Neutral Citation No: [2018] NIQB 68	*Ref:* MAG10627
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 8/08/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2017 No. 19714

BETWEEN:

BAM CIVIL LIMITED
and
FB McCANN LIMITED (BAM McCANN JOINT VENTURE, EACH ACTING JOINTLY AND ON OWN BEHALF)

Plaintiff;

-and-

THE DEPARTMENT FOR INFRASTRUCTURE (TRANSPORT NI AS ROADS AUTHORITY WITHIN THE DEPARTMENT FOR INFRASTRUCTURE, FORMERLY THE DEPARTMENT FOR REGIONAL DEVELOPMENT)

Defendant.

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MAGUIRE J

Introduction

[1] It has long been recognised that the point of confluence between the Westlink in Belfast and, on the one hand, the M2, and M3 (and M5), and, on the other hand, York Street, constitutes a traffic bottleneck which urgently requires remedial measures on a substantial scale. This need has given rise to the "York Street Interchange Project", the purpose of which is to relieve traffic congestion by an extensive programme of works – costing some £90/£110m. An idea of the scope of the project can be obtained from a consideration of its major elements. These include the construction of approximately 5kms of road; the widening and realignment of the Westlink north of its junction with Clifton Street; the building of new interchange links providing connection with the three motorway networks; the construction of four new underpasses and numerous retaining walls; and the erection or widening

of some six bridges together with the provision (in some cases) of additional slip roads.

[2] This case concerns a procurement competition in respect of the public works which make up the project. The competition involved the award to a single successful tenderer of three different contracts which together make up the project. The contracts, in chronological order, were:

(a) NEC3 Professional Service Contract (PSC) Option E.

(b) NEC3 Engineering and Construction Contract Element Option B.

(c) NEC Engineering and Construction Contract Element Option C.

[3] Put broadly the above contracts can be ascribed to activities as follows:

(a) Phase 1 of the works.

(b) Archaeological and groundworks: which was a Phase 1 activity.

(c) Phase 2 of the works.

[4] The plaintiff is a joint venture consisting of two entities: BAM Civil Limited and FP McCann Limited. Jointly, they have tendered for the contracts above which constitute the public works. However, their tender ultimately was unsuccessful by a narrow margin. The defendant is the Department for Infrastructure (formerly the Department for Regional Development). It is the public authority responsible for the procurement competition. The winning tenderer, Graham Farrans Joint Venture, has been a notice party in these proceedings.

[5] In essence the plaintiff's challenge is to the way in which the defendant devised certain aspects of the competition and to the way in which the Evaluation Panel ("EP") established by the defendant assessed aspects of the plaintiff's Tender Submission Package ('TSP'), more specifically, its quality submission. Issues have been raised about the meaning of certain aspects of the questions which had to be answered in the TSP and about whether the assessment of those answers was manifestly in error.

[6] Overall the plaintiff's case has been that the process was legally defective with the consequence that the plaintiff ought to be entitled to an appropriate form of judicial intervention and remedy.

The competition

[7] As is usual in cases of this type, the competition was formally opened following an advertisement in respect of it contained in the Official Journal of the EU published on 25 November 2015. The relevant notice indicated that the procedure to be used in respect of the procurement exercise was to be the restricted procedure. In accordance with Regulation 28 of the Public Contracts Regulations 2015 ('the 2015 Regulations') any economic operator could submit a request to participate in the competition by providing information for qualitative selection. In the light of that information the contracting authority (here the defendant) was entitled to invite economic operators to submit a formal tender.

[8] In this case the contracting authority invited three economic operators to submit a tender.

[9] In order to enable tenders to be submitted the contracting authority published a number of key documents. These provided the information necessary in order to enable those invited to tender to prepare their TSP. The principal documents provided by the contracting authority were a document called Instructions for Tendering ("IFT") and a document entitled "Scope of Services".

[10] The IFT document, in particular, provided extensive information about what was expected from a potential tenderer. The key element was that the tenderer was informed that it would be responsible for the design, construction and commissioning of the project. As already indicated, the project was to consist of two phases to the works in accordance with individual contractual provisions which dealt with each phase. In very broad terms, Phase 1 was concerned with the development of the design and the establishment of the construction sequence in detail. The object of Phase 1, *inter alia*, was to enable agreement to be reached as to what was described as the Target (Total of the prices). On the other hand, Phase 2 was to be concerned with the actual construction of the principal works. The balance as between the phases can be identified by the provisions in respect of duration of the works. Under these provisions, Phase 1 was programmed to last for 10 months ending with the agreement of the Target. In contrast, Phase 2 – the actual construction works – was expected to have an approximate duration of 3 years.

[11] The ultimate criterion upon which the successful tenderer was to be identified was that of the "most economically advantageous tender" ("MEAT").

[12] In order to identify the most economically advantageous tender the instructions for tender document identified for marking purposes two different forms of submission. The first may be described as the "price submission" whereas the second may be identified as the "quality submission". Under the arrangements set out in the IFT these submissions were to be assessed by different panels concurrently. According to the design of the process, the panel dealing with the

price submission was to be unaware of the marking of the panel dealing with the quality submission and *vice versa.*

[13] In this case it will be unnecessary to consider in detail the arrangements in respect of the price submission. All that needs to be said in respect of this area is that the weighting arrangements in respect of the competition involved a 30% weighting in respect of the price submission as against 70% in respect of the quality submission.

[14] In fact, it is clear that the plaintiff's submission in respect of price was placed first out of the three tenders received. In these circumstances the price submission element has not been the subject of any complaint on the part of the plaintiff.

[15] As regards the quality submission, it contained four sections:

(a) Health and safety.

(b) Phase 1: ground investigation, archaeological evaluation design, development and preparation of the "Target".

(c) Phase 2 construction.

(d) Sustainability.

[16] The way the above four sections were to be evaluated was set out in the IFT as follows:

> "The response to each question in Section 1 shall be scored on a pass/fail basis in accordance with the scoring interpretation table for each question.
>
> Economic operators who score a fail in any question in Section 1 shall have their TSP rejected.
>
> The response to each question in Sections 2 to 4 shall be scored in a range 0-5 in accordance with the Scoring Interpretation Table for each question.
>
> The Contracting Authority has set a minimum standard score of 2 for each question in Sections 2-4. Economic Operators must score at least 2 (Satisfactory) in each question in Sections 2-4 to proceed in the competition. Economic Operators who score 1 or 0 in any questions in Sections 2-4 shall have their TSP rejected.

> Economic Operators shall have their score for each question in Sections 2-4 added to the scoring framework contained in Appendix 1 of the main Quality Submission Document TS-QS in order to establish their weighted Quality Mark.
>
> The Economic Operator with the highest weighted Quality Mark (QM) shall be given 100 marks with the others scored pro rata using the formula below:
>
> $$\text{Quality Assessment Mark} = \frac{\text{Quality Mark}}{\text{Highest Quality Mark}} \times 100$$
>
> This mark will be known as the 'Quality Assessment Mark' and recorded to a minimum of 2 decimal places."

[17] As already indicated the overall assessment of a tender involved a weighting process between the quality assessment mark and the price assessment mark.

[18] The tender with the highest overall assessment score was deemed to be the MEAT.

The quality submission

[19] As already noted the quality submission consisted of four sections. In the IFT it was noted that:

> "Economic operators must ensure that their response to each question is relevant and focused on addressing the question asked."

[20] Overall the quality submission involved a process under which the economic operator responded to 12 questions. Section 1 (Health and Safety) involved four questions marked on a pass/fail basis. This section will not arise for discussion in this judgment as all of the economic operators received passes in respect of these questions.

[21] Section 2 involved five questions marked on a scale 0-5. As no complaint is made about Section 2 it will not be necessary to comment further in respect of it.

[22] Section 3 (Phase 2 Construction) involved two questions which were to be marked on a scale 0-5. It is this aspect which has given rise to these proceedings. The two questions which fell to be answered in the context of Section 3 were questions 3-01 and 3-02.

[23] Section 4 (Sustainability) consisted of one question marked on a scale of 0-5. It will not be necessary to discuss Section 4 as there is no challenge to this aspect of the assessment process.

The relevant legal principles

[24] The relevant legal provisions governing a challenge of this type may be traced to four sources: firstly, they are found in the relevant European Directive, which in this case is Directive 2014/24/EU. Secondly, they are found in the principles established by relevant judgments of the European Court of Justice ("ECJ"). Thirdly, they are to be discovered in the domestic legislation which transposes the terms of the Directive into United Kingdom law. Fourthly, they are to be found in relevant United Kingdom domestic legal authorities.

[25] It is proposed to make brief comment about each of these sources.

Directive 2014/24/EU

[26] The above is dated 26 February 2014 and is the latest of a series of Directives concerned with public procurement. It repeals and replaces an earlier Directive, Directive 2004/18/EC.

[27] The essential principles underpinning the directive are evident from the recitals to it. These include the following:

- The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union ("TFEU") and in particular the free movement of goods, freedom of establishment and freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency (recital 1).

- The notion of award criteria is central to this directive. It is therefore important that the relevant provisions be presented in as simple and streamlined a way as possible. This can be obtained by using the terminology 'most economically advantageous tender' as the overriding concept, since all winning tenderers should finally be chosen in accordance with what the individual contracting authority considers to be the economically best solution amongst those offered (recital 89).

- Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment with a view to ensuring an objective comparison of the relative values of the tenders in order to determine, in conditions of effective

competition, which tender is the most economically advantageous tender (recital 90).

- To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision. Contracting authorities should therefore be obliged to indicate the contract award criteria and the relevant weighting given to each of these criteria (recital 90).

- When assessing the best price – quality ratio contracting authorities should determine the economic and qualitative criteria linked to the subject matter of the contract that they will use for that purpose. Those criteria should thus allow for a comparative assessment of the level of performance offered by each tenderer in the light of the subject matter of the contract, as defined in the technical specifications (recital 92).

- The chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective and fair competition and be accompanied by arrangements to allow the information provided by the tenderers to be effectively verified (recital 92).

Principles established in the ECJ

[28] There is, by this stage in the development of EU procurement law, a substantial volume of legal authorities in which the ECJ has enunciated the principles which will apply to this area. The court will set out below the key points in a range of ECJ cases which have been cited to it. It is the overall impact of these authorities which the court will bear in mind in what follows hereafter.

[29] An important judgment of the ECJ is that found in *SIAC Construction Limited v County Council of the County of Mayo* (2001) C-19/00. The passages setting out the relevant principles in this judgment have been cited with approval in many other cases. They begin at paragraph 32 and are set out below:

> "[32] … the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State …

[33] In accordance with that objective, the duty to observe the principle of equal treatment of tenderers lies at the very heart of Directive 71/305 …

[34] More precisely, tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority …

[35] As for the criteria which may be accepted as criteria for the award of a public works contract to what is the most economically advantageous tender, Article 29(1) … as amended, does not list these exhaustively.

[36] Although that provision thus leaves to the adjudicating authorities to choose the criteria on which they propose to base their award of the contract, that choice may relate only to criteria aimed at identifying the offer which is economically the most advantageous …

[37] Further, an award criterion having the effect of conferring on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer would be incompatible with Article 29 of Directive 71/305 …

[40] However, in order for the use of such a criterion to be compatible with the requirement that tenderers be treated equally, it is first of all necessary, as indeed Article 29(2) of Directive 71/305 … provides, that that criterion be mentioned in the contract documents or contract notice.

[41] Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified …

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

> [43] This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure …
>
> [44] Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known precisely only in the future is in principle capable of guaranteeing compliance with that condition."

