Act by reason of the Service Specification, and, by way of supplementary question, asks if such issue was properly pleaded.

65. I have already identified that the Defendant was not itself under any relevant duty owed to the Claimant and, to the extent it owed a Public Sector Equality Duty, there is no complaint that it was in breach. No other duty was contended for and I am not aware of any.

66. The answer to Issue 2 is "no".

Issue 3

67. In the context of the Equality Act, this issue asks whether the award of the contract to PAL by the Defendant entailed the use of undisclosed Award criteria; a breach of the principle of transparency; or the principle of equal treatment in circumstances where that provider was proposing to carry out specific radiographs outside the Lot area in certain circumstances.

68. For the reasons given above I reject any complaint about the use of undisclosed Award criteria.

69. It follows from the manner in which I consider that an invitation to tender would have been understood by a RWIND tenderer that the award of the contract to PAL, based on its proposal, was a transparent one.

70. I now turn to the complaint about unequal treatment. The Defendant's submission is that both bidders were in the same position in that neither of their premises gave unfettered access to the particular radiographs that may be required but that they were both subject to the same requirement to make a reasonable adjustment pursuant to the Equality Act. On its case, each bidder proposed a solution which constituted a reasonable adjustment and the evaluators were then required to score the criteria having regard to, amongst other factors, the quality of those adjustments. In summary, the Defendant's case is that both bidders therefore received equal treatment. The Defendant's alternative case is that, if there was any difference in treatment, by allowing PAL to provide radiographs outside the Lot area as part of the reasonable adjustment, it was de minimis and arose from wider considerations of equity and equality of access provided for elsewhere within the Service Specification.

71. I conclude that both bidders received equal treatment. Both bidders were entitled to provide bids which made provision for a reasonable adjustment, in accordance with the Equality Act, and both bids were assessed on the basis that each of them had done so.

72. I therefore find there was no breach of the principle of equal treatment.

73. I should conclude my review of this issue with one further observation. In closing, Mr Holl Allen properly accepted that there was no evidence that, had the Claimant known it was open to it to offer alternative premises outside the Lot area in the limited circumstances identified, the Claimant's bid would in any respect have been different.

Issues 4 and 5

74. These issues concern the alleged duty to investigate which was not pursued by the Claimant. No question of breach arises.

Issues 6 to 9

75. The Claimant confirmed in the course of opening submissions that these issues no longer arise.

Reception Services

Issues 10 and 11

76. The Claimant confirmed in the course of opening submissions that these issues no longer arise.

Number of service days

Issue 12

77. In PAL's bid, it was made clear that the service would initially be provided over three days a week, rising with demand. The Defendant considered this was both permissible and understandable.

78. The Claimant's contention is a RWIND tenderer would not have understood that this was permissible and, as such, the Defendant did not treat the bids in a transparent way.

79. The Claimant's further contention is that it was a breach of the principle of equal treatment to have allowed PAL to offer a service of three days a week rising with demand.

80. Section 7 of the Service Specification provided:

> *"**7. Accessibility and Opening Hours***
> *The service will be flexible and responsive to individual patient need in accordance with the Equality Act 2010 and the Health and Social Care Act 2008.*
>
> *The service must offer a choice of appointments including early mornings and late afternoon appointments for patients at key educational stages. Opening*

> *hours should allow for access outside of school hours and should be set to maximise attendance from children from all socio-economic backgrounds eg evenings and weekends.*
>
> …
>
> *It is expected that a minimum of 30% of appointments are available outside of school hours during term time per week unless it can be evidenced that an alternative provision is required to meet local need."*

81. Beyond that, the requirement was simply that the provider should complete the requisite number of UOA within a given year. Therefore, subject to the constraints set out in Section 7, it was for the bidder to determine how that number of UOA could be accommodated within the opening hours. There was no specific requirement as to the number of days during which the practice should be open. This would have been apparent to all RWIND tenderers. It follows that there was no breach of the transparency principle.

82. Both tenders were also evaluated on this basis. There was no breach of the principle of equal treatment.

83. Ms Falgayrac-Jones gave evidence that the Defendant recognised the fact that a new practice would need time to establish itself and grow its activity and business to make a 5-day opening a viable and sustainable business model. She said it would not have been fair to discriminate between well-established practices and newcomers to the area. She also said it would be inappropriate to compare a new contractor with no existing caseload to an existing contractor in terms of service offer on Day 1. I accept her evidence in each of these respects. Accordingly, I also accept the Defendant's submission that it was entitled to conclude that a period of ramping up for the successful bidder would be appropriate (unless it was the incumbent) as its practice in the area grew.

84. Insofar as the Claimant makes the same points in the context of a complaint about the use of undisclosed Award criteria, I reject them for the reasons given previously, but also on the merits, for the reasons just given.

Issue 13

85. The Claimant confirmed it did not pursue the complaint arising under this issue.

Issue 14

86. This issue asks the question whether the Defendant should have taken into account that the incumbent operator was providing NHS appointments 5 days a week when it was scoring and assessing the winning bidder's bid.

87. As set out in respect of Issue 12, there was no specific requirement as to the number of days during which the practice should be open. The Service Specification did not require account to be taken of the number of opening days per week of the incumbent operator. Nor did the Service Specification require the bidder's bid to reflect the number of opening days per week of the incumbent operator.

88. It would not, therefore, have been a relevant consideration that the incumbent operator was providing appointments 5 days a week.

89. In any event, it is clear to me that the answer in respect of this issue is that this should not have been taken into account. As is clear from paragraph 3.1 of Part D of the Invitation to Tender, the marking system was that each bid would be scored on its own merits, and it was not the function of the evaluators to compare one bid with another. Insofar as this issue assumes that the incumbent operator was a tenderer, it would have been a breach of that regime to take into account what the incumbent operator was providing. Insofar as this issue makes no assumption that the incumbent operator was a tenderer, there was no requirement of the Defendant to take into account the number of days per week that the incumbent operator offered appointments for booking. What mattered was what the Service Specification sought going forward and how each bidder proposed to meet it. That is what the Defendant should have done when scoring and assessing the winning bidder's bid.

90. This issue arises again in the context of the Claimant's case about manifest errors and will, therefore, be revisited below. Subject to that, the answer to the issue is "no".

Emergency Treatment

Issue 15

91. This issue raises the question of whether the Service Specification required the provision of emergency appointments. It may be more accurate to consider this question

in the context of how the Service Specification would have been understood by a RWIND tenderer.

92. As I have earlier noted, paragraph 3.3 of the Service Specification, dealing with Service Description, provided:

> *"**3.3 Service Description***
> *The service will include:*
> - *assessment and treatment delivered according to each patient's clinical needs, including interceptive treatment and in hours urgent care;"*

93. There is a recognised distinction between urgent and emergency care. The Service Specification made no reference to emergency care and mentions only urgent care. I have earlier explained that, in light of the evidence which I heard, the risk of pain resulting from orthodontic treatment is less likely to arise, and where it does so, can usually be considered as a matter of urgency, rather than as an emergency. It is therefore unsurprising that the Service Specification only requires the bidders to make provision for urgent care and that is how a RWIND tenderer would have understood it.