[30] To the above may be added relevant passages from the 2004 judgment of the ECJ in *EVN AG and Another v Austria* case C-448/01; [2004] 1 CMLR 22. Of interest for present purposes, the court said:

> "[34] It follows that the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, a criteria requiring that the electricity supplied be produced from renewable energy sources, provided that the criterion is linked to the subject matter of the contract, does not confer an unrestricted freedom of choice on the authority, is expressly mentioned in the contract documents or the contract notice, and complies with all the fundamental principles of Community law, including the principle of non-discrimination.
>
> [37] It must be recalled that according to settled case law it is open to the contracting authority when choosing the most economically advantageous tenderer to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tenderer and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer.

[39] It follows that provided that they comply with the requirements of Community law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.

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

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

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

[50] Objective and transparent evaluation of the various tenders depends on the contractual authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria.

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

[52] Therefore, an award criterion which is not accompanied by requirements which permit the

> information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement.
>
> [56] It is clear from the Court's case law that the procedure for awarding a public contract must comply, at every stage, with both the principle of equal treatment of potential tenderers and the principle of transparency so as to afford all parties equality of opportunity in formulating the terms of their tenders.
>
> [57] More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well informed tenderers of normal diligence to interpret them in the same way."

[31] More recently still, in 2006, the *ECJ in European Dynamics v European Union Intellectual Property Office* case T-556/11 said at paragraph 101, dealing with the issue of a vague award criterion:

> "…the question raised … is particularly vague in that it refers generally to 'key measures to be considered'. It follows that the detailed requirements regarding the presentation of certain 'criteria', which, according to the criticisms set out in the evaluation report, are absent from the first applicant's bid, do not have a sufficiently clear, precise and unambiguous basis in the wording of that award criterion to enable all reasonably informed tenderers exercising ordinary care to interpret them in the same way and to place the contracting authority in the position to apply them objectively and uniformly by checking whether their tenders meet those requirements."

The Public Contracts Regulations 2015

[32] These are the Regulations which transpose the requirements of the Directive into domestic law.

[33] Of interest are the following:

> "**Principles of procurement**

18. (1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

Contract award criteria

67.—(1) Contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.

(6) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.

(7) Award criteria shall—

(a) ensure the possibility of effective competition; and

(b) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

(9) The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone."

[34] There are also extensive provisions in the Regulations dealing with remedies. It is not necessary for the court to set these out at this stage.

Decisions of the United Kingdom Courts

[35] Of particular importance to the challenge under consideration are the following United Kingdom decisions:

(i) The decision of the Supreme Court in *Health Care at Home Limited v The Common Services Agency (Scotland)* [2014] UKSC 49. This decision is helpful in a number of ways, but principally in respect of the concept

of the 'reasonably well informed and diligent tenderer' (RWIND). In respect of same Lord Reed stated:

> "5. The RWIND tenderer, as he has been referred to … was born in Luxembourg. He owes his existence to the EU directives concerned with public procurement. For present purposes the most significant directive is Directive 2004/18/EC of 31 March 2004 … on coordination of procedures for the award of public works contracts … The background to the Directive, is explained in the second recital to the preamble, is that the award of contracts by public authorities in the Member States is subject to the principles of freedom of movement of goods, freedom of establishment and freedom to provide services, and to other principles derived from those, such as the principles of equal treatment, non-discrimination, neutral recognition, proportionality and transparency. In particular as explained in the 46th recital:
>
> > 'Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition …
> >
> > To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation – established by case law – to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most

> economically advantageous tender'."

At paragraph [8] Lord Reed went on, referring to the *SIAC* case:

> "…the court explained what the legal principle of transparency meant in the context of invitations to tender for public contracts: the award criteria must be formulated in such a way as to allow all RWIND tenderers to interpret them in the same way. That requirement set a legal standard: the question was not whether it had been proved that all actual or potential tenderers had in fact interpreted the criterion in the same way, but whether the court considered that the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers.

Hence, as per the opinion of Advocate General Sharpston in *Lammerzahl GmbH v Freie Hansestat Bremen*, cited by Lord Reed at paragraph 12 of his judgment:

> 'The yardstick of the RWIND tenderer is an objective standard applied by the court'."

In a later passage, Lord Reed referred to the ECJ case of *EVN AG v Austria* (referred to above). Of particular interested he quoted paragraphs [56]-[59] which are set out above.

At paragraph [14] of his judgment Lord Reed went on:

> "The rationale of the standard of the RWIND tenderer is thus to determine whether the invitation to tender is sufficiently clear to enable tenderers to interpret it in the same way, so ensuring equality of treatment. The application of the standard involves the making of a factual assessment by the national court, taking account of all the circumstances of the particular case."

In a later portion of his judgment Lord Reed refers to the case of *Commission of the European Communities v Netherlands* (case C-368/10) [2012] 3 CMLR 234. In particular, he quoted from paragraphs [109] and [110] of that judgment. These are passages which the court considers worthy of citation:

> "[109] The principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract …
>
> [110] As the Advocate General stated in point 146 of her opinion, it must be held that the requirements relating to compliance with the 'criteria of sustainability of purchases and socially responsible business' and the obligation to 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' are not so clear, precise and unequivocal as to enable all reasonably informed tenderers exercising ordinary care to be completely sure what the criteria governing those requirements are. The same applies, and all the more so, in relation to the requirement addressed to tenderers that they state in their tender 'in what way [they] fulfil those criteria' or 'in what way [they] contribute to the goal sought by the contracting authority with regard to the contract and to coffee production, without precisely indicating to them what information they must provide'."

Lord Reed's judgment also helpfully deals with the provision of reasons. At paragraph [17] he discusses the duty to inform the unsuccessful candidate, on request, of the reasons for the rejection of his application. This obligation, he notes, is fulfilled when tenderers are informed of the relative characteristics and advantages of the successful tenderer and the name of the successful tenderer. At the same time he acknowledges that the contracting authority is not obliged to produce a copy of the evaluation report or to undertake a detailed comparative analysis of the successful tenderer and of the unsuccessful tender.

In applying the above principles to the appeal before him, Lord Reed at paragraph [26] of his judgment expressed his agreement with the way the issue was dealt with by the Lord Justice Clerk at paragraph [60] of the lower court's judgment:

> "The court's decision will involve placing itself in the position of the reasonably informed tenderer, looking at the matter objectively, rather than, as occurred here to a degree, hearing evidence of what such a hypothetical person might think … Although different from an orthodox exercise in contractual interpretation, the question of what a reasonably well informed and normally diligent tenderer might anticipate or understand requires an objective answer, albeit on a properly informed basis. Just like those other judicial creations, such as the man on the Clapham omnibus … or the officious bystander …, the court decides what that person would think by making its own evaluation against the background circumstances …"

(ii) The decision of the Northern Ireland Court of Appeal in *Clinton v Department of Employment and Learning and others* [2012] NICA 48. This decision deals, *inter alia*, with the interpretation of selection criteria. Of particular importance are paragraphs [22]-[27] within the judgment of Girvan LJ. Paragraphs [22], [23], [26] and [27] read as follows:

> "[22] Tenderers must be in a position of equality both when they formulate their tenders and when their tenders are being assessed by the adjudicating authority.

Award criteria must not give public authorities unrestricted freedom of choice as to the awarding of contracts. The principal of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified. The criteria must be clearly stated.

[23] The principal of proportionality requires that measures adopted do not exceed the limits of what is appropriate and necessary in order to achieve the objects sought. Where there is a choice between several appropriate measures recourse must be had to the least onerous … The principle of proportionality is capable of applying to the implementation of the terms of a procurement process.

…

[26] The appropriate test to be applied on the question of whether a criterion is clear and transparent is that stated by the European Court of Justice in *SIAC Construction v Mayo County Council* … The award criterion has to be formulated in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret them in the same way. The obligation of transparency also means that the adjudicating authority has to interpret the award criteria in the same way throughout the entire procedure.

[27] If an authority has not complied with its obligations as to equality, transparency and objectivity then there is no scope for the authority to have a margin of appreciation as to the extent to which it will or will not comply with its obligations. In relation to matters of judgment for assessment the authority does have a margin of appreciation so that the courts should only disturb the authority's decision where it has

committed a manifest error. The word manifest does not require any exaggerated description of obviousness. Manifest error arises in a case where an error has clearly been made … In *JB Leadbitter & Co Ltd v Devon County Council* [2009] EWHC Ch 903 David Richard J stated that:

> "The court must respect (the authority's) area of judgment and will not intervene unless the decision is unjustifiable. This is the meaning of manifest error in this context.""

(iii) In the case of *Woods Building v Milton Keynes* [2015] EWHC 2011 (TCC) Coulson J discussed the concept of manifest error. In the headnote to the report of the case ([2015] Butterworth's LGR 715) the following is stated:

> "There was a broad equivalence between the concepts of manifest error and Wednesbury unreasonableness. Manifest error was essentially about the nature and centrality (or materiality) of the error in question. In particular, the mere fact that the error might not be immediately apparent to the layman was not necessarily a reason to conclude that it was not manifest.
>
> The court should focus on the nature of the substantial complaint being made about the evaluation of the answer to the 12 questions rather than ticking off the myriad different ways in which that complaint might be capable of being presented."

In a helpful section discussing the law Coulson J stated:

> "**Transparency**
>
> [5] … the duty of transparency focused on the award criteria. It is trite law that 'the award criteria must be formulated, in the contract

documents or the contract notice in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret them in the same way': see SIAC…

[6] The award criteria must be drawn up 'in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract': see *European Commission v Netherlands* (Case 368/10) [2013] All ER EC 804 (para 109).

[7] The true meaning in effect of the published award criteria is a matter of law for the court: see *Clinton (T/A Oriel Training Services) v Department for Employment and Learning* [2012] NICA 48 at [33]. A failure to comply with the criteria is a breach of the duty of transparency: see *Easy Coach Ltd v Department for Regional Development* [2012] NIQB 10.

[8] Unlike other allegations commonly made during procurement disputes, such as whether or not a manifest error has been made in the evaluation, a breach of the transparency obligation does not allow for any 'margin of appreciation': see paragraph [36] of the judgment of Morgan J in *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 (Ch).

Equal Treatment

[9] The duty of equal treatment requires that the contracting authority must treat both parties in the same way. Thus 'comparable situations must not be treated differently' and 'different situations must not be treated in the same way unless such treatment is objectively justified' … Thus the contracting authority must adopt the same

approach to similar bids unless there is an objective justification for a difference in approach.

[10] Morgan J's observation in *Lion Apparel*, noted above, is equally applicable to the duty of equality: again when considering whether there has been compliance, there is no scope for 'any margin of appreciation' on the part of the contracting authority.

Manifest Error

[11] The relevant regulation of the Public Contract Regulations 2006 … allows redress where the contracting authority has made a manifest error in its evaluation. As Morgan J makes plain in paragraph [37] of his judgment in *Lion Apparel*, this is a matter of judgment or assessment, so in this respect the contracting authority does have a margin of appreciation. The court can only disturb the authority's decision in circumstances where it has committed a manifest error. Morgan J went on at [38] to say:

> "When referring to 'manifest error', the word 'manifest' does not require any exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made."

[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 Newham London BC* [2008] EWHC 1538 (QB), [2008] LGR 908. 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 [counsel for Newham] 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."
>
> On the facts, Silber J altered two of the individual scores, in circumstances where the errors were either admitted or incapable of rational explanation.
>
> [13] The only real issue of principle was the extent to which "manifest error" broadly equated with the concept in UK law of Wednesbury unreasonableness … [counsel] said that it did…
>
> [14] In my view there is a broad equivalence between the two concepts. I set out my reasons for that conclusion, together with the relevant authorities, in *By Development Ltd v Covent Garden Market Authority* [2012] EWHC 2546 (TCC), 145 Con LR 102. I note that subsequently, in the Court of Appeal decision in *Smyth v Secretary of State for Communities and Local Government* [2005] CWCA Civ 174 … Sales LJ said when dealing with a review of a planning dispute on environmental grounds that 'the relevant standard of review is the Wednesbury standard, which is substantially the same as the relevant standard of review of 'manifest error of assessment' applied by the CJEU in equivalent contexts …"
>
> [15] By contrast no authority was cited to me which suggests that this broad equivalence is incorrect …"

(iv) Much of the jurisprudence in this area cites the domestic authority of *Lion Apparel Systems Ltd v Firebuy Limited* (*supra*). In this case there is an extensive discussion of the relevant principles from paragraphs [26]-[61]. Of particular note are the following:

> "[35] The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have

> been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.
>
> [36] If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a "margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.
>
> [37] In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a "manifest error".
>
> [38] When referring to "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made."

The outcome of the Competition

[36] The outcome of the procurement process was communicated to the plaintiff by letter from the defendant dated 30 January 2017. The letter indicated that the plaintiff's tender had not been successful and informed the plaintiff that the successful tenderer had been Graham Farrans JV.

[37] Information was imparted in the letter as to the standstill period (during which the defendant was obliged to refrain from entering into any of the contracts): see: Regulation 87 of the 2015 Regulations.

[38] The letter included an Annex which provided basic information about the evaluation of tenders against the criteria and weightings. What was described as a "written debrief" was forwarded. This included information in relation to the score recorded in respect of the plaintiff's tender and the scores recorded in respect of the winning tender. Likewise the information included the Evaluation Panel's comments in respect of the plaintiff's tender and the winning tender. It also included information about the percentage difference between the plaintiff's price and that of the price of the winning tender.

[39] It is on the basis of the written debrief that the quality evaluation scoring and the comments of the EP can be identified. However, it is to be noted that neither the

competition's rules nor, it would appear, procurement law generally requires the revelation of the responses given by the successful tenderer in its TSP. It is not possible, therefore, to carry out a direct comparison of the approach of the EP to the challenger's, and to the successful tenderer's, response.

[40] In terms of the overall result, there is a helpful Table which the court will replicate.

Overall Result	Quality Score	Price Score	Overall Assessment Score	Final Mark
Economic operator BAM McCann JV	61.89	30.00	91.89	2 of 3
Winning Tenderer	70.00	23.56	93.56	1

[41] On the basis of the above, it can be seen that the difference between the winning score and the plaintiff's score was small.

[42] It would only take a change in the quality marks for the plaintiff of a small dimension for there to be a significant impact on the overall outcome. At paragraph 129 of the plaintiff's opening skeleton argument it is suggested that the effect of an additional one point for the plaintiff in the overall context of Section C of the quality assessment would result "in the plaintiff scoring highest in the competition". This has not been contested by either the defendant or notice party and appears to be correct. Indeed, it was acknowledged by one of the defendant's witnesses when giving evidence.

[43] The proceedings in this case were issued by the plaintiff within the standstill period (as extended). This has meant that none of the contracts at issue in this procurement competition have, to date, been made pending the outcome of these proceedings. This is in accordance with the Regulations.

The contested questions and answers

Question 3.01

[44] Question 3.01 comes within Section 3 of the Quality Assessment document. This section deals with Phase 2 Construction. The heading of 3.01 is "Planning and Executing Construction". The question is then broken down into two parts: (a) and (b). However, the question overall sought "an outline methodology for the planning and execution of the following elements during Phase 2 Construction".

[45] Element (a) related to the widening of the existing North Queen Street overbridge (BR-001) and A12 Westlink Road Embankment whereas element (b) related to the construction of the new Dock Street overbridge (BR-004).

[46] In respect of each of the two elements there was a set of key indicators.

[47] The role of indicators is dealt with at paragraph 1.11 of the guidance provided as part of the IFT in respect of completing the quality submission document. It is stated that indicators are designed to provide additional guidance to economic operators. It is then stated that responses shall be evaluated on answers to the key indicators.

[48] It is unnecessary for the court to explore how the plaintiff's answer to the second element was evaluated as there has been no complaint about this which is being pursued by the plaintiff.

[49] The issue in respect of question 3.01 relates only to how the plaintiff's response to the first element was assessed.

[50] In answer to 3.01(a) the plaintiff provided a response which can be related sequentially to each of the indicators listed at 3.01(a). The indicators referred to for this particular aspect were:

> "1. Phasing of the Works.
>
> 2. Construction activities in close proximity to residential housing (Little George Street).
>
> 3. Environmental health restrictions on working hours.
>
> 4. Traffic management requirements for the A12 Westlink.
>
> 5. Diversions of statutory undertaker apparatus and existing motorway communication equipment.
>
> 6. Measures to ensure community liaison."

[51] In terms of the plaintiff's challenge to the evaluation, its complaint related to how the EP assessed that part of the response which dealt with the first indicator "phasing of the works". This arises because of the way in which the debrief has been composed by the defendant.

[52] As regards the answer given to question 3.01, the debrief states:

> "Very good response with all indicators adequately addressed with the majority in detail.
>
> (a) North Queen Street – Indicator 1 – Lacks detail of component steps associated with activity phasing eg erection of bridge beams and parapets, completion of bridge widening."

[53] The overall score given by the EP for this question was a 4. It therefore appears to be the case that the only criticism which could give rise to a score of 4 (as against a 5) was that recorded by the EP and referred to above which relates alone to Indicator 1 in connection with that part of the response dealing with North Queen Street.

The Plaintiff's Response

[54] The plaintiff's response relating to Indicator 1 in connection with "(a) North Queen Street" is found in the quality submission under the heading "Widening BR001 and A12 Embankment".

[55] The relevant section of the response is not lengthy and the court will set it out in full:

> "PHASING
>
> The new A12 Westlink alignment requires widening of North Queen St overbridge (4m on northside, 2.5m on southside) and construction of a new A12 road embankment adjacent to the tightest residential interface on the scheme. Successful delivery will require comprehensive planning & careful phasing. We will plan the whole scheme using the MS Project Critical Path Method (CPM) and detailed Work Breakdown Structure (WBS) matching the Phase 2 Activity Schedule. It will adopt "constraint calendars" addressing all stakeholder, environmental & seasonal matters. It will be logically linked, cost & resource loaded for robustness & formatted to facilitate review in Integrated Design Team (IDT) workshops. Lane Occupation Charges will be minimised.
>
> WBS codes will include geographic & phase references. Activity durations will be based on

> conservative output rates. Time risk allowances within each phase will ensure achievement of key dates.
>
> These works will follow the Traffic Management (TM) phases presented in the Environmental Statement:
>
> Ph 1 – Preparation: Erect side hoardings & acoustic fencing. Site clearance for A12 embankments. Remove McGurk's Bar Memorial. SU diversions, Route A. Realign North Queen Street south bound (SB).
>
> Ph 2 – North bound (NB) widening: temporary piling platforms & sheet piling to abutments, NB east and NB West. Demolish wing walls. Construct: abutment extensions; RW01; EB01. Demolish and extend BR01 NB deck and parapets. Reinstatement of NB footpaths and steps.
>
> Ph 3 – SB widening: temporary piling platforms & sheet piling to abutments, SB East and SB West. Demolish wing walls. Construct: abutment extensions; RW02; EB02. Re-profile embankments A12 SB West. Demolish & extend BR01 SB deck & parapets. Re-instatement of SB footpaths.
>
> Ph 4 – Completion: Undercroft, decorative panels & themed lighting. Re-instate/re-site McGurk's Bar Memorial if/as required."

Question 3.02

[56] This question is also within Section 3 of the Quality Assessment document and relates to Phase 2 construction. The relevant heading in this instance is that of "Contract Management".

[57] The question reads:

> "Demonstrate how your organisation including relevant sub-contractors and suppliers will deliver a quality product and comply with the contractual requirements (ie Employers' Requirements, Specification etc) in the delivery and management of the Phase 2 works."

[58] In this instance there were 7 key indicators in respect of the question. The response, it was stated, would be evaluated on answers to the key indicators.

[59] The indicators were as follows:

> "1. Quality control process for control of documentation, monitoring and reviewing the acceptance of deliverables eg workmanship, sampling and testing of materials.
>
> 2. Proposals for liaison with the Employer, project manager and supervisor.
>
> 3. Proposals for liaison with the statutory undertakers.
>
> 4. Proposals for liaison with employer with respect to temporary traffic management.
>
> 5. Proposals for management of risk.
>
> 6. Management of change control and early warning of compensation events.
>
> 7. Reporting and managing approved performance."

The plaintiff's response

[60] The response of the plaintiff was composed having regard to the above indicators in the order in which they appear.

[61] The only issue in these proceedings is taken with the marking of the Evaluation Panel in respect of indicators 4 and 6 above.

[62] The debrief document discloses that in respect of this question overall the plaintiff received a 3 which (using the scoring interpretation table) means that the response constituted a good answer.

[63] The debrief reads:

> "Good answer with all indicators adequately addressed (Indicators 1, 2 and 7 addressed in detail). Responses to Indicators 3, 4, 5 and 6 do not demonstrate a detailed understanding of the unique

> contractual requirements for this project. Indicator 3 does not refer to the delegation of functions as stated in Z42. **Indicator 4 lacked detail for eg no reference to app 1/17 including procedure for management of lane/road closure process**. **No reference to lane occupation charging**. Indicator 5 – lack of understanding of unique nature of this contract and the development of risk management in Ph1. NEC risk register is maintained/revised by the BM not the commercial manager. **Indicator 6 – lack of understanding of unique nature of this contract eg value engineering not part of Phase 2 for this contract. Some terminology used not from NEC."** (Court's emphasis)

[64] Those parts of the plaintiff's response relevant for present purposes are those which deal with its response to indicators 4 and 6, as indicated *supra*.

[65] As regards indicator 4, the plaintiff's response had stated:

> "PROPOSALS FOR LIAISON WITH EMPLOYER WITH RESPECT TO TEMPORARY TRAFFIC MANAGEMENT (TTM)
>
> For Phase 2 BMJV will develop the Traffic Management Strategy & Traffic Management Plan created in Phase 1. This will also include an associated Intelligence Transport System (ITS) Strategy & Plan.
>
> WEEKLY TTM CO-ORDINATION MEETINGS – Our TSCO shall arrange weekly TTM co-ordination meetings with PSNI, TNI Traffic, PPP Unit & TICC and the employer. These meetings will discuss future TTM proposals & review of implemented TTM.
> For all TTM proposals a 3D simulated model compatible with BIM Project Information Model (PIM) will be presented at the meetings to enable employer and key stakeholders the opportunity to view each proposed stage or key area via a fly-through. This will assist optimising the flow of traffic safely through the works & detect problems/clashes e.g. visibility of signs, sightlines etc.
>
> PUBLIC INFORMATION – Such as dates & times of installation, charges or removal to TTM, lane or road

closures etc., will be released in agreement & discussion with TNI/AECOM. This will include determining the text, notice periods & various media to be used to best give advance warning & inform the public of e.g. alternative routes etc.

EMERGENCIES – Response & communication procedures will be included in the TTM plan agreed with TNI. It is proposed to have a continuously monitored project TTM CCTV system so that incidents (vehicle accidents, failure of temporary traffic signals/ITS systems, damage to the TTM systems etc) are quickly & efficiently addressed & notified to TNI & AECOM PM.