94. This issue arises again in the context of the Claimant's case about manifest errors and will, therefore, be revisited below. Subject to that, the answer to the question posed by the issue is "no".

Issue 16

95. In light of my conclusion in respect of Issue 15, this issue does not arise.

Issue 17

96. In light of my conclusions in respect of Issues 15 and 16, this issue does not arise.

Issue 18

97. This issue raises the complaints of both undisclosed award criteria and transparency in the context of emergency treatment.

98. My earlier comments in respect of undisclosed award criteria apply equally in this context and, for that reason, the complaint against the Defendant on that basis fails.

99. As I understand it, the Claimant's case that there has been a breach of the principle of transparency, is dependent on different answers to Issues 15 to 17 than those I have given. Given that there was no requirement for emergency treatment at all, it cannot be

a breach of the transparency requirement for a bidder to make provision for emergency treatment outside the Lot area.

100. The answer to the issue is "no" in respect of both complaints.

Manifest errors

101. Issue 19 asks whether there were manifest errors in the marks given to the parties, as particularised in the Schedule to the Claimant's Particulars of Claim. It will shortly be necessary to consider each in turn.

102. However, before turning to the individual contentions in respect of which the Defendant was said to have made manifest errors, the Claimant made a series of general observations, within its Closing Submissions, which may be intended as criticisms, about the evaluation system itself. I am not sure what status these points were intended to have, given the pleadings and List of Issues. In any event, I am satisfied that they are not justified as complaints for the following reasons.

103. Firstly, it is said that the evaluation was based on questions derived or distilled from the Service Specification by the Commissioning Support Unit ("CSU"). I agree that the questions were derived by CSU from the Service Specification. That is exactly as it should have been. The whole point was that the questions should be directed to the content of the Service Specification.

104. Secondly, whilst it is accepted that the Defendant provided its evaluators with the Service Specification (as I have earlier found) it is submitted that the evaluators were not generally as familiar with its content as they ought to have been. I reject that submission. I find on the evidence that, at the time, the evaluators were familiar with its content. The fact that, at trial some years later, some of the evaluators could not recall every element of its detail did not indicate otherwise.

105. Thirdly, the Claimant has suggested that the distribution of multiple evaluators in different permutations across the questions created a difference of approach and, therefore, inconsistency. I disagree. The whole point was that there should be different evaluators with appropriate skill sets and experience necessary to address the particular question. This was a good thing, not something about which there should be complaint.

I do not agree there was an appreciable risk of inconsistency. Each question was to be separately marked because it related to different subject matter. No question of inconsistency arises if the issues are different. It is not wrong in principle that there should be differences of approach to issues relevant to more than one question. It all depends on context. An issue, such as disability, may be multi-faceted. How it is addressed and scored in the context of one question, say, relating to premises and equipment does not inevitably impact upon how it is addressed and scored in the context of another question, relating to service delivery. Bidders were expressly told to answer their questions in a self-contained way, which may have meant part of a bid answer had to be repeated for a different evaluator applying different criteria for another question. The approach one evaluating team takes to disability may be the same as that taken by another evaluating team addressing a different question but it need not be. It depends on the context of their own particular question. In any event, the Claimant only averts to a "risk" of difference and inconsistency but has not pursued its submission beyond that.

106. Fourthly, it was observed that the evaluators were not given training or guidance as to how they should provide a single score where the criterion entailed consideration of multiple bullet points. In particular, there was no sub-weighting given to one bullet point over another. This point had no merit. Ms Falgayrac-Jones expressed it well in her evidence when she said what was required was a composite score to a multi-faceted question. Ms Mahony, the lead senior Clinical Procurement Manager for the CSU made the point that the relative weight would, itself, be a matter for the evaluators and they should look at the answer as a whole. I am satisfied that the evaluators were perfectly able to provide a composite score without the prescriptive need for each bullet point to be the subject of sub-weighting. In any event, there is a further fundamental flaw in the contention. The bullet points were not deployed as an exhaustive list of factors. In those circumstances, weighting the non-exhaustive list would have been completely inappropriate because it would not permit account to be taken of other relevant matters not included in the list.

107. Fifthly, the Claimant submitted that the notes of discussions at moderation meetings were very limited and differed in some respects from the debrief letter. Having heard the evidence, I am satisfied that, in general terms, there was sufficient

correspondence between the notes and the feedback provided in the debrief letter. The notes did not purport to be a verbatim record and the purpose of both the notes and the spreadsheet compiled by the moderator were intended to capture the essence of having arrived at the moderated score. The Claimant has not begun to satisfy me that there was any error of process here, still less the respects in which any such error might have led to the Defendant having made a manifest error, or that it amounted to breach of the requirements for transparency or equal treatment.

108. As I have said, Issue 19 requires me to consider the multiple individual complaints made by the Claimant in a Schedule to its Particulars of Claim. I observe that, if established, some of these would result in a higher evaluation of the Claimant's bid and others would result in a lower evaluation of PAL's bid. The Schedule addresses each of the complaints by reference to the relevant Question No. of the bid e.g., CSD01, CSD02 and so on. I have earlier set out the legal principles applicable to manifest error which are to be applied in each case. Overall and by way of general observation, I found the evaluators to have been careful in the performance of their duties, properly self-directed and thoughtful in their initial assessment of the bids. Then, they listened to each other and properly accommodated different views in the moderation. But that is not to pre-judge the circumstances of any individual criticism, as considered below.

CSD01

109. CSD01 concerns Clinical and Service Delivery.

110. The Claimant raises six points which, taken in combination, it submits would have resulted in PAL's score for this question moving down from 3 to a 2 or even 1. The Claimant scored 3.

111. The first matter in respect of which the Defendant's evaluation was said to amount to a manifest error is that PAL's premises were unable to treat patients with a physical disability so there was no consideration of equity of care for all patients. Even on the Claimant's case, I consider that this complaint has been too broadly expressed. At its highest, the complaint does not relate to all patients with a physical disability but only those who would be unable to readily access the premises on the first floor. Ms John, the consultant in Dental Public Health, who was one of the evaluators, said her focus

was on the provision of the service, not the location of the premises. What mattered to her was equity of access to the service. That was a permissible view. In my judgment, the Claimant's complaint also fails because, contrary to the Claimant's case, PAL's bid was premised on the basis that it was able to treat all such patients who could not readily access its primary premises on the first floor. It said it would do so by offering appointments at The Lodge and, when relevant X-rays were required, through a bespoke appointment in Winchester. I am satisfied that the Defendant was reasonably entitled to conclude that these alternative arrangements were comparable to provision at a single, accessible site and, moreover, that the Defendant was entitled to consider that this amounted to equity of care. As Ms Mahony pointed out, the evaluators gave proper consideration to the fact that the buddy practice was within the Lot area and the patient with accessibility issues would get to see the same team of staff with the same level of expertise.