[66] As regards indicator 6, the plaintiff's response read:

"CHANGE CONTROL & EARLY WARNINGS (EWs) OF COMPENSATION EVENTS (CE's)

Our CommM, will have lead responsibility for managing this process as follows:

CHANGE CONTROL –BMJV's procedures support early problem identification, review of options, assessment of quality, time & cost impacts, to allow appropriate action. An internet based NEC Contract Change Management system will be used to support communications.

EARLY WARNINGS – Our ComM will notify EWs to AECOM PM as soon as he is aware of any event or anticipated event that may affect works cost, time or performance. An EW/Risk Reduction Meeting will be called to mitigate impacts, identify solutions & agree actions.

Our ComM will track all changes from scope of original Target Cost and report to AECOM PM each month. When required, he will implement the NEC3 quotation process & provide a quotation promptly. A schedule will track progress of changes, status, programme effect & any resulting requests for information.

> Quotations will be provided within 2 wks (Cl 62.3 – 3 wks) including value engineering solutions, revised programmes & alternatives options to AECOM PM. Revised quotations submitted within 1 wk (Cl 62.4 -3 wks). Shorter timescales will apply if CE is on critical path. Assessment carried out jointly between AECOM & BMJV supervisors before formal submission. Changes implemented only by confirmation of AECOM (via site memo, written variation/instruction, or verbal instruction confirmed in writing). By monitoring changes schedule status, our ComM will forecast revised Total of the Prices & generate the out-turn Price for Work Done to Date which combined with forecast for Contractor's Share of gain or pain, will provide out-turn forecast of the total cost. Our ComM will submit a report showing reasons for changes with monthly forecast included in the Monthly Progress Report Executive Summary."

The Scoring Interpretation Table

[67] There is a scoring interpretation table in respect of each question which has been devised to guide scoring in respect of the answer to each question. It is in much the same terms for question 3-01 and question 3-02, though the language in respect of 3-02 slightly varies from the language in respect of 3-01.

[68] In essence, the top score of 5 accompanies an assessment which is viewed as excellent. A score of 4 is reserved for a very good answer; 3 for a good answer; 2 for a satisfactory answer; 1 for an unacceptable answer and 0 for a fail.

[69] Against each score there is an interpretation section. In respect of a 5 score the interpretation section for 3-01 reads:

> "Response demonstrated the Economic Operator will have in place an excellent outline methodology for the planning and execution in Phase 2 construction of the contract.
>
> All indicators are addressed in detail in response."

[70] Against a very good assessment the interpretation section for the same question indicates that the economic operator will have in place a very good outline methodology and that all indicators are adequately addressed with the majority in detail in the response. In respect of a score of 3 the interpretation section for question 3-01 reads:

> "Response demonstrates Economic Operator will have in place a good outline methodology for the planning and execution in Phase 2 construction of the contract."

All indicators are adequately addressed in the response or the majority of indicators are addressed in detail in the response."

[71] In respect of question 3-02, a similar approach is taken. The same categories operate but the interpretative text is adjusted to reflect the subject area of the question. Thus, in respect of an excellent score, the interpretation provided is:

> "Response demonstrates the Economic Operator will have in place excellent processes and procedures to ensure your organisation including relevant sub-contractors and suppliers will deliver a quality product and comply with the contractual requirements."
>
> All indicators are addressed in detail in response."

[72] The interpretation for lower scores in relation to question 3-02 is closely modelled on the language used in the scoring interpretation table for question 3-01 and referred to at paragraph [70] *supra*.

THE ARGUMENTS 1

3-01

[73] The court has had the benefit of receiving both an opening and closing skeleton argument for both the plaintiff and the defendant, as well as a closing skeleton argument from the notice party (the winning tenderer). These have all been of assistance to the court. However, the closing arguments have the benefit of being written after the close of evidence and are of particular value.

[74] In his closing skeleton argument on behalf of the plaintiff, in respect of question 3-01, Mr Dunlop has succinctly stated his client's case as follows:

> "There are two issues for the court to address:-
>
> (a) The meaning of the Question to a RWIND Tenderer and whether it satisfied the defendant's duty of transparency.

(b) The rationale adopted by the EP and whether it was free from manifest error."

[75] In respect of each of these issues the point is elucidated by reference to legal authority and to the evidence.

[76] As regards the first issue, relying on the *Health Care at Home*, *Clinton* and *EVN* cases (all referred to above), Mr Dunlop argued that the plaintiff on the evidence was unclear about the specific matters the defendant wished to have addressed. In his submission, the EP was itself unclear in terms of what details were necessary to address the indicator in respect of "phasing".

[77] Counsel argued that the issue of what the question was seeking had to be placed in the context that the question itself which sought "an outline methodology", which he interpreted, adopting some of the expressions used by the defendant's witnesses, as something "skeletal" or "non-specific" or "generic". In his submission "a RWIND tenderer viewing the question would not have anticipated that [it] was asking for such intricate and diverse details of the works as 'the delivery and access of plant', 'impact on residents', 'closure of footpaths', 'widening abutments to the bridge', 'siting of cranes' 'debris falling onto traffic during bridge widening', 'noise issues', 'working outside normal hours' and 'the impact of the increased student pedestrian traffic with the new University'", details referred in evidence to by witnesses for the defendant. The court, counsel continued, should take into account that the four members of the scoring panel had expressed different views as to the sort of detail which was appropriate in the context of the answer to the question.

[78] Mr Dunlop also submitted that an alternative way of approaching the matter would be for the court to take the view that the EP took into account "undisclosed criteria". This arose, he said, because the evidence of the defendant's witnesses was so varied about what matters were of importance to the evaluation of the tenderer's response.

[79] A further criticism advanced by counsel related to the process by which the discussions of the EP were recorded which, he said, "could scarcely have been less transparent". The court, Mr Dunlop submitted should view the methodology employed in respect of a complex tender of this kind as "extremely poor".

[80] Overall, on this aspect, "the sort of detail actually considered by the EP as important, was not disclosed", he said.

[81] In relation to the second issue to which Mr Dunlop referred to – the rationale adopted by the EP – counsel made the concession that "if the court concludes that a RWIND tenderer ought to have interpreted the Question as requiring the level and sort of detail proposed by the EP in evidence, then the court will not thereafter find

the EP [to have] made a manifest error in its approach". However, if, on the other hand, the court was of the view that what the tenderer was being asked to provide was an outline methodology which was generic and non-specific, there will, counsel argued, have been a manifest error because the question will have been interpreted in a wholly inappropriate manner.

[82] The defendant's closing skeleton argument in response sought to meet Mr Dunlop's submissions head on. In its submission, the starting point which the court should keep in mind was that the EP consisted of experienced personnel in this area, most of whom were civil engineers with considerable knowledge and experience of this type of situation involving a major roads and infrastructure project of this sort.

[83] In simple terms, it was submitted that the debrief which had been provided plainly gave the reasons for the plaintiff's mark of four in respect of this question. There was an absence of sufficient detail as to the steps which needed to be taken. As the debrief disclosed, the plaintiff's answer lacked "detail of the component steps associated with activity phasing". Examples of such a lack of detail, it was suggested, were provided and, in this regard, counsel pointed to omissions in respect of the erection of bridge beams and parapets, as integral steps in the process of bridge widening.

[84] Mr McMillen QC, referring to criticism made by the plaintiff at the hearing of an alleged failure by the EP to provide greater detail of the its reasoning in the debrief, commented that, in fact, in the course of their evidence, witnesses for the defendant offered further examples of omissions, not contained in the debrief. He made the specific point that the absence of examples, in any event, was "simply a function of the complexity of the construction process and dozens, if not hundreds, of examples … could have been given". In his submission, there was no obligation to give any examples, let alone an obligation to set out all examples.

[85] At a later stage, Mr McMillen expressed the same point in a similar way. He said: "It would be impossible to list all the steps that could have been used to provide further detail of the phasing." Moreover, "tenderers may adopt various methods which would require [a] different list for each possible method even those not in the mind of the defendant".

[86] Counsel also made the point that to achieve a score of five the tenderer had to address all of the indicators in detail which, he said, was a fact well understood by the plaintiff. The matter was put pithily when Mr McMillen stated that: "The fact remains that the indicator must be addressed in detail. Thereafter it is a matter of professional judgment whether phasing was addressed with sufficient particularity to be considered 'in detail'". What was sought, it was pointed out, was the detail of the phasing for this particular location.

[87] In summary, the defendant's case was that this was a straightforward marking challenge and it was neither a case of the introduction of undisclosed criteria nor a case of manifest error.

[88] In large part, the submissions of the notice party supported those of the defendant and, with no disrespect to the submissions of Mr Humphries QC who represented the notice party, it is not necessary to set these out in this circumstance.

The evidence base in respect of 3-01

[89] It is important that the court should offer a short description of the evidence received by it in relation to the approach which should be adopted to the contentious part of Question 3-01. While the court has taken the totality of the evidence in this regard into account, it will be useful to seek to capture the essential nature of the dispute which shines through.

[90] The plaintiff's case, in its evidential form, was advanced by Mr John Crawley. Mr Crawley was and is a director of JC Construction Services and had been retained for particular projects by F B McCann Limited as a consultant, including in respect of this project. He has 34 years' experience in civil engineering projects.

[91] In relation to Question 3-01 he said that he felt the question was dealing with the progression of the works into manageable elements. In his view, the words "outline methodology" suggested no more than an outline. Such an outline, he thought, would not contain every detail or every step. The view was reinforced by the limit of 18,000 characters placed on the response which had to deal with two different locations and in all some 12 indicators (6 related to element (a) and 6 related to element (b)). This, on any view, was a substantial limiting factor.

[92] The witness indicated that he was familiar with the scoring interpretation table which applied to Sections 2 to 4 of the TSP and was aware of the references to "detail" in the context of marking.

[93] In his description of the preparation of this aspect of the plaintiff's response, his evidence was that there was a tender team in McCann's which worked with counterparts in BAM. The questions were discussed at meetings and the response went through a number of drafts (though none of these was produced).

[94] In cross-examination the witness accepted that there was no document which spelt out the plaintiff's understanding of the question. He also accepted that he had no difficulty in understanding the question and, despite having the facility to query it in advance of answering, he did not do so. Indeed he said at one point that he had no complaints about the question.

[95] When questioned by Mr McMillen (for the defendant) about the view that there was a tension between the notion of an "outline methodology" and the need for detail, Mr Crawley said he did not regard any such tension as a particular issue. When it was suggested that what was sought in a response was the tenderer's plans to deal with the problem of construction in the area around and surrounding the overbridge at North Queen Street, he answered in the affirmative and accepted that the area was problematical. However, in his view, the plaintiff's response did address key features.

[96] Mr Crawley also adopted a written statement of evidence which had been prepared for the proceedings. While the court has considered the totality of this statement, it will quote sparingly from it.

[97] At paragraph (50) he indicated that he understood the question to require a response which provided an outline methodology for the planning and execution of the two key elements. He understood indicator a.1 to require a response which addressed the phasing of the works but he did not read it to require a detailed account of the component steps of the proposed construction method or a detailed indication of the equipment and resources to be deployed.

[98] In the same paragraph he also referred to the importance of the character limitation in respect of the response which he considered was consistent with the requirement for an outline methodology for phasing. In his view, this would not permit every step of the construction process to be documented whilst leaving space proportionately to address the remaining indicators.

[99] Mr Crawley also at paragraph (53) made the point that the details of component steps had not been referred to in the question.

[100] It is also noteworthy that, as he claimed, the plaintiff's overall statement as to the phasing the works was not criticised only the details of component steps associated with activity phasing: para (60).

[101] At para (64) he indicated that in his view the question posed did not request an elemental step by step detail of each construction task, for example, as might be expected to appear within a detailed method statement.

[102] His overall theme was as expressed at (67), that a diligent tenderer would not have considered that an outline methodology for the phasing of the works would be expected to produce the level of detail that the EP seemed to consider relevant.

The defendant's witnesses

Mr Megarry

[103] Mr Michael Megarry was the first of the witnesses who gave evidence for the defendant. By occupation he is a chartered civil engineer. At all material times for the purpose of these proceedings he had been employed by AECOM, which is an entity engaged by the defendant as its technical adviser in respect of the project. It is clear, and was not seriously contested, that he was familiar with the delivery of major road schemes and bridge construction. His involvement in the York Street Interchange Project dated from April 2009 when he was appointed by the Department as Project Manager. He continued in that role until June 2016, but now is working on a different project. His role as Project Manager is now occupied by Mr McBride (see below).

[104] In his view the question contained at 3-01 when read in the context of the key indicators in the context of the construction and extension of the North Queen Street bridge and Westlink embankments reflected the construction challenges and engineering constraints associated with their setting.

[105] In his view the listing of the main elements of the construction process was important but not enough, in itself, to address the question in detail. There remained issues about the timing and sequencing of the tasks associated with the work.

[106] An important aspect of a response to the question was an indication of the challenges that would arise in respect of the various work elements and the provision of detail in respect of those was important. In this regard, the witness gave as an example that the plaintiff's answer did not address the work elements involved with the extension of the existing abutments. He noted that the plaintiff's response was limited and was confined to a statement which merely said that the plaintiff would "construct: abutment extensions".

[107] Other details which he felt ought to have been referenced included aspects of the use of cranes in the context of operations to extend the bridge (for example, lifting bridge beams into place) and how removal of reinforced concrete parts of the deck of the bridge would be achieved. Information of this nature, in his view, was necessary to demonstrate how such operations would be undertaken, when this would occur, and what implications the doing of them might have on vehicular and pedestrian traffic and on local residents.

[108] Notably, as emerged from cross-examination, neither the issue of the existing abutments nor the issue of cranes or lifting operations or removing reinforced concrete parts of the deck were referred to in the debrief material or in his written statement of evidence.

[109] Without developing other details said to be missing he referred to various other matters, such as the length of time hoarding would be up; how this might affect deliveries; the removal of scrub planting at embankments; diversionary routes for utilities; and problems which would arise in working on the Westlink itself with a live carriageway below (North Queen Street).

[110] The witness also criticised the plaintiff's response for being 'too bald' in respect of such matters as the construction of abutment extensions; and the demolition and extension of bridge decks and parapets.

[111] When it was put to him that what was being sought in the question was a 'skeletal methodology' he accepted this. He also in the course of his evidence accepted that his note taking had been 'very limited' and that by the date of composing his witness statement and then giving evidence in court he could not remember all that had been discussed in the course of the deliberations of the EP.

Mr Pollock

[112] Mr Stephen Pollock was the second of the defendant's witnesses to give evidence. He adopted a written statement of evidence and also explained his position orally. Mr Pollock is currently the Network Development Manager in respect of roads, Eastern Division. However, he told the court that he had been directly involved with the York Street Interchange Project since October 2015 when he was appointed by the Department as Project Sponsor. In his evidence he indicated that he had worked for the Department for 35 years as a chartered civil engineer. Over that time he had been involved in major road projects.

[113] This witness had been involved in the preparations for this procurement process and was selected to perform the key role of Chairperson of the EP. The two work elements associated with the aspect of question 3-01 which is under consideration, including the indicator referring to 'phasing', were, he said, selected to reflect the construction challenges and engineering constraints associated with these aspects of the project. The relevant part of the question, he indicated, related to how the work would be planned and executed. In order to obtain full marks the outline methodology had to be explained in detail.

[114] Mr Pollock felt that there was a need in a tenderer's answer for detail of the component steps involved in the bridge widening to take account of tasks such as the setting in place of bridge beams and how this would be achieved given the environmental constraints and the nature of the area. The impact on local traffic, he thought, was also important.

[115] As with Mr Megarry's evidence, the witness appeared unclear about what was actually discussed at the EP and he accepted that, in the absence of detailed note

taking, it was difficult for him to remember what precisely had been discussed given the passage of time.

Mr Pentland

[116] Mr Colin Pentland was the third witness to give evidence for the defendant. His background, like the last two witnesses, lay in civil engineering. Mr Pentland had been employed by the Department since 1991 and had been involved in numerous roads projects. As regards the York Street Interchange Project, his involvement went back to 2011. It was in his role as the Department's Project Manager that he had been appointed to the EP.

[117] Mr Pentland's evidence, in broad terms, reflected what had been said by Mr Megarry and Mr Pollock. In respect of that aspect of the plaintiff's response now under consideration, he referred to it as 'generic' in the sense that what was said could have been applied to a task of this type wherever it was. It was, he said, 'adequate rather than detailed'. He also accepted the description of the response as 'skeletal' when this was put to him in cross examination.

[118] Like others he referred to various points of detail which he felt supported the EP's conclusion that this was not a case for the award of 5 points in relation to this question. He referred *inter alia* to wanting to see how the bridge beams would be put in and how that might affect traffic in North Queen Street. He also referred to a concern about how the works would be executed in circumstances where it was to be expected that a large number of students would be living in the area as a result of expansion plans developed by the University of Ulster.

[119] Interestingly, at one point, he indicated that the EP had not been looking for a set answer and that there were a range of details which could have cited by the plaintiff.

Roisin Wilson

[120] While this witness also had civil engineering qualifications, her expertise, for present purposes, related to her role as procurement officer in the Department and, in particular, as the procurement officer for the contracts here at issue. In this capacity she was a member of the EP and had been fully involved in preparations for the competition. She saw it as her role to ensure that the process was carried out in accordance with the law and best practice.

[121] Unsurprisingly, much of her evidence was concerned with process issues.

[122] Her evidence, therefore, is of limited value in terms of how question 3-01 was read and interpreted by the EP and much of what she said about this in her witness statement repeats the standard expressions found within the scoring interpretation

table. The witness did, however, indicate in answer to a question that she had not offered advice to the EP about how to interpret the question. Her memory about whether particular issues had been raised at the various meetings of the EP was uncertain.

Mr McBride

[123] Mr John McBride was called as a witness on behalf of the defendant. He was not cross examined but largely relied on his witness statement which he proved. Mr McBride's background is as a civil engineer but chiefly with AECOM, the defendant's consultant. He told the court that he had been involved in the project since 2009 and recently, in June 2016, took over as AECOM's Project Manager from Mr Megarry.

[124] This witness attended most of the meetings of the EP but he was not a voting EP member. In effect, he was an observer, albeit that he was able, it appears, to take part in the discussion, in view of his impending promotion to Project Manager.

[125] In his witness statement the emphasis was upon how, in answer to the question, the contractor envisaged the stages of the work being completed in practice given the nature and problems of the area. He voiced this especially in the context of the extension to the North Queen Street Overbridge. This extension he viewed as presenting significant engineering and logistical challenges. An example he deployed was in respect of the widening of the deck and how that would be achieved either from the Westlink or North Queen Street itself.

THE ARGUMENTS 2

3-02

[126] It will be recalled from the discussion of Question 3-02 *supra* that the dispute between the parties centres on the marking awarded in the light of indicators 4 and 6, with an overall outcome of 3 being achieved by the plaintiff. It is proposed to look at the arguments of the parties relating to each of these indicators in turn.

Indicator 4

[127] In respect of this indicator, the plaintiff's case was that it had demonstrated that it would deliver a quality product and comply with contractual requirements in its delivery and management of the Phase 2 works, having regard to proposals for liaison with the employer in the area of temporary traffic management. Mr Dunlop argued that the plaintiff's response had been comprehensive and that the criticism of it in the debrief document was not justified and reflected a failure on the part of the EP fully to understand the parameters of the question.

[128] In particular, counsel pointed out that there was no requirement arising from the question for a tenderer to make any reference to the document known as Appendix 1/17 (which dealt with Traffic Safety and Management and was part of the Target Works Information) and that, accordingly, the admitted absence of such a reference to it in the plaintiff's response was not material, especially as the substance of key elements within the Appendix, he said, were referred to.

[129] Central to the plaintiff's case was its view of what was meant by the reference to the "Employer" in the question. It was the plaintiff's view that this term, given the contractual setting[1], should be read narrowly to mean the Department, specifically and only, to the exclusion of branches and emanations within the Department. This reading had the consequence that the plaintiff had correctly excluded from its response reference to processes in the area of traffic management and liaison which involved entities other than the Employer, such as those involved in road or lane closures or the levying of lane occupation charges. Thus there was no need, and it would be wrong, to refer to those entities which operated the lane charging mechanisms as they were not the "Employer".

[130] In his response to this aspect of the plaintiff's case, Mr McMillan QC, for the defendant, was adamant that the omission of the plaintiff in its answer to this question to refer to Appendix 1/17 was bound to mean that its response would be marked down as this document was critical to the operation, at the stage of construction, of traffic management measures, itself a significant feature of delivering a quality product.

[131] Counsel repudiated any suggestion that the substance of the Appendix had been dealt with in the plaintiff's answer, other than in the most fleeting of terms. In his submission, the Appendix was imbued with references to opportunities to liaise with the Employer (in the wide sense of the Department and affiliated bodies) and reference to consultation meetings alone was insufficient and reflected an obvious weakness in the way in which this aspect of the matter was treated.

[132] The plaintiff's omission to refer in any detail to matters such as land/road closures and lane occupation charges could not, counsel continued, be excused on the basis suggested by the plaintiff that the word 'Employer' should be interpreted narrowly and to the exclusion of those parts of the Department which on a day to day basis deal with these matters, for example, various branches of Transport Northern Ireland ('TNI'). This, it was submitted, would not be the way the term would be viewed in the construction context. In this regard, Mr McMillan drew attention to another part of the plaintiff's answer to Question 3-02 in which TNI was referred to. This related to Indicator 2 which had asked about proposals for liaison "with the Employer, project manager and supervisor". In that context, the plaintiff,

[1] The contract defines the 'Employer' as the Department. On the other hand, the IFT refers to the term in wider terms. At page 170 under the heading 'TransportNI' it is recorded that "The Department…is the statutory roads authority for Northern Ireland. TransportNI shall act on behalf of the Department, in the procurement and future administration of these contracts".

counsel pointed out, was treating (correctly in his submission) TNI as an emanation of the Employer.

[133] Mr Humphreys QC, for the winning tenderer, in his closing submission referred to the absence of any reference to the Appendix as "startling". He also made reference to the plaintiff's response in the context of indicator 2 where there was a discussion by the plaintiff of working in collaboration as a key feature of the NEC contracts. However, as he went on to comment: the plaintiff has "failed to take this thinking through into indicator 4, focusing instead on separate contractual requirements concerning consultation". In his submission, even if a narrow interpretation was to be given to the word 'Employer' consistent with the plaintiff's argument, there was clear evidence that there remained significant gaps in terms of the level of detail provided in the plaintiff's response, as there were numerous opportunities found in the Appendix, which the plaintiff had failed to mention, for liaison with the Employer.