112. The second matter in respect of which the Defendant's evaluation was said to amount to a manifest error is that PAL's bid would provide regular treatment of patients with a physical disability outside of the Lot area. The complaint is overstated, not only for the reason given above but also because, as I have found, there would not be a need for regular treatment of patients outside of the Lot area. Most patients, including those who would be unable to readily access the premises on the first floor, would require only one single appointment to have their OPG scan taken. What mattered to that patient was the reporting of the scan by the orthodontist at the subsequent appointment within the Lot area. I have already concluded that a bid provider was not restricted to offering services within the Lot area if an aspect of service provision outside the Lot area amounted to a reasonable adjustment. The patient would not have been concerned by the geographical boundaries of the Lot area. As Ms Smoker, another evaluator, pointed out, a trip to Winchester may in fact be closer to the patient's home than a trip to the practice. Her understandable position was that "as long as they get the care and don't need an X-ray every five minutes, which they don't, then it is OK". It was put to Ms Smoker that her evaluation would have been different had she clearly known what PAL was proposing. Initially she said that she doubted it. Ultimately, she thought her score would have been unchanged. She would have regarded what was proposed as an acceptable and not unreasonable solution for the occasional need that arose.

113. Ms John said it was not unusual for patients to be required to travel to another site to access services such as an OPG. She said that if a person gets the right level of service, regardless of where it is provided, then that is all that is required. It was the patient and the service they receive that is the most important consideration. In this case, the offer of door to door private transport funded by the practice would meet the patient's requirements. Tellingly, when it was put to her in cross examination that the proposed site for the OPG was outside the Lot area, which she had not appreciated, her natural reaction was that it was a one-off appointment and she did not regard that as significant or unusual. I accept that unvarnished evidence is a view an evaluator was entitled to hold.

114. Taken together, their evidence demonstrates why it was a permissible view that this point was of no great significance.

115. The third point made by way of complaint is that PAL's reception and emergency services were being provided outside the Lot area for a substantial portion of service provision. The complaint in respect of the reception area was pleaded in paragraph 11(6) of the Particulars of Claim. Mr Holl Allen confirmed that that plea was no longer pursued. To the extent it was still pursued as part of the pleaded manifest errors, I reject it. The Defendant was entitled to treat PAL's bid as providing reception services within the Lot area. PAL's bid included provision of telephone reception services which, by their very nature, were not dependent on physical siting within the Lot area. As regards emergency treatment, the Service Specification would not have been understood to require such emergency provision. Therefore, the Claimant's contention is that the Defendant should have awarded PAL a lesser score for not providing something which the Service Specification did not require. Such a complaint against the Defendant is not sustainable.

116. The fourth point is similar to the third. The complaint is that the Defendant made a manifest error by not taking into account that PAL would not see emergency patients within the Lot area outside of the three days when the premises were open. It fails for the same reason, namely that the Service Specification would not have been understood as requiring emergency provision.

117. The fifth point is that it was a manifest error for the Defendant to have taken into account that PAL's proposed opening times and accessibility was less than the incumbent operator which had five-day service provision. I have already addressed this point in a different context. The Service Specification set out the requirements in respect of opening times, which did not require a 5-day service provision, and PAL stated how it intended to meet those requirements. The bid stated that as the caseload increased the opening times would be extended to meet the increased level of demand. As I said earlier, the Defendant was entitled to conclude that a period of ramping up would be appropriate. I am wholly satisfied on the evidence that this was given proper consideration.

118. The sixth point is that the Defendant made a manifest error by not concluding that PAL's bid was vague and inappropriate insofar as it provided for variable opening times and accessibility in line with further consultation. I disagree. The Defendant was entitled to interpret the bid in the way it did and, moreover, to treat it as both clear and appropriate.

119. It follows that I reject each of the points made in respect of CSD01.

CSD 02

120. CSD02 also concerns Clinical and Service Delivery. Although I have set it out earlier, for convenience I shall set it out again. The question was in the following terms:

> *"Bidders should provide an overall description of accessibility of the proposed location of the service to demonstrate compliance of the premises and equipment with relevant guidance. The service must be provided in the specific LOT geographic area as per the LOT data sheet.*
>
> *Your response should reference, but not be limited to, the following considerations:*
> - *Description of the location(s) (include Hub and spoke if applicable) for the proposed service and rationale for this choice;*
> - *Accessibility to patients via private and public transport;*
> - *Accessibility of premises in terms of Equality Act, 2010;*
> - *Provision of parking;*
> - *Identification of patients access needs/requirements;*
> - *Provision of premises which conform with all relevant guidance/legislation;*
> - *Compliance with HTM0105 best practice standards;*

- *Facilities, equipment and access to British Orthodontic Society, Orthodontic Radiographs Guidelines (2015) to meet patient needs."*

121. The Claimant raises two points which, taken in combination, it submits would have resulted in PAL's score for this question moving down from 3 to a 2. The Claimant scored 3. It also complains that its own score should have increased from 3 to 4.

122. The first point upon which the reduction of PAL's bid is sought is a verbatim repetition of the second complaint made under CSD01, namely that PAL's bid was offering regular treatment of patients with a disability outside of the Lot area. It therefore raises the same considerations, albeit in a new context, and therefore requires reconsideration in this context.

123. Mr Hinman was one of the evaluators for this question. He had not been involved in CSD01. In his individual marking, he had thought that the successful bidder's proposal to use a number of practices for disabled patients was not impressive. He thought it complicated. However, the topic was discussed in moderation and, on reflection, he was willing to agree to a higher score. He expressed himself as satisfied with the moderated score. In cross examination he explained in more detail why he changed his mind. His feelings about the inconvenience of the patient having to travel a long distance to Winchester was diluted when he listened to the views of the other evaluators. He satisfied himself that he had placed too much weight on the distance involved, given that the trip was a one-off.

124. Ms Easterby-Smith was another evaluator who evaluated CSD02. She is a clinical dental advisor of considerable experience and, until recently, was a practising dentist. Her evidence was similar to that given by Ms John and Ms Smoker in respect of CSD01. She said that if the only reason that a relevantly disabled patient had to travel to Winchester was for an OPG or lateral cephalometric radiograph, in a pre-paid taxi, it was not unreasonable.

125. I am satisfied that the evaluators were entitled to come to those conclusions in respect of PAL's bid. For the reasons I have given previously, it is not correct for the Claimant to say that regular treatment of patients with a physical disability was being

offered by PAL outside the Lot area. Overall, there was no manifest error in their evaluation of PAL's bid.

126. The second point made as to why PAL's bid should have been reduced is a complaint that the Defendant failed to take account of the financial implications that would flow from PAL having to bear the cost of the taxi fare for long trips. These are assumed to be trips to Winchester for the reasons given earlier. I did not understand this point to have been pursued. To the extent it was, the Defendant was entitled to conclude that the occasions on which these trips would have to be funded were so infrequent as to amount to a de minimis impact on the financial viability of the bid. In any event, it is difficult to see why the score for CSD02, rather than the score of the financial question, should be affected by any such factor. In my judgment, this is a hopeless complaint.

127. I now turn to the Claimant's case that its own bid ought to have been scored a 4 rather than a 3. Its case is that the Defendant made a manifest error because the Claimant's bid had "clear items relating to accessibility of premises, in line with the Equality Act, in contrast to PAL". Particularly, it is said by the Claimant that there should have been no "marking down" of its bid for the reference to the stairlift. My initial observation is that, in the context of assessing manifest error, it was not the intended role of the Defendant to contrast the rival bids for their approach to accessibility. As I have said, bids were not to be and were not in fact compared. In my judgment, the Defendant did not and should not have marked the Claimant on the basis it did not make any provision in respect of accessibility of its premises in line with the Equality Act. Indeed, it could not properly have done so because compliance with the Equality Act had been self-certified by the Claimant itself as one of the pass/fail questions. However, it was within the Defendant's remit to score the Claimant's bid by reference to how well it made provision in respect of accessibility. The proper question is whether the Defendant made a manifest error in performing that assessment.

128. The Claimant's pleaded complaint is that its bid was the subject of unfair "marking down". The Defendant submits that bidders were simply scored individually against the criteria and there was no question of bids being marked down. In this context, it is difficult to see any difference in substance between a complaint that a bidder was

marked down (i.e., it lost one or more points from the maximum allowable) and a complaint that a bidder should have been awarded a higher score (i.e., it should have been awarded one or more points upwards from the score it was given). There might be cases in which the scoring system was such as to distinguish these two approaches but that was not this case. Accordingly, whilst I agree the Defendant did not approach these bids on the basis of any "marking down", the real question is whether the Defendant made a manifest error by not awarding the Claimant a higher score than the one it was given. Therefore, to do justice to the way in which the case was presented and contested at trial, it is appropriate to construe this complaint on the basis that the Claimant is contending it ought to have received a higher score overall in respect of CSD02 had the Defendant properly understood what it was the Claimant was proposing and that, in not understanding the bid, the Defendant made a manifest error. Ultimately, that was one of the ways in which the case was put by the Claimant[6] and which was substantively addressed by the Defendant.

129. In respect of accessibility, there were two aspects of the Claimant's bid that were misunderstood by the Defendant. One related to the equipment proposed for those who could not easily access the first-floor premises by stairs. The other related to the Claimant's reference to alternative premises.

130. In respect of the first point, the bid had said: "The AAT S-Max stairclimber equipment will be used to support wheelchair users being safely transported up and down stairs at the practice." As part of its bid, the Claimant also provided a quotation for the provision of the stair climber. The item is there described as a "S-Max Sella stairclimber 135kg with integrated seat and arm rests" There was a website identified on the quotation. If the Defendant was in any doubt about the nature of the proposed solution, it would have taken a matter of moments to establish that the Claimant was not proposing a fixed stair lift at all but was instead providing a stair climber. Ms Falgayrac-Jones accepted it was an error for her to have interpreted the proposed item as a fixed stair lift. In its written skeleton argument, the Defendant also accepted that an incorrect assumption had been made in this respect[7]. The consequence of the

[6] See, for example, its written closing submission that: "C's score should have been increased to 4, as the reasoning behind the score of 3 following moderation was flawed".
[7] See footnote 19.

misunderstanding about what it was that the Claimant was proposing to use meant that its bid was assessed on a factually incorrect premise.

131. In respect of the second point, the bid had said: "For business continuity, if our existing site became inaccessible (e.g. flood/fire) then we can temporarily relocate patients to our Reciprocal Practice, Alton Dental". Within question CSD02, this was the only reference to any such alternative premises. As I will shortly identify, the Defendant appears to have mistakenly assumed that those alternative premises would be routinely available (at least for disabled patients) in circumstances other than following a flood or fire.

132. In the context of MP02 there was evidence adduced by the Defendant about the relative benefits or disadvantages of stair lifts and stair climbers. In particular, Ms Smoker discussed this. I have concluded that it would not be right to take that evidence from her into account in this context. That is for three related reasons. The first is that she was not involved in the evaluation of CSD02. It would not, therefore, have featured in the moderation discussion for CSD02. The second is that the context in which the differences were being discussed was that related to the criteria for MP02, not CSD02[8]. The third is that the Defendant was at pains to point out that answers to each question should be self-contained and would be independently marked.

133. In respect of the Defendant's consideration of the Claimant's bid, I will now set out my findings in respect of the principal evidence relating to CSD02 as it relates to these two elements.

134. In their individual assessments of CSD02 prior to the moderation, Mr Hinman awarded the Claimant 4, Ms Falgayrac-Jones awarded the Claimant 3 and Ms Easterby-Smith awarded 4. Mr Hinman regarded the premises as "fully disabled compliant", stating that the answer provided "a high level of assurance with respect to the suitability of the premises". Ms Easterby-Smith said the answer was "very comprehensive" and that what was offered was a "good location and very accessible for patients for both public transport and by car". She noted the promised installation of a stair riser. Ms

[8] Both of these points were made by the Defendant itself in paragraph 46 of its written closing submissions.

Falgayrac-Jones also noted the response was "comprehensive". However, to get full marks, she said "I would have liked to see some of the sections more explicitly detailed and more robust arrangements in place for the building to be DDA compliant[9]. Based on the response, it currently isn't as the surgeries are on the first floor with no lift access. The proposal is to install a stair lift which is not really adequate, as this is not only about wheelchair users but people with reduced mobility and pram access and therefore needs to be easy to use".

135. Those written comments from Ms Falgayrac-Jones are unsatisfactory because they wrongly assume the Claimant was proposing to use a stair lift. In her own witness statement, she accepted that her views about the inadequacy of stair lifts were informed by an earlier evaluation on an unrelated matter where a clinical evaluator had described them as old fashioned. In addition, they did not allow for the carer to travel with the person they cared for. She agreed that, at the time of the moderation, she still did not know the difference between a stair lift and a stair climber.

136. The record of the moderation meeting identifies a moderated score of 3. The comments attributed to the evaluators were as follows:

> *"OF: Due to the need to use alternative practice for patients who are unable to use the stair riser it is felt that these patients will be disadvantaged as equipment will not be of the same standard. Happy with score of 3.*
>
> *VE: Having talked through the access limitation and the lack of information around the facilities available at the alternative site score moved down to 3.*
>
> *CH: Agree with Oliva's (sic) comments around limited accessibility for patients/careers (sic) with limited mobility needs. Following discussion and reasoning provided score downgraded to a 3."*

137. Ms Falgayrac-Jones accepted in cross examination that the majority view held before moderation to score this question at 4 was unanimously reduced to 3 at the moderation meeting because of the accessibility issues identified in these comments. This is significant because, as I have said, these comments contain two misunderstandings. Ms Falgayrac-Jones had identified the reference to the Claimant's alternative premises to be used on a temporary basis in the event of flood/fire and

[9] I have already made the point that the evaluators should have proceeded on the basis that the premises would be Equality Act compliant by the time of service commencement.

assumed they were on offer for a patient who could not use a stair riser. In that context, her concern that the dental equipment at those alternative premises would be of a lesser standard was therefore misplaced. There was no basis for the assumption that the Claimant was proposing to offer alternative premises to patients with limited mobility. Ms Easterby-Smith, who had also criticised the lack of information about the facilities at the alternative site, accepted that, in retrospect, it was harsh to have criticised the adequacy of the Claimant's alternative premises if they were not even being proffered in the context of accessibility. She was unable to explain why she had assumed it was. In my judgment, it was because she accepted the incorrect assumption that had been made by Ms Falgayrac-Jones.