The evidential base

[134] It is unnecessary for the court to offer an extensive account of the evidence adduced in respect of this aspect of the case as the key materials have already been set out above and much of the dispute is about the interpretation of the question.

[135] It is clear, however, that in cross examination Mr Crawley made a number of salient concessions. In particular, he accepted the description of the Appendix as 'the bible' in the area of traffic management and that it was always used in this context; he accepted that there were numerous references to the Employer in the Appendix which, even on his limited view of what this term meant, the plaintiff's response had not referred to; he accepted that liaison was a wider concept than consultation and that it was about co-operation; and he admitted that if he was writing the response again he would make reference to the Appendix. Indeed, he acknowledged that a reference to the Appendix would have improved the answer.

[136] As regards the defendant's witnesses the following points stood out:

- The panel chairperson (Mr Pollock) placed emphasis in evidence on the importance of the Appendix and was of the view that the plaintiff's understanding of it was not demonstrated in the response.

- Mr Megarry emphasised the need for the tenderer to show how the impact of the construction process could be minimised, especially given the needs of road users. He pointed out that over 100,000 vehicles use the existing junction every day. The use of the procedures set out in the Appendix was central. In his view, the issue of liaison with the Employer in respect of temporary traffic measures was significant and the Appendix was the principal document in relation to this.

- Mr Pentland had noted the absence of detail in the answer given in his notes of the EP meetings in respect of this aspect and was concerned about what he viewed as the insufficiency of detail about liaison with the various sections of the Department. He referred to the contents of the Appendix not being apparent in the plaintiff's answer and to the absence of reference to the Statutory Functions Officer and the failure to mention lane occupation charges.

- Mr McBride recorded similar concerns.

- Notably, none of the defendant's witnesses viewed the plaintiff's narrow interpretation of the description 'Employer', when it was put to them in cross examination, as the interpretation they would expect a tenderer to adopt. They all viewed the term more widely as embracing entities within the Department such as TNI and the Statutory Functions Officer.

Indicator 6

[137] In respect of Indicator 6, the issue for the tenderer was how it proposed (in the context of contract management) to manage change control and early warning of compensation events – see paragraphs [57]-[59] for the precise wording. The plaintiff's response is set out at paragraph [66] and the specific criticism of it is found at paragraph [63]. That criticism involved the proposition that the plaintiff's response had demonstrated a lack of understanding of the unique nature of the contract and that, in particular, this was exemplified by the failure to recognise that value engineering ("VE") was not part of phase 2 for this contract. There was also a statement in the debrief that the plaintiff had used some terminology "not from the NEC contract".

[138] Mr Dunlop, for the plaintiff, has striven to repudiate the above criticisms, especially that dealing with the plaintiff's understanding of the nature of the contract and, in particular, the role within it of VE. In essence, the plaintiff's case was that it had fully appreciated that VE performed a key role at Phase 1 of the contract but this did not mean that there could be no VE at Phase 2 (contrary to the apparent view of the EP which appeared to rule out any VE at Phase 2). Counsel argued that at Phase 2, consistently with the plaintiff's response to the question asked, there were circumstances in which the contractor could propose changes to the works information and have its proposals, which in effect consisted of a species of VE, accepted by the Project Manager. This was facilitated, it was submitted, by clauses in the contract which addressed the general issue of "compensation events", to which the question under consideration, had specifically referred. It was, therefore, the case that the EP was wrong to accuse the plaintiff of failing to understand the contract. Rather, it was the EP that had failed to understand the contract.

[139] On the other hand, the defendant and the notice party stood by the comments of the EP contained under the heading "Indicator 6" in the debrief. In their submissions, there had been a failure by the plaintiff to understand the contract. VE was a key element at Phase 1 of the contract but it had no role to play at Phase 2. The plaintiff's invocation of the term was, therefore, mistaken and wrong and the EP were acting properly in referring to its invocation by the plaintiff as being an example of a lack of understanding of the nature of the contract.

The Evidential Base

[140] In explaining the plaintiff's approach in evidence, Mr Crawley emphasised the need for the Contractor throughout the life of the project to deliver best value for money and manage costs. In his view, this outlook on the contractor's part was important and was supported by such documents, among others, as "Achieving Excellence in Construction". The witness submitted that VE was a continuous process in which all the components involved were to be critically appraised to determine whether better value alternatives or solutions were available. In this context, his view was that the clauses in the contract relating to compensation events were not out of place and could be viewed as harmonious with the general objectives underpinning modern construction projects. Mr Crawley relied explicitly on Clause 62.1 of the Contract. In his view the EP had been guilty of manifest error in respect of its understanding of the contractual requirements.

[141] Under cross-examination, Mr Crawley accepted that there was a specific process of VE at Phase 1. He accepted there was no similar process at Phase 2 but he said that under Phase 2, in his opinion, there was a role for it and it could arise if the contractor was in a position to offer suggestions which could then be the subject of consideration by the Project Manager. It was suggested to him that a distinction should be drawn between VE as a concept or process and a notion such as "value for money", but he did not accept such a distinction. While VE could be a process it could also be a specific issue or task, in his opinion.

[142] The defendant's evidence on this aspect came principally from Mr Megarry. His emphasis was on the importance of VE at Phase 1. The NEC 3 Option C contract, importantly in his view, was a contract with a "target Cost" which had to be agreed between the Employer and the Consultant (Contractor) during Phase 1 – a process which took a period of some 28 weeks. The target Cost arrived at, he noted, was central to how overall the contractual arrangements operated as it was against it, representing the costed design project costs, that the final "out-turn" cost would be compared for the purpose of how pain or gain ultimately would be allocated as between the Employer and the Contractor depending on whether there was a situation of saved or excess costs. In his view, the object behind these arrangements would be detrimentally affected if VE was not a function of Phase 1, as a weakness of the target Cost approach was that contractors were only motivated to come to grips with cost savings when they came to carry out the works. Unsurprisingly, therefore,

as in this case, VE was not applicable to Phase 2 and the plaintiff had been in error, as at Phase 2 there is no further requirement for VE. The question under consideration was not about VE but was about contract management during Phase 2 in the context of quotations for Compensation Events and how they were to be handled.

[143] In cross-examination by Mr Dunlop, Mr Megarry accepted that compensation events were unforeseen events and might occur "far down the line" and be significant. Under the contractual arrangement he accepted that there were circumstances where the Contractor was able to submit quotations but in his view even the acceptance of such suggestions did not amount to VE. When pressed that the adoption of such suggestions may bring with it the need to change the works information, the witness ultimately accepted that this was so.

[144] Mr Pollock, in his evidence, also addressed this issue. To his mind, VE was a Phase 1 issue and not a Phase 2 issue. Quotations for Compensation Events were no more than a means of costing any necessary design changes. His emphasis was on the process which operated at the strategic level during Phase 1. While he accepted that there could be circumstances where even after Phase 1 a Contractor could make suggestions which could result in savings where the Employer or his representative was prepared to listen, this was not to be confused with VE.

[145] The issue was also addressed by Colin Pentland, Roisin Wilson and John McBride in their evidence but it is unnecessary to set out their views as, in general, they reflect the views of both Mr Megarry and Mr Pollock.

[146] In the course of submissions on this aspect of the case it is right to record that the court heard detailed arguments on particular aspects of the contractual framework. In the interests of economy, the court will not seek to summarise all of these submissions here. It will suffice to say that, in the court's view, the following points emerged:

- There was no relevant bespoke clause in the NEC Option C Contract dealing with VE at Phase 2. While there were claims that Clause Z24 (an optional clause) relating to VE was operative in this case, the court can see no basis for this and it seems to the court that this suggestion is not well made, particularly as it is clear that the Option C model is not one where Clause Z24 is, in accordance with Departmental Guidance, used. Its use is dealt with specifically in the Guidance and is confined to Options A and B of the Contract. While it was suggested that under the Guidance there could be circumstances where clause Z24, notwithstanding the above, could be applied with the prior approval of the Head of Procurement, there is no evidence before the court that such approval was either sought or granted in this case.[2]

[2] Interestingly, clause Z24 does contain a description of VE within its provisions where at Z24.1 it adverts to the position of the Contractor, as follows: "The contractor may submit to the Project Manager…for acceptance written proposals to change the

- The terms of the relevant clauses in the contract dealing with Compensation Events appears to the court to be relatively straightforward. In particular, Clause 62.1 addresses Quotations for Compensation Events. It reads:

> "62.1 After discussing with the Contractor different ways of dealing with the Compensation Events which are practicable, the Project Manager may instruct the Contractor to submit alternative quotations. The Contractor submits the required quotations to the Project Manager and may submit quotations for other methods of dealing with the compensation event which he considers practicable."

- Clause 63.11 is also relevant. It states:

> "If the effect of a compensation event is to reduce the total Defined Cost and the event is:
>
> - A change to the Works Information, other than a change to the Works Information provided by the Employer which the Contractor proposed and the Project Manager has accepted …
>
> the Prices are reduced."

- The effect of these clauses appears to contemplate that there will be circumstances where, as a result of a Compensation Event there can be a change in the Works Information. At the least, this appears to be consistent with the idea behind VE[3]. Where there is such a change, and the terms of the exception are satisfied, Prices would not be reduced.

- The court is in little doubt that the broad intention in the present case was that VE should be a Phase 1 activity. This can be supported by reference to the document "Scope of Services" (referred to as Document 3 of 18). In it there is

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Works Information which if implemented will in the Contractor's opinion enhance the durability of the works, improve the efficiency of carrying out the works or reduce the cost to the Employer of maintaining the works".

[3] As Mr Dunlop pointed out, a number of sources confirm this interpretation. In particular, he drew the court's attention to the Guidance Notes for the NEC ECC Contract Option C which discussed the proviso found in the bullet point replicated above. The author of the Guidance comments that its purpose "is to encourage the Contractor to apply value engineering principles to the Works Information". He also referred to Keating on the NEC Contract where in the context of clause 63 (11) it is stated that "…where the change to the Works Information was proposed by the Contractor and accepted by the Project Manager the Price cannot be reduced. This allows the Contractor to benefit from value engineering" (see Chapter 7.116). He also referred to Broome's User Guide to NEC3 at page 233 which contains the comment in this context that "…the Prices are not reduced if the Contractor suggests changes to the Works Information that reduce cost. The contract therefore encourages identification of opportunities".

an extensive discussion of Phase 1's value engineering process (see internal pp10-11). In this document there is also a discussion of how Design Development is to take place at Phase 1. At paragraph 4.2 there is reference made to the Consultant (Contractor) submitting a Value Engineering Register at Phase 1. In addition, at paragraph 4.2.2 there is found an explicit statement that "There shall be no provision for value engineering at Phase 2". In this context i.e. that dealing with the process of VE at Phase 1, paragraph 4.2.2 appears to make sense. However, it is questionable whether, without specific amendment of the core clauses dealing with compensation events, this has any impact on them.

The court's assessment

3-01

[147] The court has above described the relevant features of this question and the terms of the answer given in response to it by the plaintiff. It has also described how the response was dealt with in the debrief provided by the defendant and how the members of the EP viewed the plaintiff's response. The submissions of the parties have also been summarised. Little would be achieved by the repetition of these matters.

[148] In the court's opinion, the issues which arise principally involve the concept of the reasonably well informed and diligent tenderer i.e. the RWIND tenderer. The court must consider objectively whether the aspects of the award criteria contained in question 3-01 could be understood by RWIND tenderers in the same way. In other words, were the criteria, including the indicator concerned with phasing, sufficiently clear to permit of uniform interpretation by all RWIND tenderers?