138. Ms Morris had a "neat" point which she skilfully sought to establish in re-examination of Ms Easterby-Smith namely that, once the evaluators had formed a view that there were limitations over the stair lift, it would have been harsher on the Claimant to assume (correctly) that there were no alternative premises available than to assume (wrongly) that there were alternative premises. On this basis, the error made by the evaluators worked in the Claimant's favour. Ms Easterby-Smith agreed. However, the premise seems to me to be wrong. If the evaluators had been aware that no alternative premises were available, it would surely have heightened their concerns about the perceived inadequacies of the stairlift at the Claimant's sole premises. It also ignores the point that the Claimant's bid was evaluated on the basis that it had failed to provide sufficient information about the alternative site.

139. As I have already noted, the Claimant had in place plans to install a stair climber. Just one of the differences between the two is that the carer would travel upstairs with the patient using a stair climber because they would be using it to lift the patient. The error also means the Defendant did not take into account the extent to which a stair climber could or could not be used by a patient with impaired mobility who was not in a wheelchair. The evidence on that point was unsatisfactory. When asked if a stair climber could be used by non-wheelchair users, Mr Spathoulas said "I think so. I am not aware of any reason why not." That evidence was not challenged in terms. On the other hand, Ms Falgayrac-Jones said in evidence that, having now been made aware of the difference between a stair lift and a stair climber, a child on crutches would not be helped by either mode. In the end, though, she accepted that a person with a broken leg

may be able to use a stair climber. Doing the best that I can on the evidence provided, I conclude that a stair climber could be used by a patient with limited mobility who was not in a wheelchair. It follows that the criticisms made of the Claimant's bid were misplaced.

140. Ms Falgayrac-Jones also made a separate point about parents with buggies and prams which, notably, was also not specifically mentioned in the contemporaneous documents. It may have been an afterthought. She said that many younger or teenage patients were likely to be accompanied by parents with buggies and prams for their siblings. I accept that first-floor premises would create a difficulty for them. But, as the Claimant submitted, that is caused by the existence of the stairs and is not a difficulty limited to parents with disabled children attending as patients. Moreover, the principal focus on accessibility under the Equality Act is on the patient, not the able-bodied parent with a pram or buggy.

141. The Defendant's internal spreadsheet which recorded the overall conclusion said that the response was "good" (equating to a score of 3) but that:

> *"the response could potentially have been improved by: Greater consideration to more robust arrangements being put into place to ensure accessibility to services and equal treatment for patients with impaired mobility. Although plans are in place to install a stair lift, the response would have benefitted from recognising that patients with impaired mobility is not limited to those in a wheelchair."*

142. These comments were replicated in the feedback provided to the Claimant.

143. It follows from what I have said that this reasoning was flawed, based as it was on two misunderstandings about the content of the Claimant's bid. However, that does not, in and of itself, mean that the Defendant has made a manifest error in its score.

144. I have earlier referred to the Bechtel case in connection with approach to be taken when determining whether a manifest error has been made. In this particular context, it is also helpful to refer to EnergySolutions EU Ltd v Nuclear Decommissioning Authority [2016] EWHC 1988, in which Fraser J said:

> *"[336]The opinion of the evaluators, also referred to as SMEs, was therefore an integral part of the evaluation process. It is necessary, when considering the*

> *substance of the different complaints in these proceedings, to guard against simply substituting the court's view for what the score should have been on the facts, in other words simply reconsidering the exercise upon which the SMEs were engaged at the time. As Coulson J stated in* ***BY Development Ltd v Covent Garden Market Authority*** *(2012) 145 Con LR 102 {AB/53/1} at paragraph [8]:*
>
> > *"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."*
>
> *[337] Where the SMEs were called upon, as they were, to make complex assessments and apply their opinion, the NDA enjoys a wide measure of discretion. The court cannot substitute its own assessment of the facts for that made by the authority concerned. What the court will consider is whether the NDA's evaluation was vitiated by a "manifest error" or a misuse of powers, and that it did not "clearly exceed" the bounds of its discretion {AB/53/5}. The expression used by Morgan J In* ***Lion Apparel Systems Ltd v Firebuy Ltd*** *[2007] EWHC 2179 (Ch) [2008] EuLR 191 {AB/40.1/1}, namely a "margin of appreciation", applies to matters of judgement of assessment when considering manifest error, but not in relation to compliance with its legal obligations of transparency and equality. It is therefore necessary to consider whether there is or are such errors when considering the complaints raised by Energy Solutions."*
>
> *"[786] The correct approach, in my judgment, when the court is exercising its supervisory function is firstly for a Claimant to clear the necessary legal hurdle, and only then will the court embark upon the necessary re-marking exercise. That is dealt with in Part IX of this judgment. However, if that hurdle is cleared, the focus must inevitably and primarily turn to the reasons provided by the SMEs to explain what they in fact did at the time, but also the other points relied upon by a Defendant authority in arriving at what the correct score would be, absent the manifest error. If the reasons relied upon are also manifestly erroneous, then there is of course some scope for the authority in any case to provide evidence that is relevant to the alternative score that would or could have been given at the time (which is simply addressing causation, or whether any manifest error was material)."*

145. In the present case there are two points to bear in mind. Firstly, the margin of appreciation is not relevant in determining whether a straightforward misunderstanding of the bid has taken place. If a basic factual error of understanding of the bid has been made that is not a question of judgement or assessment. I express no view on the position if the misunderstanding has been derived from an ambiguity of expression by the bidder because that is not this case. Secondly, a misunderstanding of the content of the bid is only ultimately relevant if it has causative impact on the evaluation.

146. In relation to this second point, the Defendant emphasised in closing that this was not a challenge to the procurement based on the adequacy of the Defendant's reasons. What mattered was its overall conclusion taking all the elements into account. On this basis, it said I had to be satisfied that it was a manifest error to have scored the Claimant 3. In this context, the Defendant sought to rely on evidence from its witnesses that, had it known the Claimant was proposing a stair climber, it would have made no difference to the outcome of the score for CSD02. Ms Falgayrac-Jones originally said she doubted it would have made a difference and certainly not for the better. In cross examination, she said it would not have significantly changed her mark. Ms Easterby-Smith said that, whatever was proposed, it was less than ideal. In the end, I found this type of evidence unhelpful and self-serving. I prefer to have regard to the written records from which it is possible to draw conclusions as to whether the Claimant's score could (or even would) have been higher had the content of the bid been properly understood.

147. I accept the Defendant's submission that I have to be satisfied that it was a manifest error to have scored a 3, even allowing for the margin of appreciation. This requires me to focus on all the issues which contributed to the overall score in respect of Premises and Equipment, and not merely to focus on those aspects where I consider the Defendant to have been in error. I have earlier noted the reasons why I did not take evidence in respect of MP02 into account when determining whether there may have been a manifest error. In the present context, it is also right to note that there was no submission from the Defendant that I should take into account reasons relied on in the context of MP02 as reasons that could have been relevant to CSD02. Having regard to the totality of the evidence relevant to CDS02, I am satisfied that the overall score would have been different to the one given. Before the accessibility issues were raised by Ms Falgyrac-Jones, the other two evaluators had scored the Claimant a 4. It is clear from the moderation meeting that both were influenced in their assessment by the accessibility issues, which had earlier led Ms Falgyrac-Jones to award a 3, rather than a 4. Accessibility was the sole area given in the feedback as a potential basis for improvement. This indicates to me that it was the key reason for the Claimant not having scored a 4. It was therefore material to the outcome.

148. I quite accept Fraser J's observations in Bechtel both that proving manifest error is a high hurdle and that it is not enough to show that the Court would have reached a

different view from the expert evaluators. But in this case, the Defendant simply misunderstood the basis of the Claimant's bid in two connected respects and therefore took into account matters which it ought not to have taken into account. Of the two, the point about the stair climber was obviously the more significant. On the evidence, I am satisfied that had the Defendant understood the basis for the bid, the outcome would have been different, even allowing for a margin of appreciation.

149. It follows that, whilst I reject some of the points made in respect of CSD02 by the Claimant, I accept its submission that a manifest error was made in the Defendant's assessment of accessibility in the Claimant's bid and that this impacted upon its score for CSD02.

CSD04

150. The Claimant confirmed at trial that the complaint in respect of CSD04 was not pursued.

CG01

151. The next part of the Claimant's complaint concerns the question relating to Clinical Governance.

152. The Claimant scored 3 for this question but contends it should have been awarded 4. The basis for this single complaint is that the feedback received by the Claimant had said its bid could potentially have been improved by further expansion of how clinical governance would be enhanced through the use of digital equipment in place. The Claimant contends that its bid already mentioned the use of intraoral digital scanners to independently measure treatment results. In response, the Defendant contends that the Claimant gave only limited detail as to the impact of the scanners on clinical governance and that it made no manifest error. This point was developed in the evidence. As the Defendant submitted, this question concerned both clinical standards and clinical governance i.e., it was concerned with the adequacy of the process for ensuring standards were met. I am satisfied that the explanation given by the Defendant as to how the response could potentially have been improved was making that distinction and pointing out that the Claimant had not addressed governance in the sense

of the process for ensuring standards would be met. The Defendant made no manifest error. It was entitled to conclude that the Claimant had not sufficiently addressed governance.

153. The Defendant also points to the fact that this was only one of a number of reasons why the Claimant scored 3. That is a valid point but does not arise for consideration in circumstances where the Defendant made no manifest error in its approach to the particular reason.

154. It follows that I reject the complaint made in respect of CG01.

CG02

155. This part of the Claimant's complaint concerns the second question relating to Clinical Governance. There are two points made. Taken together, the Claimant contends that it should have scored 3, not the 2 it was awarded.

156. The Claimant's first point is that it was wrong (to the degree of constituting a manifest error) for the Defendant to have criticised its audit template for cancer as irrelevant in circumstances where the Claimant was treating a cancer patient.

157. The Defendant's answer is that it was reasonably open to it to conclude that an audit of a campaign about oral cancer was of limited relevance given that the primary recipients of treatment would be teenagers, unlikely to be affected by oral cancer. The audit provided by the Claimant showed it was focused on those aged 40+. The fact that the Claimant happened to have treated a teenage cancer patient did not make it relevant to the main target population.

158. The evaluation evidence was consistent with the Defendant's answer just described. Ms Falgayrac-Jones considered that, on balance, oral cancer was not an issue which was relevant to teenage patients. As an evaluator, she was looking to see what the bidder had learned from the audit and how it was relevant and helpful to the service being procured. Her view, which she was perfectly entitled to hold, was that the audit provided by the Claimant was not relevant and/or that no context for the provision of cancer care was given.

159. I reject the Claimant's first point.

160. The Claimant's second point is that it was wrong (to the degree of constituting a manifest error) for the Defendant to have concluded that further details should have been provided in the bid in respect of under-performing colleagues, in circumstances where the Claimant had given a comprehensive answer.

161. The Defendant's response is that the Claimant has not identified any manifest error and has merely argued with the merits of the decision. In any event, the Defendant submits it was reasonably entitled to conclude that more might have been said by the Claimant, beyond that "Underperformance of another colleague can be reported to the Practice Manager (Freedom to Speak Up Guardian) via our Whistleblowing Policy".

162. In my judgment, it was a matter for the Defendant to evaluate whether a sufficient answer had been given by the Claimant. Having regard to the evidence, it was not an error of principle to conclude that more could have been said.

163. It follows that I reject both points made in respect of CG02.

MP02

164. The final complaint concerns the question relating to mobilisation. The Claimant scored 3 whereas it contends that it ought to have been awarded 4, consistent with the score awarded to PAL.

165. The question was as follows:

> *"With reference to all of the tender documentation please describe how you will mobilise the service, up to the point of delivery. Actions and timescales should be outlined for the following to demonstrate ability to deliver the service at service commencement.*
>
> *Bidders should provide a mobilisation plan in support of their response, for the mobilisation of this service.*
>
> *The response should include, but not be limited to:*
>
> - *Premises ownership/lease agreement (to be uploaded to relevant placeholder);*
> - *Planning/implementation and governance arrangements across the pathway;*

- *Workforce (including training and accreditation for all areas of delivery and provision);*
- *Transfer of staff to your organisation under TUPE;*
- *Finance;*
- *IM&T;*
- *Facilities Management arrangement for premises;*
- *Equipment;*
- *Communications and relationships;*
- *Stakeholder engagement;*
- *Patient and public engagement;*
- *Risk management and contingencies;"*

166. The particular point of complaint arises under this question because the Claimant was told its response could have been improved by providing more detail in relation to its plan to add a stair lift into the practice and the practicalities of how this would work to maintain user independence and not interfere with able bodied access. The Claimant contends that it was "marked down" for not having provided this information whereas it says PAL had not made provision within its bid for any access for disabled patients.

167. I repeat my earlier comments about "marking down". In this case there is no material difference between saying a bidder scored less than the maximum and saying that a bidder ought to have received a higher score than it in fact did. Once again, to do justice to the way in which the case was presented and contested, it is therefore appropriate to construe this complaint on the basis that the Claimant is contending it ought to have received a higher score overall in respect of MP02. That is how the case was put at trial and the Defendant defended it on that basis.

168. The Defendant was right to submit that this complaint invites comparison with the content of PAL's bid, despite it being the case that bids were not compared with one another. It was also right to point out that the stated description of PAL's bid is incorrect in that PAL had in fact made provision for access for disabled patients in two ways. Those that could use the stairs without difficulty (i.e., those whose disability was unrelated to access on the first floor) would do so. Alternative arrangements, which the Defendant concluded were satisfactory, were made for those who could not use the stairs without difficulty.

169. The Defendant's pleaded answer to the Claimant's complaint is that the Claimant's bid did not provide sufficient detail or innovation to get a higher score than it in fact got.

170. Although this issue raises similar points about the stair lift which arose in respect of CSD02, for the reasons submitted by the Defendant, I must focus on the evidence adduced in respect of MP02. The evaluators were different and the issue about the adequacy of the means of access arose in a different way and was considered by different people.