[149] In considering this issue the court is assisted by the knowledge that in his evidence Mr Crawley did not criticise the question or the indicator which in the context of the question was at issue. Indeed he did not claim that he did not understand the question or the indicator. This was so notwithstanding that he was questioned about a possible tension between being asked to provide an outline methodology for planning and execution of the particular elements of the works at issue and the need, in accordance with the indicator, in order to achieve a mark of 5 as per the Scoring Interpretation Table, to deal with phasing in detail in the plaintiff's response.

[150] While Mr Crawley's view is not definitive on this aspect it is plainly relevant.

[151] The court has asked itself how the language of the question and the indicator should be interpreted. The use of the term 'outline methodology' in the question should not, the court believes, present significant difficulty. A methodology is a means of effecting a result and can be viewed in the present context as being

concerned with the way of achieving the object of the project. Likewise, the word 'outline' should not present difficulty in that it seems clear that what is being called for is a broad or perhaps general statement as opposed to a statement which seeks to cover every aspect or go into every detail. While the court acknowledges that there can be gradations of what constitutes an 'outline', and that some outlines may be more detailed than others, it does not believe that an experienced tenderer should face any substantial difficulty in knowing what sort of response is being sought from it.

[152] The indicator, requiring the phasing of the work to be addressed, appears to be concerned with the question of the steps which sequentially are to be taken in the execution of the works. While the court would expect the main, essential or key steps of phasing to be dealt with in a response, this does not mean that every possible step or action in the construction process has to be spelt out. To require same would, it seems to the court, involve the tenderer having to descend to a micro level of analysis which would be inconsistent with the nature of the exercise and the space available in which to conduct it.

[153] The court therefore would conclude that a RWIND tenderer should be able, in answering question 3-01, to understand what sort of response was expected from it. The answer expected, having regard to the particular element of the construction process which was at issue, primarily was one which offered a broad description of what was required, including in respect of the phasing of the works, and which was directed at the primary features of the situation on the ground which confronted it. While, no doubt, illustrative examples of how the tenderer would deal with particular difficulties could be expected, this could not reasonably be viewed as meaning that the tenderer had to advert to and deal with every problem which might arise in the course of the works, provided its response dealt with the central issues which arose from the execution of the works at the site to which the question referred.

[154] The court will, therefore, reject the plaintiff's argument that question 3-01 was itself unlawful as it was unclear about the matters which had to be addressed.

[155] The above finding is not, however, dispositive of the plaintiff's complaint in respect of question 3-01.

[156] There are other aspects which, to the court's mind, require consideration. The principal one relates to the consistency of the EP's approach to assessment with the established requirements of EU law and, in particular, with the requirement of transparency. Transparency arises in the context of the RWIND tenderer's need to understand what sort of response was expected but it goes beyond this and requires the evaluation itself to conform to a standard of effective and fair competition in the interests of equal treatment. The criteria have to be applied by the contracting authority – here, the EP – in a way which can be viewed as objective and uniform, as

between tenderers, and which allows for a comparative assessment of the level of performance of each tenderer. What must be avoided is a situation in which the criteria are applied in a way which confers on the contracting authority an unrestricted freedom of choice.

[157] In view of the authorities, to which the court has already made reference above, none of the above is controversial. The Court of Appeal in Northern Ireland in the *Clinton* case put the matter succinctly when Girvan LJ made the point that:

> "The obligation of transparency also means that the adjudicating authority has to interpret the award criteria in the same way throughout the entire procedure".

[158] In the present case, the court must ask itself whether the EP had adhered to this standard.

[159] The court has reason to be concerned that this may not have been so, for a number of reasons:

(i) First of all, there is something of a vacuum in the evidence as to how the EP went about its task in terms of its function of interpretation of what it was searching for when addressing the responses received. In particular, there is clear evidence that none of the EP's members discussed the issue or sought to ensure that there was any form of consensus as to the approach to be taken or how the language of the question or the associated indicator was to be viewed for the purpose in hand. Indeed it was notable that those who gave evidence on behalf of the defendant on this aspect all appeared wedded to a denial that anything other than the language of the question and the relevant indicator was considered.

(ii) Secondly, whether as a result of the situation just described or otherwise, the members of the EP appear to have restricted themselves in their assessments to an expressed concern that the plaintiff's answer lacked detail and so could not receive the top mark in conformity with the scoring interpretation table. This state of affairs has troubled the court as it appears to betoken a situation in which the EP has approached its assessment not by applying its mind to the issues of degree implicit in the language used in the question and indicator but has instead allowed its deliberations to be dictated by a question related only to the level of detail provided. Such an outlook, in the court's view, is not faithful to the meaning which the court has already viewed as central to the question (as discussed above) which included the important rider that the language used, on a correct interpretation,

cannot reasonably be viewed as requiring that every detail of a complex construction task is to be provided by the tenderer.

(iii) Thirdly, the above state of affairs, begets still further difficulties when the matter is analysed from the point of view of the consistency of the EP's approach to assessment across the tendering process. Individual criticisms of particular incidents of alleged omission to provide detail risk becoming almost arbitrary in their effect when detached from any related consideration of core issues which have not been adequately attended to by the tenderer with the result that, advertently or inadvertently, the outcome is that the contracting authority appears to be operating as if it had an unrestricted freedom of choice.

(iv) Fourthly, evidence that the risk above may have been in play can be easily found in this case in the paltry nature of the note taking by panel members; the terse explanations found in the debrief provided; and in the way in which some witnesses in the course of giving evidence or *via* the production of a pre-prepared statement, introduced new examples of the plaintiff's alleged omission to provide the detail required by the terms of the competition. The net effect was that a myriad of such examples accumulated as each of the defendant's witnesses gave evidence, unaccompanied by associated evidence that in fact the matters referred to had been discussed or even raised at the time before the EP or were other than 'off the cuff' recollections, nowhere documented at the time.

(v) Fifthly, the court was unable to discern from those who gave evidence for the defendant any recognition that there would be occasions where an omission to provide detail on a point would have no real importance to the assessment process when placed in due context, for example, where the omission related to an inconsequential issue.

[160] The court in this area of the case is left with substantial misgivings as to whether the EP in fact did apply the criteria contained in question 3-01 and its associated indicator in a way which was consistent with the requirements of transparency, as discussed hereinabove. In these circumstances it concludes that there has been a failure on the part of the EP in respect of this aspect of the competition.

[161] In view of the above conclusion, it is unnecessary for the court formally to adjudicate on the plaintiff's argument that this was a case where the EP took into account "undisclosed criteria". A problem which seems to arise in cases of this sort is that often different labels can be applied to the same or similar forms of alleged default by the contracting authority and the court is left to deal with much the same

issue or issues under a variety of headings[4]. This problem is evident in the way this case has been presented, for reasons the court can understand. However, the court is satisfied that the 'undisclosed criteria' argument is in this case at most simply another way of putting the overall argument which the court has adjudicated on above and, for this reason, the court declines specifically to treat it as requiring consideration in its own right.[5]

[162] In a similar way, the court will resist any temptation to enter into a discussion of what Mr Dunlop viewed as the "extremely poor" methodology employed in this case by the EP, save insofar as implicit in what the court has already said.

3-02

Indicator 4

[163] The essential nature of the plaintiff's challenge in this area has already been described above and the court will not repeat it.

[164] In the court's view, the issue between the parties centres on whether the EP's view that the plaintiff's response lacked detail in the context of how it dealt with indicator 4 (proposals for liaison with Employer with respect to temporary traffic management) constituted a manifest error.

[165] A key element within the plaintiff's challenge was that the EP had failed to understand the question to be answered and had failed to appreciate that the word "Employer" in the context of the indicator had to be interpreted narrowly in the way described at paragraph [129] above *viz* that it referred only to the Department as *per* the contract and excluded the various emanations of the Department. To this extent the issue of how the RWIND tenderer would understand this aspect of the question is relevant, though the court notes at the outset that nowhere in the plaintiff's answer does it flag up that it had approached the question and indicator on the basis of a narrow or particular view of the term 'Employer'.

[166] The court will address the RWIND issue first before going on to deal with the central issue.

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[4] See, for example, Coulson J's comment at paragraph [37] of his judgment in Woods Building v Milton Keynes [2015] EWHC 2011 (TCC) (referred to above) where he said that "…the court should focus on the nature of the substantial complaint…rather than ticking off the myriad of different ways in which that complaint might be capable of being presented".

[5] The court accepts that in some cases the undisclosed criteria issue can be viewed as the central issue. It has considered the extensive case law in respect of it which is usefully summarised by Ramsey J in Mears Ltd v Leeds City Council [2011] EWHC 1031 (TCC): see, paragraphs [92]-[122]. From this review, it can be seen that while the contracting authority as a general rule must disclose to tenderers those award criteria or sub-criteria which it intends to apply to the award, there is room for argument as to what all comes within the general rule, with the result that in some cases disclosure of sub-criteria may not be required: on this, see paragraph [122] propositions (3), (4) and (5). In the present case, it seems to the court that the issue arises tangentially.

[167] As regards the RWIND issue, the court, as already has been adverted to in the discussion of this matter in the context of question 3-01 above, must consider the matter objectively and ask itself how the 'reasonably well informed and diligent tenderer' would have understood the reference to the 'Employer' in the setting in which it appeared. Would that tenderer have read this description broadly or narrowly?

[168] On this issue, the court is of the clear view that the RWIND tenderer would not have viewed the reference to the Employer in the narrow way contended for by the plaintiff. Tenderers in their professional lives would be used to dealing with governmental contracting authorities and would be no stranger to the fact that a Government Department operates through a wide range of emanations. In the present situation, while the overriding governmental entity is the Department, there will commonly be numerous specialist satellite bodies which carry out particular tasks on its behalf. The most obvious example of this in the present context is Transport Northern Ireland (TNI) which deals with a wide range of roads related activities but operates overall under the ultimate control of the Department. Likewise it would not be uncommon for specific individuals within government to be allocated particular functions relevant to the day to day operation of the roads system. An example drawn from the material before the court would be the Statutory Functions Officer. Tenderers, like the plaintiff, would deal with bodies like TNI and the Statutory Functions Officer regularly in the delivery and management of roads works, which was subject area of the question. Indeed, the court would go so far as to say that it would be difficult to envisage how the manifold detailed requirements of a major road construction contract could be carried out unless there was regular contact with TNI and, where required, the Statutory Functions Officer. The delivery and management of the works in a context of a subject like 'temporary traffic management' (using the words of the indicator) would be made much more difficult if it was approached from the point of view that it would be restricted to dealings between the Department (in the narrow sense) and the contractor.

[169] The language of Appendix 1/17 also, it seems to the court, strongly supports the above analysis. In evidence, this document was described as 'the Bible' in its area of operation (which is that of Temporary Traffic Management) yet it (unsurprisingly) contained many references to bodies and persons which would be excluded from consideration if the plaintiff's submission on this aspect was to be accepted.

[170] Another factor which the court considers it should take into account relates to the accepted fact that the plaintiff in an earlier part of its response to question 3-02, dealing with indicator 2 (which had asked about proposals for liaison with "the Employer, project manager and supervisor"), plainly did treat TNI as an emanation of the Employer. This suggests to the court that the position now being adopted by the plaintiff to the term 'Employer' is unlikely to be one that would commonly be shared within the roads construction sector and may be one which has been devised for the purpose of this litigation. Notably, at one stage in cross examination, Mr

Crawley sought to modify his position and bring TNI within his view of what constituted the Employer when confronted about *inter alia* the answer given to question 3-02 indicator 2. The court assesses this development as in the nature of a rear-guard action which reflected the weakness of the plaintiff's original argument.