171. The Claimant's bid had said:

> *"(BL) will install a stairclimber during mobilisation enabling the treatment of disabled patients from the two first floor surgeries/OPG room, All the service amenities are located on a single level supported with the stairclimber providing DDA compliance assurance. A quote has been received and delivery/installation/training takes less than 28 days."*

172. During the individual marking prior to moderation, one of the evaluators, Ms Smith, scored the Claimant a 4 whereas the other two, Ms Smoker and Ms Easterby-Smith scored 3. Ms Smith described the response as comprehensive, containing a good level of detail about all the key areas involved in mobilisation. Ms Smoker described the response as thorough but pointed out that any stairlift would need to be user managed to maintain independence. She said it was unclear if a stairlift would interfere with able bodied access up the stairs. Ms Easterby-Smith described the answer as comprehensive but suggested it lacked detail in a few areas such as patient and stakeholder engagement. She considered the mobilisation plan was clear.

173. The notes of the moderation meeting are brief and lacking in content. All that is said is:

> *"MS: Following discussion happy with score of 3*
> *JS: Happy to move down to a 3 based on Mel and Verna's comments*
> *VE: Following discussion happy with score of 3*
> *Moderated score = 3"*

174. The spreadsheet recorded the Claimant's response was "good". Having identified the positive elements, the two areas which could potentially have been improved were:

> *"- Further detail in relation to patient and stakeholder engagement.*
> *-Further detail in relation to the plans to add a stair lift into the practice and the practicalities of how this would work in practice to maintain user independence and not interfere with able bodied access."*

175. This was the feedback that the Claimant received.

176. The Claimant contends that a significant factor in the moderated score appears to have been a factor, namely accessibility, which did not feature at all in the evaluation of PAL's score.

177. Although it was not quite the way the Claimant expressed its complaint, it is difficult to see why the sufficiency or adequacy of access provision for disabled patients during the term of the contract was really a consideration for MP02 at all. MP02 was concerned with bidders' plans for initial mobilisation. To the extent it was relevant, I also accept that, in undertaking this evaluation, the evaluators again thought that what the Claimant was offering was a stair lift, rather than a stair climber. On the other hand, it is equally clear that, in this context, an understanding of the difference between the two modes would have had no or far less impact on the comments made. A stair climber does not allow for user independence either. Indeed, unlike a stair lift which can at least be operated by the patient alone, it necessarily requires the assistance of the carer to deploy it. Whilst either a stair climber or stair lift is in use, able bodied access would be impeded. It follows that, in MP02, the misunderstanding had no causal impact.

178. A more formidable difficulty for the Claimant was the Defendant's point that Ms Easterby-Smith's evaluation had also taken into account the lack of detail about patient and stakeholder engagement. There is nothing to suggest that this view changed in moderation.

179. The Claimant has made no attempt to undermine the criticism or to suggest that the Defendant was in error in having considered it.

180. As I am required to consider whether, overall, it was a manifest error to have scored a 3, rather than a 4, I must assess the Defendant's approach to the whole question. The discussion about the stair lift was but one part of a bigger topic about mobilisation.

181. I am satisfied that the Claimant's objection on this ground fails. No manifest error occurred here. The Defendant was entitled to consider that the Claimant's response was good but not excellent.

182. It follows that I reject the single point made in respect of MP02.

Summary of outcomes

183. All of the Claimant's claims fail with the exception of its case in respect of manifest error in respect of CSD02 and, then, only in the context of the marking of its own score rather than that of the preferred bidder.

184. Since I have rejected each of the complaints about equal treatment on the basis that there was no different treatment it is unnecessary for me to determine whether, in law, the margin of appreciation applied at the second stage when it comes to looking at whether the differences can objectively be justified.

Relief

185. Issue 20 is concerned with the question of whether, if any of the Claimant's allegations are made out, the Court should attempt to re-score the bids or assess matters on the basis of a loss of chance. Issues 21 and 22 depend on the outcome.

186. The Defendant accepts that, if manifest error is made out, the Court will normally re-score unless it is not possible to make a reliable assessment of material error. In this I have reached the clear conclusion that the Defendant would have scored the Claimant a 4 but for the errors it made. That was the thinking of the majority of the evaluators before the discussion. Ms Olivia Falgayrac-Jones accepted that it was the accessibility issue discussed at the meeting which led the other two evaluators to agree with her earlier score of 3. I am not bound to reach a re-scored conclusion based on what I consider the Defendant's evaluators would have selected as the moderated scores but I consider it highly relevant. It is true that the fact the Claimant's (sole) premises were on the first floor meant that its bid was not perfect from an access point of view but, in my judgment, that should not have precluded it from receiving a score of Excellent, which two of the three evaluators had been prepared to award it. I do not consider this to be a case in which it is right to assess the position on the basis of a loss of a chance of winning the bid. This was a two-horse race so it is simply a matter of arithmetic to

determine whether the re-scoring had a causal impact on the outcome of the tender process.

187. In respect of Issue 20, I decide that the Court can re-score the bids and that it would not be appropriate to assess the position on the basis of a loss of chance.

188. In respect of Issue 21, the new score for CSD02 increases to a 4. The total bid score should have been 2.5% higher, which would have made it the successful bidder.

189. I have said earlier that, overall, I was impressed with the way in which the evaluators had carried out their functions. On a broader level, I felt the procurement itself was carefully planned and well organised. It is therefore most unfortunate that in respect of one question, the Defendant fell into manifest error and that, by reason of the closeness of the two bidders, this manifest error had such drastic consequences.

190. Issue 22 does not arise.

191. The final issue, Issue 23, concerns the question of whether the breaches are "sufficiently serious" to justify an award of Francovich damages which, it will be recalled, falls for consideration in this trial pursuant to the Order of Fraser J.

192. In the EnergySolutions case, the Judge decided the question of "sufficiently serious" at a subsequent trial[10], after having reached a conclusion on breach at the earlier trial[11]. Necessarily, in the present case the parties had to make their submissions on the "sufficiently serious" question without knowing the basis upon which any finding(s) adverse to the Defendant would be made. In many cases that may be an inevitable consequence of the trial process but, in this case, I have concluded that the appropriate course is to hand down judgment on Issues 1 to 22 and to defer any decision in respect of Issue 23 until further submissions have been made in respect of it. These can be focussed on the nature of the breach as found. I am far from suggesting that this should be the norm in every case. But in this case, with no criticism intended, the submissions I received on this issue were not sufficiently directed to the matters as they have turned out. I would therefore be assisted by further submissions.

[10] [2016] EWHC 3326 (TCC).
[11] [2016] EWHC 1988 (TCC).

Conclusions

193. For the reasons given, the claim is upheld in the single respect identified. I make no decision at this stage in respect of Issue 23.

194. I will leave it to the parties, in the first instance, to draw up an order which reflects the terms of this judgment.

195. My preference would be to adjourn all consequential matters until Issue 23 has been decided. In terms of the procedure for determining Issue 23, I propose to direct that each party may serve written submissions within 21 days of handing down. Unless new authorities are relied on, I am content to use the bundles I already have. Unless both parties are agreed that an oral hearing should be dispensed with, the parties should arrange a half-day hearing to address matters orally, to take place no less than 7 days after written submissions.

LIST OF ISSUES

Compliance with the Equality Act 2010 ("EqA") as a requirement of the service specification

1. Did the invitation to tender allow bidders to arrange for any patients, who by reason of their disability could not access specific radiographics at the service inside the LOT area, to access them outside of the LOT area by way of reasonable adjustment under the EqA?

   Answer: Yes.

2. Was:

   (a) The Defendant under any additional duty to consider the EqA by reason of the service specification? and

   (b) Is the issue in (2)(a) above properly pleaded?

   Answer: (a) No. (b) Not necessary.

3. In awarding the contract to a bidder who made arrangements as set out in paragraph (1) did the Defendant:

   (a) Use undisclosed Award Criteria;

   (b) Breach the principle of transparency; and/or

   (c) Breach the principle of equal treatment?

   Answer: No in each case.

4. In the alternative to (2) and (3):

   (a) Was the Defendant under a duty to "properly investigate" whether a bid complied with the EqA?

   (b) Has the existence of this duty been properly pleaded?

   Answer: Not pursued.

5. Further to (4) and if so:

   (a) Did the Defendant fail to properly investigate whether the winning bidder's bid complied with the EqA? and

   (b) Has the breach of this alleged duty been properly pleaded?

Answer: Not pursued.

Claim under the EqA

6. Did the Defendant have a duty under the EqA to do more than assess a bid against the service specification?

   Answer: Not pursued.

7. Can the Claimant pursue such a claim against the Defendant in these proceedings?

   Answer: Not pursued.

8. Has such a claim been properly pleaded?

   Answer: Does not arise.

9. If the Claimant has such a claim, what relief should the Court grant?

   Answer: Not pursued.

Reception services

10. Did the service specification require reception services to be physically located within the LOT Area?

    Answer: Not pursued.

11. In evaluating this aspect of the winning bidder's bid, did the Defendant:

    (a) Use undisclosed Award Criteria;

    (b) Breach the principle of transparency; and/or

    (c) Breach the principle of equal treatment?

    Answer: Not pursued.

Number of service days

12. In evaluating the winning bidder's offer to provide a service of three days a week rising with demand, did the Defendant:

    (a) Use undisclosed Award Criteria;

    (b) Breach the principle of transparency; and/or

    (c) Breach the principle of equal treatment?

    Answer: No in each case.

13. Was the ability of the winning bidder to increase the service from three days a week an unlawful post-award variation?

    Answer: Not pursued.

14. Should the Defendant have taken into consideration that the incumbent operator was providing NHS appointments for 5 days a week in scoring and assessing the winning bidder's bid?

Answer: No.

Emergency treatment

15. Did the service specification require the provision of emergency appointments?

Answer: No.

16. If so, did the service specification require such emergency appointments to be provided within the LOT Area?

Answer: Not applicable.

17. If not, did the winning bidder's bid offer to provide such treatment outside the LOT Area?

Answer: Not applicable.

18. In evaluating this aspect of the winning bidder's bid, did the Defendant:

(a) Use undisclosed award criteria.

(b) Breach the principle of transparency?

Answer: No in each case.

Schedule of manifest errors

19. Were there manifest errors in the marks given to the parties, as particularised in the Schedule to the Claimant's Particulars of Claim?

Answer: see attached answers in Schedule.

Relief

20. If any of the Claimant's allegations are made out, should the Court attempt to re-score the bids, or to assess matters on the basis of the loss of a chance?

Answer: The Court can re-score the bids and that it would not be appropriate to assess the position on the basis of a loss of chance

21. If the former, what should the new scores be?

Answer: The score for CSD02 increases to a 4. The total bid score should have been 2.5% higher, making it the successful bidder.

22. If the latter, what were the Claimant's chances of winning the bid?

Answer: Not applicable.

23. If there was or there might have been a material difference to the scoring of the bids, were the breaches sufficiently serious to justify an award of Francovich damages, having regard to the relevant case law touching on Francovich damages?
Answer: to be determined.

SCHEDULE ATTACHED TO PARTICULARS OF CLAIM

Question Number	Why breach by SCW and/or material failed to be considered properly	Overall difference to score in that section	Decision
CSD01	• PAL's premises that are unable to treat patients with a physical disability, and so no consideration of equity of care for all patients. • PAL's bid that would provide regular treatment of patients with a physical disability outside of the Lot area. • PAL's reception and emergency services being provided outside the Lot area for a substantial portion of service provision. • Will not see emergency patients in the Lot area outside of the 3 days. • Opening times and accessibility less than the incumbent operator which provides services 5 days a week. • Variable opening times and accessibility in line with further consultation. Vague and inappropriate.	If SCW applied the correct evaluation procedure for PAL, that entity's score would be a '1' or a '2', resulting in a reduction in the score of 4% or 8%	Claim not established.
CSD02	• Bids that would provide regular treatment of patients with a physical disability outside of the Lot area. • Financial implication of PAL paying for a taxi for long trips not apparently considered.	PAL should have been awarded a 2, resulting in a reduction in the score of 2.5%	Claim not established.
CSD02	• Braceurself's bid had clear items relating to accessibility of premises in line with EA 2010, in contrast to PAL. There should have been no	Braceurself Score should have increased by 2.5%	Claim allowed on the basis of manifest error in respect of accessibility. Score should have increased by 2.5%

Question Number	Why breach by SCW and/or material failed to be considered properly	Overall difference to score in that section	Decision
	marking down for the reference to the stairlift.		
CSD04	• Braceurself's bid provides for a local buddy practice within the Lot area. Whereas Orthodontics by Eva (preferred bidder) bid provides for a buddy practice in Petersfield and a sister practice in Winchester which is outside of the Lot area. • It was wrong to mark down Braceurself for any alleged staffing discrepancy as the purpose of the BCP is not as a register of all of the staff. • There is no other orthodontic practice in East Hants, so it is not possible to comply with the criticism levelled at Braceurself.	Braceurself score should have matched PAL's, thereby increasing the former's by 1%	Not pursued.
	• The commissioner comments that Braceurself's bid could have been improved by further expansion of how clinical governance would be improved through the use of digital equipment in place. However, Braceurself's bid clearly mentions that the practice uses Intraoral digital scanners to independently measure treatment results (par scoring).	Braceurself's score should have matched PAL's, thereby increasing the former's by 1.25%	Claim not established.
CG02	• Wrong to criticise that audit template for cancer not relevant, as Braceurself is treating a cancer patient. • Wrong to state that further details need to be provided in relation to underperforming	Braceurself should have scored a 3 not a 2, increasing score by 1.25%	Claim not established.

Question Number	Why breach by SCW and/or material failed to be considered properly	Overall difference to score in that section	Decision
	colleagues, when a comprehensive answer had been given in this regard.		
MP02	• Braceurself's bid was marked down due to a lack of detail with respect to the addition of a stair lift to assists disabled patients, whereas PAL does not provide any access for disabled patients. Clearly a manifest error.	Braceurself's score should be equal to PAL, resulting in an increase in the former's score of 2%	Claim not established.