[171] In the light of the court's view above, the court returns to the question of whether the EP's view that the plaintiff's response in the area of indicator 4 lacked detail can be successfully assailed.

[172] For the purpose of assessment, the court notes that Mr Crawley in his evidence made a number of concessions which are described at paragraph [135] above. In particular, he accepted that if he was writing the response again he would have made reference to Appendix 1/17 and that such reference would have improved his answer. This concession was made in the context of maintaining the plaintiff's case (which the court has now rejected) in respect of the limited meaning to be given to the word 'Employer'. Once that position is discounted, it seems to the court that the plaintiff's challenge in this area falls away as it is plain that there was a substantial volume of material relevant to the issue of liaison with the Employer (using the term in the wide sense) in Appendix 1/17 which had not been referred to in the plaintiff's response. Indeed, it is the court's view that, even if a narrow interpretation was afforded to the term Employer (a position which the court has rejected), it nonetheless is clear that the plaintiff's answer was materially deficient. In particular, as Mr Humphries demonstrated in cross examination of Mr Crawley, the question focussed on liaison with the Employer and had a much wider meaning than the plaintiff's concentration on consultation. That wider approach, involving communication and co-operation and the fostering of better working relationships, was neglected in the plaintiff's response. In fact 6 or 7 examples were put to the witness by Mr Humphries of occasions where the plaintiff's answer could have referred, based on the language of the Appendix, to liaison with the Employer (even in the narrow sense). In respect of these, Mr Crawley accepted they could have been referred to and had no convincing answer as to why they or any of them were not referred to. In truth, the plaintiff's response was dependant substantially on a reference to periodic consultation meetings, which could include the Employer and was a feature found in the Appendix (though the Appendix itself was not referred to). However, this fell, in the court's judgment, well short of a reasonable statement of the opportunities for liaison with the employer which could have been cited in the plaintiff's answer.

[173] It is therefore the case that the court is not satisfied that the plaintiff has demonstrated that on this issue there has been a manifest error in the way the EP dealt with this indicator 4 in the context of question 3-02. To put this in another way, the court is satisfied that it was open to the EP to take the view that insufficient detail had been provided in the plaintiff's answer.

Indicator 6

[174] The background to this issue and the terms in which question 3-02 are cast have been discussed above. In addition, the court has provided a summary of the arguments put forward by the parties at paragraphs [137]-[139] together with a rehearsal of the main points given in the evidence, which is found at paragraphs [140]-[145]. The court has also already offered its view about some particular aspects of the contractual framework at paragraph [146]. As before, it is not proposed in this overall assessment section to repeat the contents of these various references.

[175] From the debrief document it appears that there were two particular matters which the EP viewed as detracting from the plaintiff's response to question 3-02 in the context of indicator 6. These were:

(a) What the EP viewed to be the plaintiff's lack of understanding of the unique nature of the contract as exemplified by its failing to appreciate that VE was not part of phase 2 in the contract scheme.

(b) What the EP identified as a failure on the part of the plaintiff correctly to use the terminology of the contract, in effect, an accusation that the plaintiff used language which failed to be faithful to the terms of the contract.

[176] It is the court's view that (b) above was no more than a peripheral criticism. In the course of the hearing little weight was attached to it, even by the witnesses who gave evidence on behalf of the defendant. While technically it is probably correct that there were instances in which the plaintiff's description of the precise language of the contract left something to be desired, these related largely to a failure on the plaintiff's part to replicate contractual terms of art literally to the letter, for example, in failing to use or in misusing an upper as against a lower case for one or more letters in a contractual phrase. The court considers that little of substance turned on this aspect and is of the view that the point has no greater significance than a makeweight and can be safely set to one side.

[177] The reality, therefore, is that the EP's evaluation stands or falls on how the court views the charge that the plaintiff had not understood the unique nature of the contract as exemplified by its invocation of VE in the context of phase 2 of the contract.

[178] A difficulty which surrounds this issue is the absence of any clearly accepted single view as to exactly what the term 'VE' embraces. While its gravamen can be captured by reference to the notion that its purpose is to achieve better value solutions or alternatives so producing costs or other advantages in the way the construction task is carried out, the court is unconvinced that necessarily it must be

viewed as linked to a particular process or procedure or that it must be confined within rigid boundaries.[6]

[179] While the court did not receive extensive argument on this aspect, the better view, it seems to the court, is that the term has a chameleon quality which means that it will take its colour from the circumstances and is best treated flexibly.

[180] The problem is well illustrated by this case. The court is in no doubt that the EP had one view of VE when its members were assessing the response of the plaintiff to Question 3-02 in the context of indicator 6. In their evidence before the court, its members were clear in their view that VE was an important issue which had to be conclusively resolved at phase 1. It was, in their eyes, about the collaborative process (described in the Scope of Services document) which had to be resolved within the 28 week period allocated to it and was not a matter which could be re-visited at phase 2. They understandably had in mind that the intention not to re-visit the issue at phase 2 had been made clear at paragraph 4.2.2 of the Scope of Services document, which had been provided to the tenderers.

[181] However, notwithstanding the above, it seems to the court that the EP had nonetheless an obligation to assess the plaintiff's answer to the question, which invoked the language of VE in the particular context of compensation events. Consistently with how the EP members saw the position, the EP's assessment was in the nature of a black and white one which is reflected in their view that the plaintiff had failed to understand the nature of the contract. The court must therefore seek to determine whether the EP fell into error in these circumstances.

[182] In considering the above, the court bears in mind that there had, in fact, been a specific question – Question 2-04 – which tenderers had been required to deal with on the topic of VE. In respect of this, the plaintiff's response was assessed as 'Very Good'. The response attracted a score of 4 (out of 5). In view of this, there cannot have been any serious sign that the plaintiff had been unable to understand the important role of VE at phase 1. This is consistent with what Mr Crawley had said in evidence. Indeed, in the course of his evidence, he was at pains to acknowledge the extensive emphasis on VE as a process over 28 weeks at phase 1.

[183] Question 3-02 was not about the general topic of VE. It was about the delivery of a quality product in compliance with contractual requirements but, notably and in particular, about how the tenderer would deal with the 'management of change control and early warning of compensation events'. This is important because it is elementary that the answer must be read by the EP in its proper context. It seems to the court that in these circumstances it was incumbent on the members of the EP to

[6] The court has considered the extract from Kelly and others, 'Value Management of Construction Projects' (Second Edition) provided to it by Mr McMillan, which provides some helpful historical detail as to development of the concept in the United States in the 1950's. However, the court doubts that the definition referred to therein to VE being "The application of value methodology to a planned or conceptual project or service to achieve value improvement" takes it much further.

be alert to the details of the response and to be prepared to examine it to see if what was contained in it – including the reference to VE – could stand up to analysis. The plaintiff had referred to clause 62 of the contract and to the 'quotation process' in this context. There was also reference to revised prices. These required investigation.

[184] If these matters had been investigated, it appears to the court that the result would have been that it was possible that a train of events could occur, consistently with the clauses dealing with compensation events found in the contract, which could led to an outcome which fitted that which would be achieved in a VE situation. The Project Manager could seek quotations from the Contractor; the Contractor would be free to offer its own suggestions in this context; it was open to the Project Manager whether or not to accept and give effect to the suggestions made by the Contractor; it was also open to the Project Manager to make a change to the Works Information; and the Prices could end up being reduced or not in accordance with the terms of clause 63(11). As a result, a better value solution or alternative which produced costs or other advantages in the way the construction task was carried out might be secured.

[185] When viewed in this way, the plaintiff's use of the phrase VE in its response to Question 3-02 can be seen to be far from irrational or plainly wrong and is consistent with the core elements within the contractual setting dealing with compensation events, which is the context in which the question arose.

[186] It also appears to the court that the above analysis recognises the reality that, as accepted by the defendant's witnesses in evidence, compensation events often arise long after the completion of phase 1. When they arise they can generate opportunities to improve efficiency or to reduce costs and they may augment the quality or durability of the works. To forgo these possibilities, when there is a contractual path in the context of compensation events to their achievement, should not lightly be dismissed and any assumption that VE could only be viewed as inextricably linked to consideration at phase 1 and was ruled out by the Scope of Services document at phase 2, on closer scrutiny, is not justified, as the court sees it, and fails to take into account the width and malleability of VE as a concept and its ability to arise under various guises.

[187] It follows from the above that the court does not share the EP's view that, in effect, the plaintiff's invocation of the term VE amounted to the commission of a cardinal sin which seems, from the evidence of Mr Megarry and Mr Pollock, to be the way it was viewed. These witnesses left the court with the impression that the plaintiff's allusion to VE at phase 2 was tantamount to the placing of a cuckoo in the nest and/or an action subversive of the VE process at phase 1 but, with respect, such characterisations go too far and overlook the compensation event clauses in the contract which the court considers applied at phase 2 and had at no time, material to the EP's assessment or since, been amended.

[188] The court, therefore, is willing to accept Mr Crawley's view that the reference to VE in the plaintiff's answer was not out of place. By the same token, it does not accept the submission of Mr McMillan and Mr Humphries that, by reason of paragraph 4.2.2 of the Scope of Services document, it should hold that the statement therein that "there shall be no VE in Phase 2" is determinative of this aspect of the case. As already indicated, one of the problems in the case is the absence of definition of what VE precisely means. It is not contractually defined and, for reasons the court has already given, it would be slow to seek to confine it to a particular or singular or immutable meaning, preferring to view the matter flexibly and in accordance with the context in which it appears.

[189] While the court can see that the words of paragraph 4.2.2 indicate an intention at phase 2 not to replicate the process of VE which took place at phase 1, this has to be read with the language of the clauses relating to compensation events, which will arise at phase 2, in mind. These clauses have full effect and it does not seem to the court that they are overborne by what is said in paragraph 4.2.2.

[190] In these circumstances the court considers that the EP's view that the plaintiff had failed to understand the unique nature of the contract because of its reference to the use of VE at phase 2 is not sustainable and goes well beyond the realm of a justifiable criticism.

[191] The flaw in the EP's assessment constitutes a manifest error in that it is clearly established and goes beyond being saved by the margin of appreciation which applies in this area. Insofar as the authorities equate 'manifest error' with Wednesbury unreasonableness, the court will hold that the EP's approach was unreasonable in the Wednesbury sense as the error the court has detected appears to have been committed at least partly as a result of the EP jumping to a conclusion and failing to investigate carefully the plaintiff's response, despite their scepticism about it.

Conclusion

[192] The court's central findings are as follows:

(a) As regards Question 3-01, it concludes that the EP in the assessment of the plaintiff's response did not act consistently with the requirements of transparency and did not adhere to the standards referred to at paragraph [156]. In essence, the court is of the view that the EP did not apply the criteria in a way which reflected a proper appreciation of the terms in which the Question and the associated indicator were cast and which has been discussed above.

(b) As regards Question 3-02 and indicator 4, it concludes that it should dismiss the plaintiff's argument that the term 'Employer' should be interpreted in a

narrow manner. In any event, the court is of the view that the EP's assessment that the plaintiff's response lacked detail is not assailable and is well within the margin of appreciation available to it. No manifest error, in short, has been established.

(c) As regards Question 3-02 and indicator 6, it finds that the EP's assessment was manifestly in error as it is of the view that its charge that the plaintiff had not understood the unique nature of the contract as exemplified by the plaintiff's invocation of VE in the context of phase 2 of the contract has not been established and is not sustainable.

[193] In view of the above, the Court will hear the parties' views as to the way forward in the proceedings and will convene a hearing for this purpose in due course.